

No. 24-249

**In the
Supreme Court of the United States**

A.J.T., BY AND THROUGH HER PARENTS,
A.T. AND G.T.,
Petitioner,

v.

OSSEO AREA SCHOOLS,
INDEPENDENT SCHOOL DISTRICT NO. 279;
OSSEO SCHOOL BOARD,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX - VOLUME II OF II

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JA-246

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA

A.J.T., a minor child, by and through her Parents,
A.T. and G.T., individually and jointly,
Plaintiffs,

vs. Civil File No. 21-CV-1769 (ECT/JFD)

Osseo Area Schools, Independent School District No.
279; and Osseo School Board,
Defendants.

REMOTE VIDEOCONFERENCE DEPOSITION

* * *

The following is the deposition of A.T., taken before Patricia K. Carl, RPR, Notary Public, conducted virtually pursuant to Notice of Taking Deposition, commencing at approximately 9:00 a.m., February 24, 2022.

PROCEEDINGS

Whereupon, the deposition of A.T. was commenced at 9:04 a.m. as follows:

A.T.,

after having been first duly sworn, deposes and says under oath as follows:

EXAMINATION

BY MR. SHAFER:

Q. Hello, A.T. As you heard a couple of times, my name is Christian Shafer. I'm here on behalf of the School District.

MR. SHAFER: Before we get started, Ms. Goetz, one thing we stipulated to in the previous depositions was to use initials for the student's name throughout.

I'm willing to agree to that again, if you are?

MS. GOETZ: Yes, we are.

MR. SHAFER: Ms. Carl, I probably will use the student's name, but if we can have it reduced to initials in the deposition, in the record, that [5] would be great.

BY MR. SHAFER:

Q. A.T., could you please state and spell your name for the court reporter.

A. A.T., {name spelled}.

Q. A.T., have you ever had your deposition taken before?

A. I have not.

Q. You were present for the deposition that Ms. Goetz conducted as part of this case earlier, right?

A. I was.

Q. Do you remember at the beginning of that deposition Ms. Goetz had some introductory questions/ground rules that she went over before the deposition really got started?

A. I remember those discussions between the parties, yes.

Q. All right. I'm going to go through sort of my version of those. First of all, as you know, the court

reporter is going to take down everything we say, and just a few things to make that easier. Yes or no answers, I think it sounds much clearer on the record than “yeah” and “nah.” So [6] please answer audibly and verbally.

Please let me finish my questions. I won't talk over you. I will do my best not to talk over you, please don't talk over me.

A.T., are you on any medication today that would impair your ability to understand my questions or recall answers to my questions or your memory in general?

A. I am not.

But would you mind maybe moving the microphone closer to you. I'm sorry, but...

Q. We can try that.

A. I appreciate that.

Q. I'm assuming that it is the microphone. Is that better?

A. It's a little bit -- yeah. My apologies, I may have to ask you to repeat questions.

Q. Of course. I can project more.

A. Yes, if you can project, that's helpful. Thank you.

Q. A.T., along with what you just said, that was a great segue, it's important that you answer my question only if you hear it and understand it. So I understand you will ask me to repeat it if you don't understand or can't hear me. Will you do that please [7] is my question.

A. I am willing, yes.

Q. With that in mind, if you do answer my question, it's fair for me to assume that you understood it?

A. Yes.

Q. And you understand you are under oath today?

A. I do.

Q. Did you look at any documents, writings, pictures, video recordings, depositions or other materials to prepare for today?

A. No. The only things, I had a conversation with my attorney, a prep conversation. I printed documents yesterday about 5:30 PM that my understanding is we're going to go through today. I did not look through those documents. So I just have a stack of documents to the side.

Q. A.T., that time I had trouble hearing you. It got quiet there for a minute. I understand that you said you talked to your attorney and printed documents that you got about 5:30 PM.

A. That's right.

Q. I'm sorry, I didn't hear the rest of [8] it, so sorry if you've already answered this. Other than your attorney, did you talk to anybody today to prepare?

A. My wife was with me during the prep session with my attorney.

Q. Just so we are on the same page, I'm going to say the word "District" or "School District," and unless I'm prefacing it with something else I'm referring to Independent District No. 279 Osseo 10 Schools. Is that okay? Do you understand that?

A. I understand that.

Q. And other than the exhibits that you have been provided, do you have any other documents, writings, or other material with you presently?

A. I don't have anything else with me. I did -- I'm sorry, Mr. Shafer. I also did review the Amended Complaint as well.

Q. Okay. All right. So throughout the deposition I'm going to refer to various documents that will be labeled as exhibits and I will direct you by number to get there. There are a couple that I might refer to frequently so I just sort of like to get them in the record up front.

The first one, if you could please, [9] turn to what I have marked as Exhibit 1. Can you tell me what it is?

A. This appears to be the Amended Complaint.

Q. Do you recognize it?

A. I do.

Q. Is that your electronic signature on verification page?

A. Well, let me back up. I haven't gone through the document. I haven't read it.

Q. Take your time.

A. Do you want me to read the entire document?

MS. GOETZ: Can I point out there are two exhibits 1.

MR. SHAFER: The one with the sticker, it's the Amended Verified Complaint. That's what I'm directing him to.

MS. GOETZ: Okay. There is a second Exhibit 1 we got that's an evaluation report. That's not what we are talking about?

MR. SHAFER: No.

THE WITNESS: It's a 30-page document, I've flipped through quickly in like 45 seconds. I just flipped through it and it appears to be the same [10] document that was filed.

BY MR. SHAFER:

Q. As far as you can tell in that limited period, do you think this is a true and correct copy of the Amended Verified Complaint?

A. Yes.

Q. Does that appear to be your electronic signature on the last page?

A. Yes.

Q. If you could turn to Exhibit 2 for me, the one with exhibit sticker 2, labeled Affidavit of A.T.?

A. Yes, I have it in front of me.

Q. Can you tell me what that is, please?

A. Okay. This is an 11-page document. I scanned it for about a minute. This appears to be the affidavit that was filed in relation to the administrative hearing decision that was rendered I think in April of 2021.

Q. Again, based on your quick scan of it, does this appear to be a true and correct copy of your affidavit from the due process hearing?

A. Yes.

Q. Is that your electronic signature? Does that appear to be your electronic signature on [11] the last page?

A. Yes.

Q. All right. The other exhibit I might refer to frequently is one that I think you got this morning. It's been labeled Exhibit 31. Will you take a minute and pull it up in your e-mail.

A. Sure.

Q. Sorry, I didn't realize it didn't go through.

A. I'm still waiting for the e-mail to boot up.

Q. That's all right. Mine takes forever, too. I understand.

A. Okay. I have it up in front of me. Give me one second, please.

Q. Of course.

A. Okay. This is a 12-page document. I spent about a minute taking a look at it. It appears to be the affidavit filed, affidavit related to the proposal to introduce new evidence into the record.

Q. Is that the one marked 31, A.T.?

A. That's 30, my apologies.

Q. That's all right.

A. Sorry. I got a few different messages this morning. I'm just trying to go through it to [12] find the exhibits. I'm looking for Exhibit 30 or 31, Mr. Shafer?

Q. Thirty-one.

MS. GOETZ: It came with an e-mail at 8:44 AM.

THE WITNESS: Okay. I've got it. This is a 90-page document. I took one to two minutes scanning it. This appears to be the transcript of the administrative hearing. It looks to be my testimony. I don't know if it's just the direct or if it's cross.

BY MR. SHAFER:

Q. I understand you only took a minute or two to scan it. I appreciate if you'd just keep that one up. We might be coming back to that one. Make sure our technology is sorted out and you have it up. A.T., what is your current address?

A. [REDACTED]

Q. How long have you lived there?

A. I have been at this address since January of last year.

Q. January of '21, then?

A. Yes. [13]

Q. How about before that, did you live in the Osseo School District before that?

A. I did.

Q. How many different homes have you had in the Osseo School District?

A. Two.

Q. With whom do you live, sir?

A. I live with my wife G.T. and my daughter A.J.T.

Q. Any other children in the home?

A. No.

Q. What other states have you lived in?

A. I lived in Indiana, Ohio, Kentucky, Wisconsin, and Minnesota.

Q. In the Midwest. Got it.

When did you live in Kentucky?

A. I lived in Kentucky probably in 2007 until 2015.

Q. I'm sorry?

A. 2007 until October of 2015.

Q. What is your educational background?

A. I went to Indiana University and Marquette.

Q. Two different schools, two different degrees?

[14]

A. That's correct.

Q. What are your degrees?

A. I have a BA and a JD.

Q. BA from which school?

A. Indiana.

Q. And your degree from Marquette?

A. JD.

Q. I'm sorry, I didn't hear that?

A. Juris Doctor.

Q. Thank you. When did you get your JD from Marquette?

A. May of 1999.

Q. And I understand you are currently employed as assistant general counsel by Target, is that correct?

A. Senior director of labor employment at Target.

Q. What areas do you work with in Target?

A. I work with labor, employment, supply chain issues, vendors, suppliers. Various issues.

Q. Does that include employment discrimination claims?

A. I don't directly handle the employment discrimination claims, no.

Q. Do you directly work with the ADA at [15] Target?

A. I don't directly work with the ADA, no.

Q. Where is your work location at Target?

A. I work in downtown Minneapolis.

Q. Do you frequently travel for Target?

A. Sometimes.

Q. What is your commute time to Minneapolis?

A. It depends on the day, depends if we are talking pre-pandemic or post-pandemic.

Q. Sure. I hear that completely. The pre-pandemic, can you give me an average?

A. Depending upon the time that I'm going to work, I can get to work in 20 minutes to maybe, I don't know, 45 minutes at most if there is an accident.

Q. Sure. And post-pandemic, do you work from home now or do you still go back to the office?

A. Both.

Q. I'm sorry?

A. I do both.

Q. How frequently are you in the office?

A. I have been going into the office much more frequently, three, four, maybe five times a day {sic} I would say since May or June of last year. **[16]**

Q. June of last year. How long were you working from home before that?

A. From the beginning of the pandemic, which I think was March of 2020, until that day I just cited.

Q. Is this the room you work from home in?

A. Sometimes.

Q. Where else do you work from home?

A. I'm sure with anyone who has worked remotely you work wherever you can when you can. So this is one location that I work, I work in the kitchen, I work in other places as well.

Q. There is the primary set up, though?

A. This is the primary set up, correct.

Q. Before working for Target, were you an attorney in Ohio?

A. For a period of time, yes.

Q. Who did you work for there?

A. Catholic Health Partners, which is now known as Mercy Bon Secours Health System.

Q. What was your practice area for Catholic Health Partners?

A. Labor.

Q. Did you work with the ADA in that role?

A. Rarely. [17]

Q. How long did you work for Catholic Health Partners?

A. 2005 until 2014.

Q. That is in Cincinnati, right, Ohio?

A. Based in Cincinnati, Ohio, correct.

Q. Did you live in Kentucky while you were working with Catholic Health Partners?

A. For part of the time.

Q. That is the 2007 period onward that you mentioned earlier?

A. That is correct.

Q. I understand you were also an attorney for the National Labor Relations Board at some point?

A. That is correct.

Q. When was that?

A. November of 2020 until December of 17 2020 -- I'm sorry. Until December -- I apologize. November of 2000 until December of 2004.

Q. 2020?

A. 2004.

Q. Thank you. What did you do for the NRLB?

A. I was a field attorney.

Q. What does that entail?

A. The agency has jurisdiction to enforce [18] the National Relations Act, so we have jurisdiction for

private sector labor issues, representation cases, unfair labor practice charges, those things that relate to the Act.

Q. Other than your work for Catholic Health Partners, did you work as a lawyer in Kentucky?

A. No.

Q. What states are you licensed to practice law in?

A. None currently.

Q. Where have you been licensed?

A. Ohio, Wisconsin.

Q. I skipped over Wisconsin. What did you do for law work in Wisconsin?

A. I worked for the National Relations Board in Wisconsin.

Q. That's where that was, okay. And I think you said this in the introduction but to make sure we have it on the record, you are A.J.T.'s father, correct?

A. That is correct.

Q. I believe you mentioned she lives with you at the address you gave?

A. That is correct.

Q. Has she lived with you at all of the [19] addresses that we have been talking about?

A. She has.

Q. At any time have you had any other school age children living in those homes we talked about?

A. I have a stepdaughter.

Q. Was she school age at the time?

A. When you say "at the time," what time are you referring to.

Q. Since living in Osseo?

A. Since living in Osseo, no. She was not 12 school age. She was not school age at the time that 13 we lived in Osseo.

Q. Have you ever been targeted in litigation before?

A. The only litigation that I can remember is the action that was filed against me by Osseo School District and the subsequent due process hearing.

Q. The action that was filed by Osseo, you are referring to the due process hearing requested by Osseo?

A. That is correct.

Q. Have you been a plaintiff and a defendant in the lawsuit other than the lawsuits **[20]** currently pending with Osseo?

A. Not that I can remember.

Q. Other than your dispute with the District, have you hired a lawyer before?

A. Not that I can remember.

Q. Speaking of your dispute with the District, you are aware there is currently two cases pending in Court, right?

A. Yes.

Q. You are one of the plaintiffs in the current action, that's correct?

A. Yes.

Q. And before that you mentioned due process hearing, you are aware that was decided by an administrative law judge?

A. I'm aware of the decision, yes.

Q. And you initiated that hearing or you and your wife together initiated that hearing on A.J.T.'s behalf, is that right?

A. We did.

Q. You also filed a complaint with the Office For Civil Rights on A.J.T.'s behalf at one point, didn't you?

A. I think I did, yes.

Q. Do you know what the outcome of that [21] complaint was?

A. I don't know if it was dismissed or if there was a refusal to further investigate. I mailed some information and then there was a response, but no further action.

Q. Did the document say why they were dismissing the claim or failing to investigate?

A. Not that I remember.

Q. Did you file any complaints -- I'm sorry. Who was the complaint against with OCR?

A. When you say "OCR," this is the Department of Justice, Office for Civil Rights, is that correct?

Q. Office for Civil Rights, Department of Justice, sure, either one.

A. So that was filed against the Osseo School District is my understanding and my recollection.

Q. Did you file separately with the Department of Justice or did you file with OCR and DOJ at the same time?

A. I don't remember. I only made one filing. I thought that the U.S. Department of Justice, Office for Civil Rights was one entity. But [22] if you're telling me it's two, I just mailed the one letter to one entity.

Q. Did you ever file any complaints against the Boone County School District with the Office for Civil Rights on A.J.T.'s behalf?

A. No.

Q. What about complaints with the Kentucky Department of Education on A.J.T.'s behalf?

A. No.

Q. You have filed multiple complaints with the Minnesota Department of Education on A.J.T.'s behalf against the Osseo School District, is that correct?

A. By multiple, which ones are you referring to?

Q. Sure. So if you could turn to exhibits, start with Exhibit 3.

MS. GOETZ: There are two Exhibit 3.

MR. SHAFER: The one with the exhibit 20 sticker. The ones that look like handwritten, I believe were exhibits to A.T.'s affidavit. I could be wrong on that, but exhibit sticker 3. The header is Minnesota Department of Education letterhead.

THE WITNESS: Mr. Shafer, Exhibit 2 is an affidavit. [23]

MR. SHAFER: Exhibit sticker 3.

THE WITNESS: Can you tell me what the front, what that looks like or what's on the front of that page.

MR. SHAFER: I'm walking closer to the camera to show you.

THE WITNESS: I don't if I have that document that you're referring to. The copies I have, I have my affidavit and then it goes into Cedar Island Elementary School, documents from that entity. IEPs. Then it goes into . . . let me back up. So all of the exhibits are numbered at the bottom of the page, is that correct?

MR. SHAFER: That is correct. There are some that have a typed exhibit and then a

handwritten number. I'm not referring to those. I'm referring to what looks like a sticker.

THE WITNESS: I don't have that. This is what I have. The only thing that I have that says Exhibit 3, is this. I'm showing it. The bottom of this. It's not a sticker.

MR. SHAFER: So all of the ones with the sort of handwritten, the typed exhibit and then handwritten are attachments to your affidavit is my understanding, and that should go through Number 12 or [24] 13. Then there should be other exhibits after, it looks like -- I'm sorry, is the last one of those. So there should be some, a new set of numbering after 4 that.

THE WITNESS: Okay.

MR. SHAFER: I will say to make this easier going forward, once you're past all of those numberings that were attached to Exhibit 2, so you can set those aside. I'm not referring to those unless I specifically say so.

THE WITNESS: I'm sorry, Mr. Shafer, what is the number again that you want me to pull up?

MR. SHAFER: Three.

THE WITNESS: Okay. I have Exhibit 3 in front of me. My apologies.

MR. SHAFER: That's all right.

BY MR. SHAFER:

Q. It references Special Education Complaint dated -- I'm sorry, numbered 21-091-C on behalf of A.J.T. from Osseo. Do you see that at the top? In the "Re" line.

A. Department of Education, a letter dated August 5, 2021. Is that what I'm looking at?

Q. Yes, that's correct. **[25]**

A. Okay. Do you want me to review the document?

Q. My question was only did you file this complaint? If you care to review the document, go ahead, but that is my question.

A. Okay. I will take a look at it, please. This, this complaint was filed by me and/or my attorneys.

Q. And then the next document in the stack is Exhibit 4, a letter dated February 7, 2022. It references a different complaint number at the top. It's called "Compensatory Education Plan for 22-005C."

A. I have it in front of me but I never received this letter.

Q. You have not received that before?

A. No. It was mailed to the wrong address I'm assuming.

Q. Okay. My question again, did you remember filing a second complaint with the Minnesota Department of Education on behalf of A.J.T. against the School District?

A. Yes.

Q. Okay. Did you ever request a due process hearing against Boone County School District **[26]** on A.J.T.'s behalf?

A. No.

Q. Did you ever sue Boone County School 4 District because of anything having to do with A.J.T.?

A. No.

Q. While you were living in Kentucky, I understand that A.J.T. received some services

through the Northern Kentucky Special Education Cooperative, is that correct?

A. I don't know the name of the entity that you are referring to, but she did receive, she was qualified for certain public services.

Q. Okay. Do you remember hearing the name Northern Kentucky Special Education Cooperative before?

A. I'm sorry, but I don't. There were many different entities that she would work with. That particular name doesn't ring a bell.

Q. So did you file any complaints against any of those entities that you remember providing services to A.J.T., other than the Boone County School District, with the Office for Civil Rights?

A. No.

Q. What about the Kentucky Department of Education? [27] on A.J.T.'s behalf?

A. No.

Q. Did you request a due process hearing 3 against those entities?

A. No.

Q. Any of those entities?

A. No.

Q. In general, were you satisfied with the services A.J.T. received in Boone County?

A. Yes.

Q. What about the services provided by those other entities that you mentioned?

A. Yes.

Q. A.T., is it fair to say that you are a self advocate for A.J.T.?

A. I do my best. I love her very much.

Q. And you were when you lived in Kentucky too, right?

A. I always have been. I have always advocated for A.J.T. regardless of where we lived.

Q. So if you thought that Boone County or one of those other agencies were doing anything to hurt A.J.T. you would have taken some kind of action, is that fair?

A. What do you mean by "action"?

Q. Filed some kind of complaint, advocated [28] for A.J.T., something like that.

A. I'm a consistent advocate for A.J.T. at all times.

Q. What is A.J.T.'s morning routine on weekday mornings?

A. A.J.T. will wake up between 9:45 and maybe 10:15 or 10:30. We don't wake her up. She wakes up on her own.

Q. Is that the same every day?

A. Pretty much for the most part.

Q. What do you mean by that?

A. If she wakes up earlier than that, then there is usually a problem and it's a very bad seizure day and those seizures impact her for the entire day. It's usually a missed school day.

Q. You mentioned, I think you mentioned seizures. I believe you testified at the due process hearing that A.J.T. has clusters or grand mal seizures right when she wakes up. Is that true?

A. She can, yes.

Q. Is that every day?

A. She has seizures every single day.

Q. For the clusters or grand mal seizures specifically, is that every day or right when she wakes up? [29]

A. Her seizure activity varies every single day so it could be upon wakening, it could be a couple of grand mal seizures. There are occasions where maybe she has smaller clusters of seizures that aren't so severe but are greater in frequency. And sometimes neurological activity where she is staring or not responsive or not opening her mouth when we are trying to feed her or not cooperative with bathing. So the problems manifest in many ways. When I say problems, I mean the neurological activities.

Q. Specifically talking about the morning and upon waking, that is different?

A. I'm sorry, Mr. Shafer, restate the question.

Q. Specifically upon waking in the morning, it varies every day?

A. Within the degrees that I just stated, correct.

Q. How long does this last in the morning after waking?

A. Seizure activity usually levels off between 11:30, maybe 11:45.

Q. There's a range there?

A. Yes. Any child or any individual with a condition like A.J.T.'s, there is going to be some [30] variability. I mean she's not a robot. You can't plug and play. Every day is going to look a little bit different. The consistent, what we see consistently is that the best way to manage her seizures is to let her wake up on her own, which I said is usually between, once again 9:45, 10:15, depends on the day. She wakes up on her own. Upon awakening, she will have seizure activity. That seizure activity could be grand

mal seizures, it could be smaller seizures that aren't as intense, it could be neurological activity which impacts her ability to eat or impacts our ability for us to dress her or she might be staring. That activity is pretty consistent until maybe 11:30, 11:45, and that is when she begins to get into a better place. There are many times where my wife or I drive A.J.T. to school and she is still having some problems with neurological activity.

Q. I'm sorry, I didn't quite catch that. I heard there are many times.

A. Not many times. I said there are some times where we will drive her to school at 11:45 and in the car she may still be having some neurological activity, but it's usually very minor. If it's [31] anything significant, then we would keep her at home.

Q. How long of a drive is it to school?

A. About 15 to 20 minutes.

Q. How do you track A.J.T.'s seizure activity in the morning?

A. We don't.

Q. Do you collect any kind of information?

A. No. Not currently.

Q. Not currently. You did in the past?

A. Back when A.J.T. attended the Aaron W. Perlman Center at the Cincinnati Children's Hospital, she received services. I think those services began at 9:00 AM. She was removed from that program. Her seizure activity was just too significant for her to continue in that program. We began working with A.J.T.'s neurologist -- I will back up.

It was a very upsetting event because both my wife and I wondered if A.J.T. would ever be able

to go to school or if she'd ever be able to receive instruction or would she ever be able to receive therapies. Working with A.J.T.'s neurologist through different trial and error and different approaches we were asked to experiment with her sleep schedule. What we found that worked is to let A.J.T. sleep with her regular cadence and rhythm, which would [32] be like I said around that 10:00 AM period, and that by maintaining that process we had better seizure control through the afternoons and early evenings.

So during that process working with a neurologist we would track and report back A.J.T.'s seizure activity as we played around with different approaches to try to reduce her seizures.

Q. When was that tracking?

A. Around the time that she left the Perlman Center, so I don't know if that is 2008 or '9 or '10. I don't know the dates.

Q. Since leaving the Perlman Center you haven't tracked A.J.T.'s seizure activity in the morning, is that what I'm hearing?

A. A.J.T. was in a drug study for a period of time where we tracked A.J.T.'s seizures and provided that to the drug company.

Q. Which drug company?

A. Zogenix.

Q. When was that drug study?

A. She is still receiving the drug. I don't know the period of time, the dates, maybe 2016, '17, possibly.

Q. Did the drug company give you a form to track A.J.T.'s seizures? [33]

A. It's all done electronic. I don't have any paper copies of that.

Q. What information did they collect?

A. I think it was the number of, it was, we were told to maintain her current activity with a 10:00 AM waking time, and we were told to track the type of seizure and the frequency of the seizure.

Q. You said you don't have any paper copies. Do you have electronic copies?

A. I don't.

Q. Did those get sent to anyone other than the drug company?

A. I don't know.

Q. May I ask a better question. Did you send them to anyone other than the drug company?

A. No. In the only thing that we did was just use the device that was given to us through Minnesota Epilepsy Group which was coordinating the study.

Q. What was the device?

A. It was a hand-held electronic device. Similar to a tablet. I mean that's the only way I can describe it.

Q. You would put the seizure activity in that tablet or did it track independently? **[34]**

A. We had to manually put the information into the tablet every day.

Q. So when you are discussing A.J.T.'s seizure routine with her neurologists, what information are you giving them?

A. When you refer to "seizure routine," what are you talking about?

Q. So I can direct you to the transcript if you would like, but in the due process hearing you stated

that you discussed A.J.T.'s early morning seizure schedule with Dr. Wirrell. If I'm saying that right. It's W-I-R-R-E-L-L. It's Exhibit 31, page 106, if you want to look.

A. What is the exhibit number, please, Mr. Shafer?

Q. Thirty-one, the transcript.

A. Okay. Mr. Shafer, what's the page number, please?

Q. Page 106. It's Lines 6 and 7.

A. So, yes, I have had conversations with Dr. Wirrell, who works at Mayo, about A.J.T.'s morning routine.

Q. What information did you give Dr. Wirrell about her routine?

A. So Dr. Wirrell just asked for a quick [35] overview of what our current process was and why we have that process. She asked how long that process has been established. Other questions that she may see as germane. It mostly was just historical as far as why we have that process, is that process working, does that process continue to work well for A.J.T., and I said it does.

Q. Did Dr. Wirrell give you any sheets to complete, tracking sheets, anything like that, either physical or electronic?

A. No.

Q. Has any of A.J.T.'s neurologists done something like that, given you tracking sheets?

A. When you take "tracking sheets," Mr. Shafer, I want to be clear about what exactly it is you want or the District wants as asking for tracking. I think one of the problems or one of the challenges is are you

asking about tracking under A.J.T.'s current routine, which is waking at 10:00 AM and her going to school at noon, or are you talking about the District's proposal which we would wake up A.J.T. early and experiment with A.J.T. to see what that seizure activity may result in. Because the District -- I'm not clear as far as what you're asking and which approach. [36]

Q. I'm asking do you have any data that shows A.J.T.'s current situation, current routine, shows her seizure activity in the morning?

A. I do not.

Q. Okay. Have any of A.J.T.'s doctors that you've hired, any of her neurologists, asked you to complete anything like that?

A. No. Not that I can remember.

Q. I understand that A.J.T. receives infusion therapy at Children's Hospital, is that correct?

A. She does, every six weeks.

Q. I can't pronounce the name of it, but maybe you could help me. What is the name of the infusion therapy?

A. Just the acronym, IVIg, intra . . . I apologize, but immunoglobulin therapy is another way to describe it.

Q. If I refer to it just as "the infusion therapy" to avoid embarrassing myself on pronouncing medical words, will that work?

A. That works. And I won't embarrass myself by trying to do the same.

Q. I appreciate that.

The infusion therapy is at Children's [37] Hospital? Sorry if I asked that already.

A. It's at St. Paul Children's.

Q. St. Paul Children's. When did that start?

A. A.J.T. has received IVIg infusion therapy for many years dating back to when we were in Cincinnati or when she received services at Cincinnati Children's Hospital.

Q. How long has it been at the St. Paul Children's Hospital?

A. Since we've moved here.

Q. I understand that is in the short-stay unit?

A. That is usually where she receives her infusions, correct.

Q. What time does that unit close in the afternoon or evening?

A. Currently she goes -- her infusion begins at 10:00 AM.

Q. Do you know what time the short-term stay unit closes?

A. I think that their pandemic hours have changed. It may close at 6:30 or 7:00 currently.

Q. So during the pandemic did it close at 6:30?
[38]

A. I really don't know when it closes. I can only testify to when I leave. You would have to check with the hospital as far as when they stop their short-stay services.

Q. Sure. So if you could look at Exhibit 31 on page 90 for me, please. I think I have the wrong page number. Give me a second.

A. Sure.

Q. It starts on page 89 of the Exhibit 31. My questions are about page 90 but I thought I would direct you to where the comments start.

A. What numbers would you like me to read, please?

Q. Page 90, starting on Lines 15 to 25.

A. Okay. I read that document.

Q. Sure. Do you remember after reading this document, do you remember that the unit closed at 6:30 PM, at least at some point due to short in staffing hours?

A. I know that it closed at 6:30 PM at the time that I testified at the hearing, yes. I don't know what the current closing time is.

Q. My question is: Did A.J.T. stay in that unit beyond 6:30 PM on those days?

A. I think she's only stayed -- I think **[39]** that the latest that she's stayed recently within the past couple of years is probably 7:00 PM, 6:30, 7:00 PM.

Q. When the unit closed?

A. Yes. That is my recollection. Mr. Shafer, one of the things is that the speed of the infusion is dependent upon how good the IV is. Sometimes you run into issues where the IV is not as good as what it could be which slows the infusion because the machine keeps stopping. The speed of it also is dictated upon what A.J.T. can tolerate. So if her blood pressure increases or if she were to have any adverse reaction they would slow the titration. The hospital has made some mistakes as far as what the actual product is, which has also impacted the speed at which it runs.

Q. You testified in those lines that I asked you to look at that the unit let you complete some health information screening earlier to get A.J.T. in at the regular time in the morning, to not move her earlier, is that correct?

A. No. It's more than health information screening.

Q. What do you do? A. So the product that A.J.T. receives, [40] it's a \$25,000 infusion every six weeks. Hospital protocol requires that the patient be admitted, temperature taken, go through all of the process of admission. Once that is completed, then the orders will be called down to the pharmacy department and the pharmacy department would begin to make the medication and it could take an hour, two hours, two and a half hours to make the medication.

St. Paul Children's, we've worked with the same short-stay unit since we came to Minnesota. Initially we were told to take A.J.T. at 8:00 AM for the infusion, I think 8:00 or 9:00. The reason they requested that was because we were working with new neurologists and the MOB is next to the hospital and they wanted to be available since A.J.T. was a new patient.

A.J.T. had a very bad reaction to being woken up so early in the morning. She had a horrible seizure day that actually lasted into the weekend. We began to work with the short-stay unit to begin to push that time out as late as we could. The special dispensation that the short-stay unit is doing for us, my understanding is that we are the only patient, we will call A.J.T. in, provide her weight, tell them that we are on our way or intend to show up and they [41] will begin making that \$25,000 medication before we arrive. That way she is able to sleep as late as she can and begin that infusion usually at 10:00 AM -- or not at 10:00 AM but 10:30, 10:45, whenever she is actually in the hospital bed. All other patients, they don't make that dispensation for.

Q. Thank you. What time do you typically leave the house in the morning when you go to the office?

A. It depends on the day.

Q. Is it before A.J.T. wakes up?

A. It depends on the day. So sometimes I work from home. Sometimes I go to the office, like I said. I may go to the office at noon. I may go to the office at 3:00 or 4:00 PM. I may go to the office at 6:00 or 7:00 AM. It just depends on the day and what is in front of me.

Q. And days when you go to the office you said at 6:00 or 7:00 AM, you are not there when A.J.T. wakes up, is that fair to say, or do you come back?

A. I do come back, but that would be rare. And I don't go to the office at 6:00 or 7:00 AM often. That's a rarity.

Q. For the most part, you're at home when A.J.T. wakes up in the morning? **[42]**

A. I mean what time period are we talking about, Mr. Shafer? I'm sorry, because we have been at global pandemic so I've worked from home for most of the time during the pandemic, and I have a hybrid work environment now. So if you could just let me know what time period you are referring to.

Q. Let's start with right when you moved to Minnesota, pre-pandemic. Is that 2015 I believe?

A. Yeah. I changed residencies in 2015, correct.

Q. Sure. You moved to Minnesota. Did you go to the office, I believe more frequently I think you said earlier?

A. That is correct.

Q. What time typically would you go to the office then?

A. I probably would be at the office at 9:00 or 9:30.

Q. Did you work a full day in the office or did you come home?

A. I usually worked a full day.

Q. On those days you weren't personally there to observe A.J.T.'s seizure activities, is that correct?

A. Not when I am at work. During work [43] days.

Q. When did that hybrid, you said that kicked in in March of 2020 or so?

A. I believe so.

Q. When you were working from home, do you stop working to help A.J.T. with the morning routine you described earlier?

A. Yes.

Q. Is it fair to say A.J.T. requires adult supervision at all times?

A. Yes.

Q. As far as you know A.J.T. has at least two adults with her when she's at school, right?

A. That's what I'm told.

Q. She always has at least one adult with her when she's at home?

A. Yes.

Q. At this point I know we have been at this about an hour. I have about another three-fourths of a page or so of questions before sort of a logical break in my questions. Would you mind going forward a little bit before we take a break?

A. Please do.

Q. Who is Linda Rudd?

A. Linda is one of the caregivers who [44] helps us with A.J.T. with babysitting and caregiving.

Q. Just for the court reporter, Rudd I believe is R-U-D-D. Is that your recollection, too?

A. I don't know how to spell her name or last name.

Q. You said she was one of A.J.T.'s caregivers. Did she work in your home?

A. Yes. She provided caregiving services in my home, yes.

Q. What time period did she provide services in the home, start and end dates of employment? Not time during the day, I will ask that one separately.

A. I don't remember when she started to provide services to us. I don't know when, I don't remember. I think she just stopped working with us probably a couple of months ago.

Q. A couple of months ago you said?

A. I think so, yes.

Q. Was she there in the mornings?

A. She was there in the mornings sometimes, yes.

Q. Did she assist in that morning routine that you talked about earlier, the waking up and getting ready? [45]

A. If she was here in the morning, she would, yes.

Q. So did she have set work hours?

A. Yeah. I mean it depended upon the day. Yes. We would talk about when Linda was to arrive on the day that she was going to provide care, yes.

Q. Sure. What were those work hours on weekdays, do you remember her schedule?

A. I think it fluctuates. I don't know the specifics.

Q. Did she work on weekends as well?

A. Occasionally.

Q. Did she work in your home in the afternoons and evenings or just mornings?

A. It really depends, Mr. Shafer, because she's a resource and, you know, if there's a need then we would contact her to see if she was available. She may do a couple of hours in the evening. She may help for an hour or two in the morning. She may provide some time in the afternoon. It just depends on what our needs are and her availability. So it varies.

Q. So it's a flexible schedule?

A. It's not a schedule. It's just kind of a conversation about are you available to care for A.J.T. on a particular day and she either says yes or **[46]** no. Then we talk about the hours and she's either available or she isn't, and if she is not available, then there is no repercussion to her not being available.

Q. Did you pay her directly?

A. I did.

Q. Did you receive any reimbursement from a medical assistance program or anything for her?

A. No.

Q. What did you pay her?

A. Between \$20 and \$25 an hour probably.

Q. I'm sorry, \$20 to \$25?

A. Between \$20 and \$25 an hour is what I remember.

Q. Would she have an average number of hours a week or no?

A. I don't know. Like I said, it varies. It depends on her schedule and what our needs were.

Q. The Osseo School District has excused A.J.T.'s absences in the morning, is that correct?

A. That is correct. And by morning, they permitted A.J.T. to arrive at school at noon.

Q. Have you ever gotten a letter from the District saying A.J.T.'s is truant for not coming to school before noon? [47]

A. I have not.

Q. And all of the IEPs, draft IEPs you've received have identified noon as the start time, is that right?

A. I don't know if that's correct. I know you're referencing IEPs. But the District has made offers for us to change A.J.T.'s sleep schedule and to attend school, you know, earlier than noon.

Q. I understand that's what you are saying. I'm talking about the specific plans the District is following.

Is there anything that you remember saying come to school before noon or services will start before noon on those documents that are being followed?

A. There may be some language on those documents that states, and this is recent language, that the District is ready and available to provide services if A.J.T.'s medical conditions change or if she comes to school before noon. I think that's newer language. I don't know if that is an IEP or not. It could be in e-mails, it could be in TWNs, it could be in -- I don't know, conciliation conference notes. The number of documents in this case are many.

MR. SHAFER: We've been at this for [48] about an hour. Do you want to take a break now,

should we schedule a morning break, what is your preference?

THE WITNESS: I am fine with continuing. I think that the court reporter, I defer to the court reporter. I want to make sure the court reporter gets the breaks that she needs. Whatever the court reporter would like to do.

MR. SHAFER: All right. Is ten minutes good?

THE WITNESS: Ten minutes is good.

MR. SHAFER: We'll be back at 10:06.

BY MS. SHAFER:

Q. A.T., other than your attorney, did you talk to anybody during the break?

A. I had a quick conversation with my wife.

Q. And do you understand you are still under oath?

A. I am. I do understand that, yes.

Q. A.T., before we took a break you mentioned the Perlman Center program. Can you describe that program for me, please.

A. Sure. It's an early intervention program. There were very few children at the time who [49] were invited to be in that intervention program. A.J.T. was selected when she was maybe two, two and a half to participate in that program. It began at 9:00 AM and it might have gone until 11:00 AM or maybe noon. She was in that program for I think a couple of years.

Q. What was the nature of the program?

A. It was an early intervention program to, they had PT, OT, speech therapists. They had other interventionists who would work with a very small

number of children on varying developmental related issues.

Q. Before we took a break I asked you about litigation and complaints with Boone County School District. Do you remember those questions?

A. I do.

Q. Did you enter into any settlement agreement with the Boone County School District regarding A.J.T.?

A. A settlement agreement, like a waiver and a release of claims, is that what you are talking about.

Q. Any settlement agreement.

A. No. **[50]**

Q. Any waiver or release of claims with the Boone County School District?

A. No.

Q. Did you ever threaten to bring a due process hearing against the Boone County School District?

A. No. I did not really know about the due process hearing until the Osseo School District served me and served their own process. That is the first time I learned about the due process hearing.

Q. Did you threaten to bring a complaint to the Kentucky Department of Education against the Boone County School District?

A. No. Not that I remember.

Q. How about threaten to complain with the Office for Civil Rights or the Department of Justice?

A. No, not that I remember.

Q. You were talking about efforts you had made with A.J.T.'s doctors before regarding A.J.T.'s sleep schedule. Do you remember that?

A. Yes.

Q. Have you made efforts to adjust A.J.T.'s sleep schedule since living in the Osseo School District, have any doctors asked you to do that [51] or worked with them to do that?

A. No.

Q. Did --

A. But I do -- I'm sorry, Mr. Shafer.

Q. Go ahead.

A. No. But the doctors also know about the every six week infusion where I wake A.J.T. up before her regular time and what happens. So they know that her seizure activity is severe. They know that I have to sit many times in the backseat in order to manage her seizures on the way to the hospital. They know that her seizure activity is severe throughout the day and many times throughout the weekend. And just this recent infusion the activity was severe that she needed her rectal rescue medication.

Q. Is that common for the infusion days?

A. The need for the rectal rescue medication?

Q. Yes.

A. No, that is not common. What is common is the increased frequency and intensity of seizures throughout the day and sometimes throughout the weekend, which is why we have those infusions on Friday to minimize the obstruction of school. [52]

Q. So her sleep schedule is pretty much set at this point, is that fair to say?

A. Her sleep schedule and morning routine has been the same for many, many, many years.

Q. How long was A.J.T. enrolled in the Boone County School District?

A. Ever since she was of age to go to school.

Q. Do you know what age that is in Kentucky?

A. I'm assuming kindergarten.

Q. Do you remember the school year that she first enrolled in Boone County?

A. I don't.

Q. So sorry to do this math, but let's count back. You said you moved back to Minnesota in the fall of 2015?

A. Correct.

Q. So that would have been the 2015/'16 school year that you moved here. So was A.J.T. enrolled in the Boone County School District the year before that, the 2014 to 2015 school year?

A. She was enrolled in the 2015 and '16 school year in Boone County, Kentucky, until we moved in October. I did that trying to make it easy on the **[53]** School District, understanding that the beginning of school can sometimes be hectic. So I intentionally had her continue within Boone County in 2015 for -- I think with Boone County it might have been a month and a half or maybe two months.

Q. I'm sorry, I missed the last part of that.

A. I think in Boone County, Kentucky, I think school starts maybe mid August. I think that she received services in Boone County from mid August of '15 until mid October of '15.

Q. The school year before that then is the '14/'15 school year, was she enrolled in Boone County for that school year?

A. She was.

Q. The one before that then would have been the '13 to '14 school year, was she enrolled for that school year?

A. Yes.

Q. Before that was the '12 to '13 school year, was she enrolled for that school year?

A. Yes.

Q. Before that was the '11 to '12 school year, was she enrolled in that school year?

A. Yes. [54]

Q. Was she enrolled in any other school districts other than the Osseo School District and Boone County?

A. No.

Q. How about charter schools, was she enrolled in any charter schools?

A. No.

Q. Private schools?

A. No.

Q. Any other public school of any kind?

A. No.

Q. Going back to the Perlman early invention program, I'm not sure that I got it in my notes. Where was that?

A. Cincinnati, Ohio, Cincinnati Children's Hospital.

Q. You described the services. Did it have an educational component or what was the purposes of these interventions, if you know?

A. The purposes were to reduce the opportunity for delay and it ranged from a lot of different things. Like I said, they used PT, OT, speech therapists, they had other interventionist who were employed at the Perlman Center. That's the best I can describe the program. [55]

Q. Did you have to enroll in the Cincinnati School District to get services there?

A. No.

Q. So it was put on through the hospital entirely?

A. Yes.

Q. I believe you said earlier that at some point the program declined to provide her more services because of A.J.T.'s seizure activity?

A. Yes.

Q. Does the program go in the afternoon?

A. No.

Q. Did they provide you any services in the home or just that morning?

A. Just the morning services at the Perlman Center.

Q. Do you know what school A.J.T. specifically attended in Boone County?

A. We attended Longbranch and maybe Stephens Elementary School.

Q. Do you know what years she was in each of those?

A. I don't.

Q. Focusing on Longbranch for a minute, do you know the typical length of the school day in [56] Longbranch?

A. I don't. I don't know the specific hours of -- I'm sorry, go ahead.

Q. I didn't catch that. What were you saying?

A. I don't remember the specific hours of operation of the school.

Q. Do you remember testifying in the due process hearing that you believed it was six hours?

A. It was probably about six hours in length, but I don't know the specific times.

Q. The length of the day, that's my question.

A. The length of the day is probably -- yeah, probably around six hours I'm assuming, from what I can remember.

Q. What is that based on, your understanding, if you remember?

A. This is a lengthy answer, but A.J.T. was only receiving educational services until noon to 6:00, I'm sorry, noon to 4:00 or 3:30 or something along those lines, and I asked in an IEP meeting if she would receive additional services, and through the IEP process there was a decision to provide her with six hours of education. [57]

Q. If I told you that in 2011/2012 school year the typical school day at Longbranch Elementary was 6 hours and 45 minutes, do you have any reason to disagree with me?

A. No. I don't have any reason to agree or disagree because I don't know.

Q. The same thing for the 2015/2016 school year, the last school year A.J.T. was there, if I told you the typical school day was 6 hours and 45 minutes, would you have any reason to disagree or agree with me?

A. I don't have any information to agree or disagree. I don't remember.

Q. If I told you currently that the current school day is 7 hours at Longbranch Elementary, do you have any reason to agree or disagree with me?

A. I have no idea what the current school day is. I live in Minnesota.

Q. When did A.J.T. first start receiving special ed services?

A. Through a --

Q. Through Boone County, sorry.

A. I think she always qualified. I mean she did always qualify. So it was upon enrollment. **[58]**

Q. You mentioned earlier she was receiving services from noon until the end of the school day and then in the home. Do you remember when that arrangement started?

A. I don't remember the specific date that we began providing services in the home, but I know that that was the arrangement for many years in Kentucky.

Q. If you could turn to, this one does have a handwritten sticker number on it but it's in the sequence of mine, so if you would turn to Exhibit 9. Not the ones that were with your affidavit, sir, but my 9.

A. Yup.

Q. What I have marked as 9 is labeled "Kentucky Department of Education, Division of Learning Services, Notice of Shortened School Day and/or Week 2012 - 2013."

A. Yes, I have that in front of me.

Q. Take a look at it.

A. I have.

Q. All right. Looking at page 2, Line 2a, it says A.J.T.'s school day is from noon until 3:40, et cetera. Do you see that line? **[59]**

A. You are on page 2, line?

Q. At the top, 2a.

A. A.J.T.'s school day is from noon until 3:40, yes.

Q. Then it goes on to talk about services from 4:00 to 6:00 in the home Monday, Wednesday, Friday?

A. Yes.

Q. Is that the arrangement you were talking about earlier, she goes to school and then goes home?

A. Yes.

Q. So if you look down on Box 5, shortened school day, blah, blah, blah, previous school years it says 2011-2012. Do you see that?

A. Yes.

Q. So based on this document, do you remember if that was the same arrangement in 2011 or 2012?

A. I'm sorry. I can only testify I know she had this arrangement for many years.

Q. Was it always the same arrangement I guess is my question, did the amount of time vary?

A. No. Once I raised the issue of **[60]** instructional time with the IEP team, my recollection is I had one conversation with the IEP team. The special education director attended the second meeting or we had a second meeting with the special education director. She asked what we were asking for. I told her about the extended hours request or not extended hours, but that A.J.T. should be getting a full day or additional instructional time. We came up with this arrangement. She offered to provide services to A.J.T. from noon until 6:00. I told her that I wanted to do whatever I could to help the school with costs. She said that that was not something that she could speak to. I told her would it be helpful if I used

some public services a couple of days a week to supplement to reduce costs so the District won't bear those costs. She said that she would be amenable if it was amenable to me. I also offered to reduce costs that they could use a paraprofessional who knew A.J.T., that could keep her safe, knew the IEP and could effectuate it and was skilled and that I didn't even need a teacher or we could try it without a teacher. The director said that that's not something that we have to do. I said, well, if it seems to be a more cost effective way to provide services do you want to try it, and she said yes. [61]

So that's why we came up with the process of the School District providing services on Monday, Wednesday, and Friday. Oh, the final dissertation is we talked about just the school and I offered, I said if it would be easier to provide those services in my home, I mean that's another option if it's easier for the school. We talked about it. She said that it would be easier for the school. I said that that would be something that I would be willing to do as well.

I mean that is just the regular give and take process when you work with an IEP team that is honorable and has the interest of the child, in my opinion.

Q. All right. Back to the exhibits for a minute. Have you seen this before?

A. I'm sure I have. It's part of the IEP I think.

Q. Do you remember receiving it when you were in Kentucky?

A. I'm sure I did receive it. I'm pretty sure that I also provided documents when I enrolled into the District. I'm sorry, I think that's another time that I

saw it, when I provided these documents to [62] the District when I enrolled.

Q. I'm sorry, did you say you provided this document to the District when you enrolled A.J.T.?

A. When I enrolled, yeah, I think so. I provided a lot of documents when I enrolled above and beyond what I had to, and obviously IEP, I provided evaluations, I provided doctors' notes, I provided a slew of medical information and other documents to show A.J.T.'s medical condition, why we have the educational approach that we do, we had in Kentucky. So this is part of that big group of documents I think that I provided to the District upon enrollment.

I think I also provided this to either Paula Rakner or John Norlander prior to moving to the District because I was having conversations about whether or not this was even a good District to enroll my child and I shared the IEP. I wanted to make sure it was going to be adopted and I wouldn't have any problems if I chose this District to live in.

Q. To the best of your knowledge, is this document accurate?

A. It's accurate that A.J.T. received services from noon to 6:00, with the exception of the transportation time. [63]

Q. How long was that transportation?

A. About 20 minutes.

Q. So she received about 5 hours and 40 minutes of services then, noon to 6:00 minus 20 minutes of transportation?

A. From noon until 6:00 yeah, minus 15, 20 minutes of transportation.

Q. Noon to 6:00 is 6 hours minus 15 or 20 minutes of transportation. Okay.

A. Yes.

Q. Any reason to disagree with any of the statements in this document?

A. Yeah, it's not my document. I actually don't know what everything means. It's hard for me to answer that question about whether I agree or disagree.

Q. Okay. Did you receive any other notices like this one that you remember?

A. What do you mean by "notices"?

Q. This document is labeled "Notice of Shortened School Day and/or Week" and it says it's from 2012 to 2013. Did you receive any other document with a similar title in Kentucky, whether from the District or --

A. I can't remember. **[64]**

Q. You mentioned giving this one to the District. Do you remember if you gave the District any other similar documents, similarly titled documents?

A. Not that I remember.

Q. This says at the time this was completed that A.J.T. was seven. As of 9/12/2012 was A.J.T. seven, I suppose is my question?

A. Yes. She was born in August of '05.

Q. So the previous year, the '11/'12 school year, she would be six then, counting the year backwards on the same date?

A. Yes.

Q. This document says that there is a shortened school day request for the 2011 school year. It's that Line 5 I asked you about earlier. So when A.J.T. was six, would that be kindergarten?

A. I don't know if it's five or six. I don't know.

Q. So what I'm trying to get at again is when that arrangement started, I'm trying to get there through this document, to receive the services in home. You said it was as soon as you asked. I am [65] trying to get when did you ask. Was it A.J.T.'s kindergarten year, first grade year?

A. I don't remember.

Q. The schedule contained in this exhibit was in effect quite awhile in Kentucky?

A. Yes. It was for many years she received instruction from noon until 6:00.

Q. Minus the transportation that you mentioned earlier?

A. Minus the transportation time.

Q. Sorry. I didn't catch that.

A. Yes, minus the transportation time.

Q. Were there any changes in that schedule before you moved to Minnesota?

A. No.

Q. If you could for me, that Line 2a, A.J.T. received school in the home from 4:00 to 6:00 and it says Monday, Wednesday, and Friday.

Do you see that?

A. 2a?

Q. The box at the top of page 2.

A. "The committee agrees that A.J.T. needs the shortened school day so that she can come to school during the time of day that optimum learning can take place. Monday, Wednesday, and Friday from [66] 4:00 to 6:00 PM. A.J.T. receives school in the home from 4:00 to 6:00.

Q. Who provided those services on Monday, Wednesday, and Friday?

A. The school.

Q. The school. Do you remember the person? I'm sorry, if you answered, I didn't hear it.

A. No. I'm sorry, the pause is I'm trying to remember the name of the individual who was working with A.J.T. She was an extraordinary person. I'm embarrassed to say that I can't remember her name.

Q. Was it A.J.T.'s classroom teacher?

A. No.

Q. The first page lists a Chris Bolanos as her teacher. That wasn't the person that came into the home?

A. Chris Bolanos did not come into the home, correct.

Q. Do you remember if was a teacher or a paraprofessional?

A. Just as I told you before, it was a paraprofessional and I explained how that process unfolded. **[67]**

Q. Was it the same person consistently? I understand allowing for substitutes, but was it the same person year after year or did that role change at some point?

A. From my recollection it was the same individual for if not the entire time at least the last couple of years.

Q. Again, allowing for the occasional substitute, was it two people over your time in Boone County, three people, or how many different regularly assigned people, if you know?

A. I can't remember. There was consistency. There was a recognition that A.J.T. does best with

consistency, consistency in instructors, individuals who know what her routine is, her safety regimen. There was not a lot of fluctuation with the individual that the school provided, if any.

Q. Does A.J.T. do well or benefit from time with her peers too?

A. Yeah, she enjoys time with her peers, yes. From what I am told.

Q. This document speaks to Monday, Wednesday, and Fridays.

What about Tuesdays and Thursdays, who provided service on those days? **[68]**

A. As I told you before, I had services through I think it was a Medicare program in Kentucky. I could use those services at any time, on any day. They were ADA services and I offered to the School District to offset their costs, to not use those on weekends but to actually use those on Tuesdays and Thursdays between 4:00 and 6:00.

Q. I'm sorry if you mentioned it, I am having a hard time hearing you. When you said, that is where you used those ADA services was between 4:00 and 6:00 Tuesdays and Thursdays, did I hear that right?

A. Correct, around those -- yes. On those dates and around those hours, correct.

Q. What was rest of that? I heard on those dates-

A. On those dates and around those hours of 4:00 to 6:00, correct.

Q. Who was the provider, if you remember?

A. The last provider of those services was Mary Grace Ott.

Q. Do you know who Ms. Ott worked for?

A. I don't know. I don't remember.

Q. Do you remember if she was a Boone County School District employee? **[69]**

A. I don't. I don't know. My assumption was that she wasn't. I mean that was the reason that I offered the hours to the District, to reduce their costs and their burden.

The same offer, just so that you know, so it's on the record, was made to Osseo School District. I just want the record to reflect that all of these offers, all of these concessions that I offered to Boone County, I also offered to Osseo School District, repeatedly over the years.

Q. Other than Ms. Ott and her predecessor, was that consistent every Tuesday/Thursday or did you have other educational programming in there from other outside providers?

A. No, it was consistent. There was some -- you know, once again, this is a working relationship. So there would be times where Mary Grace, it was easier for her to work on a Tuesday and a Wednesday or a Monday and Friday, and she would work with the other provider of services in coordinating those dates. Then they would also, of course, share information on what they were doing in regards to instruction.

Q. I'm sorry, I didn't catch that.

MS. GOETZ: We are having difficulty **[70]** hearing you. Your voice kind of drops off at the end.

THE WITNESS: My face is almost in the microphone, that's why my nose looks so big. I'm not normally this close to a camera. I will do my best to project.

I think the comment that I was making is that it was a great working relationship between

Mary Grace, the School District, us. So of course there is flexibility and there would be times possibly where Mary Grace, it was easier for her to work on a Monday or a Thursday or a Tuesday and a Friday and she would work with the other provider of educational services and coordinate. But at the end day, A.J.T. would always receive instruction between noon and 6:00 with the exception of the transportation time.

BY MR. SHAFER:

Q. Mary Grace, I think I heard you say was through Medicaide. Was that a Medicaide waiver?

A. I think that is correct. But I don't know for sure the program.

Q. If you could look at Exhibit 31 for me again, page the end of 64 and beginning of 65. The last line of 64 starts a sentence, "And my wife would" and it continues to "take A.J.T. for instruction between 4:00 and 6:00 in Kentucky at one point." [71]

A. I'm sorry, Mr. Shafer, so I'm looking at page number, what number again?

Q. I think it's probably page 16 of your PDF, but it's page 64 of the hearing transcript, Exhibit 31. The last line, Line 25, the second sentence of that line begins, "And my wife would" and then it continues on the next page.

Let me know when you are there.

A. Sure. I okay. I read it.

Q. It says that your wife would take A.J.T. for instruction between 4:00 and 6:00 at one point. Where was she taking her, is my question.

A. When A.J.T. was, I don't know if A.J.T. was in school yet or there might have been a little bit of overlap but there was a program in Cincinnati that we paid out of pocket for that was provided with ADA

services, and they would mirror those ADA services to A.J.T.'s IEP. I believe the entity was Applied Behavioral Services, might have been the name of that entity, and I think it was in Cincinnati.

So that is where we were, like I said, if A.J.T. was school age, she might have only been in kindergarten or first grade, but we were trying out just from other parents using that ADA method to see how that instruction would help A.J.T. **[72]**

So that was something we were doing on our own at some point. My wife would pick A.J.T. up and drive her to downtown Cincinnati for additional services and instruction.

Q. Going back to Mary Grace Ott for just a minute. Do you remember what years she worked with A.J.T.? You said the last couple of years before you moved, do you remember specifically?

A. I'm sorry, I don't remember the specifics, but it was a couple to a few years at the least.

Q. Did you arrange with I guess the State of Kentucky to have Mary Grace Ott come and work with A.J.T.? How did that happen?

A. It was part of a program that Kentucky had and provided to A.J.T., and we were given services. It was like a consumer directed approach, and we could select what services we wanted and when we wanted those to be used. It was through the State of Kentucky. I don't know the particulars of how Mary Grace was selected to provide those services, but.

Q. You mentioned some days Mary Grace would work on different days if her schedule needed her to work Wednesdays, she would switch with the District employee. Did I hear that right earlier? **[73]**

A. Yeah, I mean there was some variability. I mean they worked together. It was a good relationship. Like I said, everyone -- A.J.T., every single day A.J.T. would receive services from noon to 6:00. So they just would coordinate.

But consistently, I mean Mary Grace was only -- it was like a consumer direct option, we only had her for a certain number of hours. She would provide the services and the District would make up the difference. I think there might have been some instances where Mary Grace was not able to provide services for one reason or another and the District, if asked, would always just step in and provide those services on those dates. That didn't happen very often because Mary Grace was very responsible. But if there was something that was going on and she could only provide services one day in a week then the District would be available to provide services on that other day. That was very uncommon.

Q. So it's noon to 6:00 minus that 15 to 20 minutes of transportation time?

A. Correct.

Q. And for the most part it was three days a week provided by a District employee, I think you said a paraprofessional, and two days a week by Mary [74] Grace Ott or her predecessor with variability you said. I just want to make sure I heard everything right. I'm sorry.

A. With a little bit of variability. It was static but I don't want to speak in absolutes. There has been a little bit of variability.

Q. Generally three days a week with the District employee, two days a week with Mary Grace, subject

to the variability. I just want to make sure I'm understanding.

If you could turn all of the way back to Exhibit 2 for me.

A. I have Exhibit 2.

Q. I told you I'm not going to ask you to go through all of the attachments to it, at least not by those numbers. I would like you to look at Paragraph 24 of Exhibit 2, which is on page 5.

A. Okay. Yes. I have read it.

Q. All right. You are stating here that the IEP did not reflect the four hours of weekly in-home behavior support provided after school because it was paid from state funds despite clearly an integral part of educational services program.

A. Is there a question? I'm sorry.

Q. I just want to make sure that that's [75] the part we're looking at.

A. I'm looking at that.

Q. My question is: Is that four hours the four hours of Mary Grace Ott's time that we have been talking about?

A. Yes.

Q. Before moving to Minnesota, did you take any steps to correct this inaccuracy in the IEP that is referenced in your affidavit?

A. So can you state that again, please.

Q. Sure. Your affidavit says that the 2012 IEP that's dated 9/12/2012 does not contain these four hours of service. Did you take steps to correct that before moving to Minnesota?

A. I didn't know that there was any clerical inconsistency at any time prior to moving to Osseo. I

didn't know there was a clerical error or issue even when I enrolled in Osseo. The District didn't ask any questions about that.

I wish if this was an issue I wish the District would have asked questions at that time because I could have very easily provided whatever information the District wanted or needed, but there was no such inquiry from the District.

Q. If you could please go back to Exhibit [76] 9, that notice of shortened school day.

A. Okay. I have it in front of me.

Q. I'm looking at 2b, beginning time. Can you read that line out loud for me, please.

A. "Provide the typical beginning and ending time for students in this school?" "Beginning time: 8:40" "Ending time: 3:40."

Q. Just doing some quick math, 8:40 to 3:40 is seven hours, isn't it?

A. It appears to be, yes. I mean seven hours of time, I don't know if that is all instructional time.

Q. And five hours -- or six hours is less than seven hours, we can agree to that?

A. Six hours is less than seven hours; but I don't know if seven hours is all instructional time.

Q. I understand.

A. I think students have time going between classrooms, I think they have lunch, I think they have a lot of other things going on. I don't know if this document or if the question reflects the instructional time, if that's what you're asking.

Q. So the school day, a full school day would exclude lunch and passing time and noninstructional time? [77]

A. Would it exclude it?

Q. Yes.

A. I really don't know. But I do know that for my daughter that is instructional time because with my daughter we work on, you know, feeding and self-care. So that time is instructional time for my daughter. I can't speak to other students and how different states allocate what is and is not instructional time. I don't know.

Q. Just on the math, 5 hours and 40 or 5 hours and 45 minutes is also less than 7 hours, we can agree to that?

A. Five hours and 40 minutes is less than 7 hours.

Q. I missed the end of that, I'm sorry.

A. Five hours and 40 minutes is less than 7 hours.

Q. So according to this document again, just according to this document, A.J.T. did not have a seven-hour school day at all, did she?

A. Well, I'll go back, the seven hours, I don't know what is and is not instructional time. I don't know the experience of a typical Boone County student. So I don't know what time they account for as they move between classrooms or different periods. **[78]** I don't know if a lunch break is instructional time. Mr. Shafer, I'm sorry, I can only speak to the experience of my daughter in her special needs classroom. I'm not an expert on Boone County experiences for typical students and instructional hours.

Q. Line 2c of that document says she was only in school day, time in school for her current IEP was noon to 3:40, is that correct?

A. I believe so.

Q. That is consistent with what you said earlier, she got services in school from noon to the end of the school day and then two hours from 4:00 to 6:00 at home?

A. That's correct.

Q. If you could look at Exhibit 31 again, page 41, Line 14 to 15. Let me know when you are there.

A. Page 31, Line 14 and 15, yes.

Q. I'm sorry, I want to direct you to a different page. Page 77. I apologize.

A. Okay. I have page 77 in front of me.

Q. Looking at Lines 7 through 11.

A. Starting on Number 5, "The typical Boone County student hours of instruction?" "That was [79] a bad question. Let me ask a different way. The other students in A.J.T.'s school in Kentucky, did they get six hours of instruction?"

I apologize, I am just reading from the transcript.

So the question is "The typical Boone County student hours of instruction?" That was my answer. I apologize. Then the question was rephrased. "That was a bad question. Let me ask it a different way. The other students in A.J.T.'s school in Kentucky, did they get six hours of instruction?" "They did, yes. As far as I know."

Q. I believe you just said you don't know what their amount of time was, is that correct?

A. Are you talking about the difference between instructional time and the hours of operation?

Q. I asked earlier if A.J.T., according to this document that I was looking at, Exhibit 9, if she had

the same length school day and you said something to the effect I don't know what the typical instructional day is for Boone County students?

A. The document that you're referring to between 8:40 and 3:40 is the length of the school day. What I said is I don't know for sure what the hours of instruction for a typical student would be within that [80] time period. I don't know if the State of Kentucky makes exclusions for breaks or passing periods or lunchtime. I don't know if that is instructional time for a typical student.

Q. So you don't know what the amount of instruction received for a typical student in Longbranch Elementary is? That's what you're saying?

A. I know that they are in school from 8:40 to 3:40.

I mean I think what the important part is is that when I sat down with the School District, we agreed that A.J.T. needed additional time then what was being offered, and that is how we reached that noon to 6:00 time period.

Q. I understand what you're saying. I'm just going back to what you said earlier to make sure that I understand what you're saying now. So you don't know how much that 8:40 to 3:40 is instructional time in Longbranch Elementary, is that correct?

A. I don't know the specifics of the 8:40 to 3:40 and how the State calculates instructional time. I'm going off of the six hours is my high-level conversation with the special education director when we talked about A.J.T. should be receiving services [81] that are identical to or similar to a typical student. That was just part of our conversation. We didn't sit down with

a calculator and go through the level of scrutiny that we are today.

Q. In fact, this document I have been calling Exhibit 9 is entitled "Notice of Shortened School Day and/or Week," isn't it?

A. That is what the document is titled, correct.

Q. Earlier we were talking about paraprofessionals. What is a paraprofessional in your understanding?

A. My understanding is that it's an individual who does not necessarily require a license to educate.

Q. They can provide educational services?

A. I know that they do for my daughter. I know that the paraprofessionals are very active in providing services to my daughter and effectuating the IEP. The paraprofessionals are involved in the education of my daughter and effectuating her IEP.

Q. If you could please turn to Exhibit 10, sticker 10 again.

A. I have it in front of me.

Q. Do you know what this document is? **[82]**

A. It appears to be the IEP of Boone County of A.J.T., my daughter, in Boone County, Kentucky.

Q. The dates on top, the one I'm looking at says meeting date of March 12, 2015.

A. That is correct.

Q. Are you familiar with this document?

A. Not really. I mean there are thousands of documents in the record, so, no, I don't have a great familiarity with this particular IEP, all of the different IEP iterations going back through all of the years, not particularly.

Q. As far as you are aware, though, it's an IEP Boone County gave you?

A. As far as I know.

Q. Do you remember approving this document? Or consenting?

A. I think that by consenting you just consent by signing or I guess you don't have to sign, right? But you don't consent is -- so if you are defining consent as did I ask for additional IEP meetings, did I ask for conciliation meetings, did I ask for a due process hearing, no.

Q. Actually, that is a good question. I don't know how the consent process works in Kentucky. **[83]**

What do you have to do in Kennedy to consent to an IEP? In Minnesota, I know you receive notices and a consent form. What about in Kennedy, do you get a consent form?

A. I don't remember.

Q. Sure. Do you remember if this IEP went into effect in Kennedy?

A. My understanding is that it did.

Q. Is this the --

A. I'm sorry to cut you off. I don't know, I'm just going off this appears to be the IEP, so.

Q. I understand a healthy dose of skepticism for other lawyers, I appreciate that. I don't have too many questions about specifics. I just want to make sure this is the 2015 to 2016 IEP as near as you can tell.

A. As far as I can tell.

Q. As far as you remember, is this the last IEP from Kentucky?

A. It would have been because this would be for the 2015 and '16 year in which she received educational services in August, September, and part of October.

Q. So is this the most recent IEP you gave [84] to the District when you enrolled A.J.T. in Osseo?

A. Oh, that I don't remember.

Q. As far as you know, this was the one that was being implemented in Kentucky before you moved?

A. As far as I know. I mean it's a document that is seven, eight years old. I haven't looked at it.

Q. Of course.

If you could turn to page 8 of that exhibit, please. There is a number in the upper right-hand corner which makes it easier.

A. Okay.

Q. I'm looking at the service grid, it's labeled "Special Education Services." It says, "Anticipated Frequency and Duration of Services." Do you see that block sort of halfway through the page?

A. Special education services and then two blocks, yes.

Q. During the due process hearing you testified that the service times identified in this IEP are incorrect. Do you remember that?

A. I don't. [85]

Q. If you could look at Exhibit 31 again for me. My copies are getting a little deranged here, but it's page 82.

A. Page 82, which line am I looking at?

Q. I'm looking at Line 7 through Line 10.

A. "Question: So the March 12, 2015 Boone County District IEP said she got 125 -- I'll slow down. Sorry.

"Question: So the March 12, 2015 Boone County District IEP said she got 125 minutes of in-school instruction, is that correct?" "Answer: That is correct."

Q. I'm sorry, the answer says "That's incorrect," right?

A. Yeah.

"Question: That's what the IEP incorrectly states, right?" "Correct."

Q. Again, with this document, before moving to Minnesota did you ever take any action to report that inconsistency to the Boone County special ed director?

A. I didn't know about the clerical error because I just continued to receive services as always. So this document -- I mean sorry, Mr. Shafer, but what my family is concerned with is the actual [86] services that are rendered, not the paperwork that accompanies it.

Q. I think I heard part of that. You said your family is concerned with the services, not the paperwork, is that what you said?

A. Yeah. We're concerned about the services that my daughter received, not the clerical paperwork that goes along with it. So if there was a change in the services that we were receiving, I would have brought it to the Boone County administration's attention. But there was no change in services. Ever.

Q. You understand the paperwork states what services A.J.T. is to receive, right?

A. I can't speak to that. Like I said, I can only speak to the services that I received and you're showing me a document.

Q. That service grid that you said the 125 minutes was wrong, also says she receives special education services 90 minutes a day five times a week in the home. So that's incorrect also, right?

A. Yes.

Q. It's incorrect because A.J.T. received two hours a day?

A. Yes. [87]

Q. And then again it's only three days a week from a School District provider, correct?

A. That was the agreement that we reached.

Q. Before the due process hearing you initiated did you ever tell the District this IEP was incorrect?

A. I didn't know that the IEP was incorrect until we started the due process. Actually, probably until either the District filed an action against my family or we filed an action later.

Q. So the District's due process hearing was before yours, correct?

A. It was.

Q. So before the District filed its request for a due process hearing you didn't know this IEP was incorrect?

A. I didn't know about the clerical error and Osseo School District never brought it to my attention and there was never a reason for the denial of services to my daughter.

Q. Is it your position here today that Boone County School District faithfully implemented A.J.T.'s IEP?

A. Boone County implemented what we agreed to, which was to provide instructional hours between [88] noon and 6:00 with the exception of the transportation time.

Q. The School District in Boone County School District agreed to provide it five days a week between 4:00 and 6:00 at home?

A. As I stated, it was an interactive conversation between me and the director. The director recognized that A.J.T. was short instructional hours. We talked about the private funds that we were using between the hours of 4:00 and 6:00 and the benefit that A.J.T. was receiving. She agreed to provide services and we started to interact the process. And I made several offers to try to offset costs and make it easier for the Boone County School District to provide those services.

I offered that same approach to Osseo School District, but it was refused.

Q. And in this interactive process that you're describing, did the Boone County special education director offer to provide services from 4:00 until 6:00 every day of the week or just three days a week?

A. Every day of the week initially. And then I offered to offset services, to offset costs to use those Medicaid dollars two days a week. [89]

She was very clear that costs are not supposed to be calculated in this conversation. She was very clear that the District, you know, had an obligation to provide those services to my daughter. And I was very clear that I wanted to be a good partner and if I had resources I wanted to work with the School District. And so I could have used those ADA services on a Saturday or a Sunday or during the

summer, but I chose to use them during the week because I had a great working relationship with the School District. They weren't suing me. They weren't recording me. I didn't have to go through five billion conciliation conferences. And when they told me they were going to do something, they actually followed through with it.

Q. Who was the director at Boone County, if you remember?

A. Ecklund might have been her last name.

Q. Ecklund?

A. Ecklund, I think.

Q. If the court reporter is not going to ask, I will. Can you spell that one?

A. This is from memory, E-C-K-L-U-N-D.

Q. And do you remember, I'm sorry, do you remember the first name? **[90]**

A. It might have been Pam, but I don't know for sure. P-A-M.

Q. You just said, I think, I couldn't hear if it was million or billion, but you said 5 million conciliation conferences. I understand you've had multiple meetings with the School District regarding A.J.T.'s IEP and educational services?

A. Are you referring to Osseo or Boone County?

Q. Osseo now.

A. Obviously, the million or the billion is a word that expresses my frustration. It's not meant to be accurate, but yes, there have been --

Q. I wasn't going to hold you to that one anyway.

A. I appreciate that.

There have been numerous IEP meetings, numerous conciliation conferences.

Q. And other correspondence, have you had e-mails with A.J.T.'s providers?

A. Numerous e-mail exchanges.

Q. Phone conversations?

A. Numerous phone conversations. Well, when you say phone conversations, like what time are you referring to? Because this is a dispute that has [91] been going on for, what, six, seven years, right?

Q. Yes. Apart from IEP meetings, have you had phone conversations with either A.J.T.'s case manager or special education director to talk about A.J.T.'s length of school day and educational services?

A. If there are phone conversations they relate to IEP meetings that are either going to occur or had occurred or conciliation conferences that were planning to be had or recently had.

Q. So they were logistical phone conversations saying we're going to have a meeting next week, that kind of thing?

A. Sometimes they were logistical. Sometimes I continued to express my frustration with the District. I'm thinking just more recently -- or actually all the time. Just not being able to get information. Not being able to get a cogent response as to why Osseo School District won't provide the same education that was received in Boone County.

Frustration because the District will put language into the IEPs that wasn't discussed or raised. In IEP meetings, frustration because I asked for a track changes document because it takes me more time to go through and take a look at the proposed IEP [92] and what the language changes are. So that's even more important because the District they have put information that we didn't

discuss in the IEPs. Only on one occasion has the District offered to provide me a track changes document.

So no, it's very difficult and it's very frustrating and it's very time-consuming.

Q. Are those phone conversations?

A. I mean there would be quick phone conversations, yeah, that I would express that frustration, correct.

Q. Did you talk to Kate Emmons, the special education director, in any of those phone conversations?

A. During this entire dispute Kate Emmons only attended one IEP meeting and it was only because I asked repeatedly. I don't know of any telephone conversation that I have had directly with Kate Emmons that I can remember.

Q. How about e-mails with Kate Emmons?

A. She might have been copied on e-mails. I don't know.

Q. Did you ever tell Kate Emmons directly the District was violating ADA? **[93]**

A. I don't know if I told Kate Emmons. I know that I told the special education director that, or special education coordinator. I'm sorry, I don't know people's names.

Q. Sure.

A. Joy Fredrickson, F-R-E-D-R-I-C-K-S-O-N.

Q. Back to Kate Emmons, did you ever tell her directly that the District was violating Section 504?

A. I never told that directly to Kate Emmons, no.

Q. Switching to Jill Lesne, which I believe is spelled L-E-N-S-E. Have I got that right?

MS. GOETZ: L-E-S-N-E.

BY MR. SHAFER:

Q. L-E-S-N-E, sorry.

Do you know who Jill Lesne is?

A. Just because of the depositions.

Q. Had you spoken with Jill Lesne before the depositions?

A. No one told me that Jill Lesne or her department exists, so the answer is no.

Q. If you could turn to Exhibit 5, my stickers again.

A. I have it in front of me. **[94]**

Q. Are you familiar with this document?

A. I have seen this document before, yes.

Q. Have you received a copy of that document or something that looks similar to it from the Osseo School District?

A. Over the six and a half years of being in the Osseo School District I received a document called Procedural Safeguards. I don't know if this document is reflective of the document provided to me in any other year. But I do know that I received on occasion a document that states "Procedural Safeguards."

Q. At some point in this process you have described that the School District or the District offered mediation to resolve disputes regarding A.J.T.'s programming?

A. I can't remember if they've offered mediation or not.

Q. I can't remember if I asked this earlier, but did you ever go to mediation with Boone County?

A. No.

Q. Have you participated in mediation with the Osseo School District at all?

A. No, not the mediation process. Not [95] that I can remember.

Q. Do you understand that mediation through the Department of Education is a voluntary process?

A. I am not aware of the specifics of the mediation process in Minnesota.

Q. Do you remember refusing to agree to mediation proposed by the District?

A. I don't remember. The only thing that I can remember refusing is I think that the School District for the most current IEP offered the Department of Education to facilitate that conversation. I know that I declined that offer.

Q. Why did you decline the facilitated meeting?

A. Because the District couldn't explain, could not explain to me what would be different with that process compared to anything else that we would be going through.

Q. Do you remember the District offering to facilitate a meeting in the past?

A. I don't remember.

Q. Are you aware that parents can request facilitated meetings?

A. I don't know. I don't remember. [96]

Q. Are you aware that parents can request mediation as well?

A. Yeah, I don't know, and I can't remember.

Q. If you could turn to page 5 of Exhibit 5. The ones labeled on the bottom near the middle.

A. I have it in front of me.

Q. The last paragraph above Confidentiality towards the bottom, do you see it says, "You and the District may also agree"? Do you see that paragraph?

A. I do.

Q. The first sentence reads, "You and the District may also agree to use mediation or facilitated individualized education program (IEP) team meeting to resolve your disagreement."

A. I do.

Q. Were you aware of that before I just read it to you?

A. I honestly can't remember if that's been a topic of conversation and how often during this entire process.

Q. Sure. If you could turn back to I believe it's Exhibit 2. I'm looking at Paragraph 16 in Exhibit 2, which starts at the bottom of page 3 and [97] ends on the top of page 4.

A. I read it.

Q. Who is the administrator you spoke to that is referenced in that paragraph?

A. So I had e-mails, four telephone conversations initially with Paula Rakner and then I had either e-mail exchanges or telephone conversations with John Norlander.

Q. Who is that? I'm sorry.

A. John Norlander.

And then I had a conversation during enrollment with I think Paula Rakner again.

Q. And then the conversations specifically appear to be before you moved to the Osseo area School District.

Approximately when was that?

A. April or May of 2015, possibly early June of 2015.

Q. If you could look at Paragraph 18 for me, please. The next page, page 4.

A. Okay. I have read it.

Q. The first sentence starts with, "The District's special education administration overrode the capacity of the IEP Team to decide this important issue," and it goes on from there. **[98]**

Do you see that language?

A. Yes.

Q. Which administrator was that?

A. I don't know.

Q. How do you know that a specific administrator made those decisions?

A. Well, I know nobody on the IEP team who is not a part of the special education team was making those decisions. I know I wasn't in agreement with those decisions. Actually, there wasn't even a lot of conversation honestly, Mr. Shafer, during the IEP meeting. I would make the request, it would be noted, and there was no conversation about it. Or very little conversation about it. And then when I get the responses as to why it was denied, like I said, it doesn't have anything to do with my daughter and it doesn't sound like something that a teacher would write. I don't think a teacher is concerned about citing a precedence among this school district or other school districts. That doesn't sound like Jocelyn Horboff, and she never said anything like that to me.

Q. In Paragraph 18 of your affidavit you talk about administrative convenience. What is the **[99]** administrative convenience that you are referencing?

A. The School District only wants to provide services when the school is open for regular instruction. The only reason this District chose to provide services when I first moved in for the time that it did was because that was the time that the school was open.

Actually, initially my wife was picking up my daughter at 3:30 or 3:45 PM because buses were lining up and there was no way for her to get her to the car safely and buses weren't moving their cars so my wife could pull the car up and the School District wasn't doing anything to help my wife. So she began to pick up my daughter a little bit early because the District wasn't providing any options.

And then at some point in an IEP team meeting I think Joy Fredrickson came back and said that they could provide services until 4:15 and the buses could be gone. But the only reason -- like I said, everything was fixated upon the hours of school.

When my daughter was matriculating into middle school, Joy Fredrickson called me and my wife to a meeting. It was not an IEP meeting. It was in February and she told us A.J.T. was matriculating into middle school and her day would end at 2:40. I got [100] very upset and I said why is it ending at 2:40 and she said that's when the school day ends. I proffered to her like five or six different ways that A.J.T. could continue to at least receive the 4 hours and 15 minutes and she declined each one of those. And then after I got that TWN, that's when we had an IEP meeting. That's when we began to talk about goals and objectives for the upcoming year. That's when we began to talk about A.J.T.'s progress. The District made that decision to reduce my daughter's hours before we even had an IEP meeting.

Q. And during that IEP meeting, did the team agree to continue providing services until 4:15?

A. No. That was in her stay put.

Q. She continued to receive services until 4:15?

A. Because that was in her stay put, yes.

Q. At any time did she only receive services until 2:40?

A. I'm sorry?

Q. At any time did she only receive services until 2:40?

A. No. The District did not violate the stay put.

Q. And services at 4:15, that's beyond the [101] end of the 2:40 school day, right?

A. Yes. I just explained that we had problems -- it was 15 minutes. It was 15 minutes of time. I actually don't even know how much instructional time you are getting with the doorbell ringing and students leaving and buses pulling out, because obviously my daughter has auditory and visual distraction issue. I know the District wants to count that extra 15 minutes as valuable instructional time. But yes, we picked her up at 4:15.

Q. Who told you that administrative convenience was the reason for the District's proposals?

A. Sorry, can you restate.

Q. Who told you that administrative convenience was the reason for the District's proposals?

A. Well, I knew it was -- the term, I had conversations with my attorneys just about the term; but the concept which is my daughter's education is determined based upon what is easy for the school

and the hours that the school is providing services to typical students.

But what I find even more frustrating is that the schools actually are still providing **[102]** services after that time period. So, you know, typical students go and they have basketball, football, baseball, sports club, that parking lot is full of typical students receiving services that relate to their education and continue to receive those services. But my daughter, they deny my daughter the opportunity to have some type of additional services during that time period that typical kids get, but not my daughter.

Q. It's your position that those clubs you mentioned are educational services provided by the school?

A. Yeah. I think that those clubs and services and sporting activities all relate to a student's education.

Why would a School District perform services that don't relate to education? Because I don't want my tax dollars going to services that don't relate to education going to a school, so I certainly hope the District is not taking that position because that would be a pretty stupid one.

Q. Did the District ever ask you to provide transportation to A.J.T.?

A. We've always just offered to do it.

Q. Same thing with Boone County? **[103]**

A. Yeah. We did it with Boone County.

It's honestly, you know, Mr. Shafer, the reason that we do it is because my wife is available to do it. There's a student across the street from me, her parents have the District provide services and she has her own vehicle that, you know, picks her up and she's

in a wheelchair and there's a lot to it. I don't know the circumstances of that family, but, you know, I'm a taxpayer. And if my wife is available to transport my daughter, we choose to do it even though we could ask the District to do it, because I'm paying taxes and it's something we can do to offset costs.

Q. Did you do the transportation or just G.T.?

A. We both do it.

Q. How frequently would you say?

A. When you say how frequently are you talking about me or my wife?

Q. I'm sorry, that's a fair question. Division. How frequently do you personally do the transportation?

A. I don't do the transportation very often at all.

Q. And that's transportation both ways? [104]

A. That's transportation both ways.

And the reason that I don't provide that transportation is not that I don't want to do it or that I'm not able to do it, it's because of the long six and a half year process, A.J.T.'s instructors, the people in the school, because of the role that I play in advocating for my daughter there is a chilling effect on those instructors. So that is the reason that I don't do it. I would like to do it and I'm capable of doing it and many times I am working at home and I would love to do it, but I choose not to do it because of the chilling effect that it has on the instructors.

That is also one of the reasons -- I'm sorry. Let me just finish. That is also one of the reasons why when I am able to, I'm not in the home between 4:30 and 6:00 is because of the effect that this dispute has had on those instructors and we try to wall off the best that we can so that my wife is, along with my

daughter, kind of the face that they see. And I have noticed that when I try to engage in playful banter or easy conversation, they are very uncomfortable. I don't want that uncomfortableness impacting my daughter. So we do anything and everything that we can to reduce it, but I don't know **[105]** if we eliminate it.

MR. SHAFER: Logistics question, A.T. I don't have too much more in the way of questions, probably, I don't know, maybe another half hour or so. Do we want to take a break for lunch? I need a break. I'm sure the court reporter needs a break. Do you want to take a break for lunch and come back or do you want to make a shorter break and try to power through?

THE WITNESS: Whatever is easiest for the court reporter.

So, Ms. Carl, whatever you would like.

THE COURT REPORTER: I'm fine with whatever you would like, and thanks for asking.

MR. SHAFER: I skipped breakfast this morning and I am a lunch aficionado. So if nobody has any strong objections, I will take the rein on this one and how about we do a lunch break.

(Lunch break.)

MR. SHAFER: We are back on the record. Tim Palmetier, the District's representative, had to leave for other engagements. The special ed director, Kate Emmons, is the District's representative going forward with this depo.

Ms. Carl, I believe you can see Kate name up there, but it's K-A-T-E, E-M-M-O-N-S. **[106]**

BY MR. SHAFER:

Q. I'm sorry, A.T. I don't know if you nodded or affirmed, but you are under oath. I am reminding you of that.

A. Yes.

Q. Apart from your lawyer or your wife, did you talk to anybody during the break?

A. No.

Q. Thank you. A.T., I want to go back to just a couple of things that we talked about before the break. You mentioned, you were talking about infusion therapy. You talked about the length of time varied depending on A.J.T.'s tolerance.

Do you remember that conversation?

A. I do.

Q. I believe you commented the hospital made some mistakes. Can you tell me what those mistakes were?

A. Sure. Actually, the St. Paul Children's Hospital is extraordinary. It's actually a great place for us to receive care. But the pharmacy department has made a mistake before. So there is a Gammagard S/D and there's a regular Gammagard. A.J.T.'s titration speed is for the Gammagard S/D version, which is a faster titration than the regular. [107] Gammagard. So we ran into a situation where the pharmacist made a mistake, gave A.J.T. the wrong Gammagard solution and her titration speed was a little too fast, or it was faster than what it was supposed to be and I think we had to dial back that speed a little bit. Then, of course, she became sick because she was receiving the infusion too fast anyway.

But the hospital does a great job. It's just, you know, sometimes mistakes are made and my wife and I always look to double or triple check and that was an instance where it just fell between the cracks and we didn't catch that until mid-infusion.

Q. You trailed off just a little or at least your sound did. Did you say it made A.J.T. sick? I don't know if I heard you right.

A. So the speed in which A.J.T.'s titration under the Gammagard S/D is different than regular Gammagard. So when the pharmacist made a mistake and provided her with regular Gammagard, not the S/D version, her titration speed was appropriate for the S/D, not regular Gammagard, and it did make her sick, nauseous, and impacted even additional seizures. She was lethargic and just sick for a few [108] days.

Q. How many times did this happen?

A. It was a one-time occurrence.

Q. Earlier we talked about the Office for Civil Rights and the Department of Justice. I'm just going to read you from an e-mail that I have. It is an e-mail from you to Joy Fredricks dated April 30, 2018. I have not provided it as an exhibit.

The second paragraph says, "As we discussed, a copy of the complaints filed with the Minnesota Department of Education, U.S. Department of Education Office for Civil Rights, and U.S. Department of Justice Civil Rights Division was mailed to the superintendent last week. If you have not received the packet by Wednesday, please let me and know I will send another copy."

Even though I haven't sent you this e-mail, do you remember that conversation roughly?

A. I do. Yeah, that e-mail I think because that was February -- I'm just talking out loud.

February and March is when Joy Fredrickson told me that A.J.T.'s hours were going to be reduced from 4.25 to 2.40. And then we had an IEP meeting in April after that decision was made. And [109] then after the IEP meeting I was so upset that the District reduced her hours before even talking about the IEP goals and objectives, I do remember either sending letters or making some type of filing with either two or three of those departments, and yeah, I think I did send that e-mail. And I did not receive any response as far as service. So I don't know what happened after that.

Q. Do you remember you said two or three of those departments. Do you remember filing a complaint with the Minnesota Department of Education at that time?

A. I thought it was Minnesota Department of Education and I thought it was maybe the Department of Justice OCR Division. I thought it was only two. I mean this is going back four years now. I don't remember. I do remember that nothing came of the filings or of the complaints or the letters that I sent.

Q. Then just going back to Mary Grace Ott, was she, do you know if she was paid for through the Michelle P. Waiver -- Medicaid waiver? Sorry.

A. I think she was.

Q. Do you still have that waiver?

A. No. [110]

Q. When did you stop having it?

A. When I moved to the great state of Minnesota.

Q. That was in Kentucky specifically?

A. Kentucky provided a lot better services for special needs students and families than Minnesota. So when I moved to Minnesota, I lost those, I lost the Michelle P. Waiver, and Minnesota doesn't have anything that I'm aware of that I'm available to get that is equal to what I received in Kentucky. Nobody at the School District has offered me any other similar programs. I'm just not aware of anything.

Q. Thank you. Talking about Linda Rudd again for just a minute. You said you paid her between \$20 and \$25 an hour. Do you have records of what you paid her?

A. I don't.

Q. Cash then or checks?

A. Yeah. Yes, cash or checks or something. Yeah. Mostly cash I think. If it was a check it would be very rare.

Q. Do you recall testifying that you moved to Osseo because of the special education services the District was prepared to provide or you thought the [111] District would provide?

A. Yes.

Q. You also I believe testified that you signed a two-year lease when you first moved, is that correct?

A. That is correct.

Q. Do you remember what you paid in rent under the lease?

A. Is that relevant? Does A.J.T.'s education relate to what I paid for my housing?

Q. You asserted a far-ranging damages claim and I'm trying to ascertain what damages might be.

A. \$3700 a month.

Q. More or less than what you paid for your last place you lived in Kentucky?

A. It was more than what I paid in my mortgage in Kentucky.

Q. What did you pay in Kentucky?

A. For a mortgage payment?

Q. Yes.

A. I'm going to estimate \$2400 a month.

Q. Did you renew that lease after it expired after two years?

A. I was month-to-month until I moved to [112] this house.

Q. How many years was that?

A. I don't know. I think I testified that I moved into my current house in January of last year. So it would have been from the date that I moved in in 2015, what is that, July, August. I know the District has a copy of the lease arrangement because I had to provide it during enrollment. Once again, I'm not quite sure for the questions because it's stuff I provided.

Q. From 2017 until you moved into this house in January it was month-to-month?

A. Yes. I didn't renew the lease.

Q. I asked earlier about some, whether A.J.T. attended other public schools or private schools.

Do you remember those questions?

A. Yes.

Q. Did you since moving to Minnesota receive any private services or have A.J.T. go to any private service providers?

A. How do you define private service providers?

Q. Sure. Other than medical, did you send her to any PT, OT, speech, behavior, BCBA, ABS, [113] anything like that?

A. Yes.

Q. What were they?

A. I don't remember off the top of my head how often those services. The last conversation that I remember having with the School District in regards to OT, PT, speech services was there was either a PT or a speech therapist in an IEP team meeting recommended that I use all of my hours for services under my current health plan in an intensive summer session and he or she in particular wanted to know what the results of the speech intensive was and they wanted us to provide a copy of that information to the therapist, and which I did. And that was before the pandemic. And as a result of that, that's when we tried the ID's technology.

Q. So apart from speech services before the pandemic, do you remember, do you know, did you send A.J.T. to any other private speech services?

A. I know for that summer she received, my recollection is intensive speech, occupational and physical therapy at Gillette. That is my recollection during that summer.

As far as what she received before that, I'm sorry, I just don't remember. [114]

Q. Other than that one summer, did you go to Gillette at all?

A. I just don't remember. I apologize.

Q. Sure. Did you have any other service providers in your home, any speech providers, PT, OT, that kind of thing?

A. Not that I can remember.

Q. Do you remember what you paid for those speech services?

A. It's through my insurance plan so I don't remember.

Q. Your Complaint, and I can show you the paragraph if you want, but it alleges you spent personal money to provide A.J.T. with services you claim that the District failed to provide, is that correct?

A. That is correct.

Q. What services are those?

A. So I can -- give me, I will answer your question, but can you restate the question on what you're looking for again, please.

Q. Sure. The Amended Verified Complaint, Exhibit 1, I can find the paragraph for you if you want to give you a minute, says that you spent money, personal money to provide A.J.T. with services that [115] the District has failed to provide. My question is: What services have you provided that the District has failed to provide?

A. So we purchased equipment and things in order to try to augment and improve in particular A.J.T.'s communication.

Q. What equipment?

A. I don't have a full list of everything. I'm still working on the damages amount or providing information to my counsel; but for example, you know, we tried an iPad to improve her communication. That is something we did on our own. That is just one of many things.

We are always, whatever it is that we see that could, we could use, we will get for my daughter. So I just don't have specifics relating to that.

Q. When did you start buying whatever it is you saw that you thought you could use?

A. When my wife and I noticed that A.J.T. was losing skills, in particular with communication and toileting, that's when we began to try to augment the Osseo School District's education. So that would -- I think the records probably show like when I began making those claims. They were pretty early on. [116] I would say probably within the first four or five months of her enrollment we saw that A.J.T. was not signing as she used to and she was not toileting as she used to.

Q. So you are saying then, assuming that the date the record reflects, in the first four or five months of enrollment or so you began buying equipment to augment what the District was failing to provide? That's what you are saying?

A. Yes. If we saw something that we thought that we could try or use to help A.J.T., we would buy it and try to use it.

Q. You mentioned iPad as an example. As you're sitting here now do you have other examples? I understand you are still putting the list together, but do you have other examples right now?

A. I'm sorry, that is all that I can think of at this time.

Q. When was the iPad, if you recall?

A. I purchased that I think in the spring after we moved here. It was a tablet, an iPad or some type of tablet. It was probably within the first four to five months of us moving to Osseo.

Q. Did you buy any software for the iPad that was communication specific? [117]

A. I can't remember if we purchased it or if could just downloaded it. That's one of the particulars I have to go and take a look at it.

Q. Do you remember the name of the software?

A. I don't. I'm sorry.

Q. Other than equipment, what have you spent, what have you spent money on to provide what you think the District failed to provide A.J.T.?

A. Well, I mean, you know, I don't know if this is responsive to your question, but my wife and I have spent a lot of time trying to augment A.J.T.'s education during the times that she should have been receiving instruction.

I come home from work and I work with A.J.T. more than a typical parent I believe on things that directly relate to her IEP because I see her, I saw her losing skills. So it was above and beyond what I ever had to do in Kentucky. So I spend time doing that and my wife spent time as well.

Q. How much time?

A. It depends upon the day. So it could be -- and it depends on when I get home from work.

Q. Any ballpark you can give me?

A. It could be anywhere from 30 minutes to [118] an hour and a half or two hours.

I think the record reflects the thing that was the most painful for my wife and I was the communication. It was the loss of the modified hand signs. That's how she tells us if she is hungry or if she is thirsty or just basic needs that she had when we moved to the School District, and she doesn't have those. She has lost proficiency with those basic hand signs. So that's really -- I tried to focus on communication. I'm not a special educator. I did the

best that I can as a parent, but that was when we started. And we spent a lot of time, I spent time, like I said, intentionally trying to help her recoup those lost skills.

Q. Any other, since your time at the District any other costs associated with providing services that you think the District has failed to provide?

A. It's my time, it's my wife's time, it's materials that we might have purchased which I get an itemized list. If your question is as far as damages, it's very narrow and you are just talking about goods and services.

Q. Yes. I'm asking what have you spent money on. Your Complaint says you spent money, [119] out-of-pocket costs to provide A.J.T. services. I want to know what you spent money on, what were those out-of-pocket costs?

A. Like I said, there are materials that I purchased over a period of time. I can provide a more detailed list later. I don't remember what I purchased in February of 2016 for my daughter, or June of 2017. I have to go back actually and try to resurrect that.

Q. With regard to what you were just talking about, working with A.J.T. on loss of communication and hand signs, how did you do that? Tell me how do you work with A.J.T.

A. The way that I would work with A.J.T. was always kind of the ABA approach. I wouldn't track necessarily her performance, but A.J.T. thrives on recognition and praise. And so, you know, if A.J.T., I could tell that she wanted to have a drink and she looks at me and I can tell that she's parched but she is not signing appropriately, I would work with her so

that she would begin to sign appropriately. And I would bring the drink.

Once again, I'm a father, I'm not an educator. I'm just trying to mimic what I have seen other people do. Bring the drink, see if she signs, [120] remind her with hand over hand, trying to prompt her to drink. She then would begin to maybe make the motion of the hand over the mouth. I would give her a little bit to drink. I'd pull it away. I could tell that she was still thirsty. I'd praise her for doing the hand over hand, and we would repeat it. And at some point I could tell that she no longer wants anything to drink and so we stopped that activity.

Then we might move into another activity, such as I know that putting objects into a bucket and praising her for that. Or we would work on puzzle pieces, and I would praise her, you know. And I would just kind of move from item to item and I'd try to focus on things that I felt like skills that she had lost or that she was more proficient at. It was very intentionally because it was very upsetting to see her lose those skills, lose that proficiency.

Q. Going back to one question, you said, I asked you earlier and you said you moved to the District because of what you thought the District's reputation for special ed services was. Is that why you moved to Minnesota in general?

A. Well, I took the job at Target but I took that job in June of 2014, but my residence continued to be in Kentucky. I was going back and [121] forth and working in Kentucky for well over a year.

Q. Were you commuting at that point?

A. Going back and forth between Kentucky and Minnesota.

Q. My question is what was the schedule? Were you driving back and forth, flying days at a time?

A. I'd fly.

Q. How long would you spend in Minnesota at a stretch, then?

A. I would work in Minnesota three or four days a week, sometimes five days a week. I went home almost every single weekend. So I'd spend at least two and a half to three days at home and possibly work one day a week at home a week.

But to answer your question, I wanted to move my family to Minnesota. So I don't have any preference as far as the City of Minneapolis or the City of St. Paul. I began making phone calls to different school districts, mostly in the suburbs, asking questions about their special education program. And I would share my daughter's IEP with each of those districts. And Osseo School District actually was the most welcoming in those initial phone conversations. Paula Rakner was responsive from what [122] I remember and connected me with John Norlander. My recollection is John Norlander might be hard of hearing or he had some disability I think, and we had a really great conversation, he and I, and he seemed very welcoming and understanding. And I provided, I talked about A.J.T.'s IEP and what the structure was in Kentucky and provided a copy of the IEP, and he said that we could absolutely meet A.J.T.'s needs and did not lead me to believe that they would not be adopting that IEP.

Q. What other Districts did you call?

A. I mean I don't know the names of the school districts. Wayzata and Eden Prairie, Edina. We thought about moving to like Apple Valley. I don't

know someplace on the south side and maybe one or two places in St. Paul.

I reached out because I don't -- you know, people who are moving to the Twin Cities don't have any preference. I know people who live here and grew up here have preferences, but, you know, it's just all Chili's and Applebee's in the suburbs to me. It doesn't matter if you are in Maple Grove or Edina. It's all kind of the same to me. I wanted to pick the best school for my daughter. To be honest with you,

I would not have [123] moved my daughter or my family if I knew this was going to happen.

Q. You would have kept the commuting schedule?

A. I would have kept the commuting schedule or I would have selected a different District to place my daughter in.

Q. Going back to that trial in the summer at Gillette you talked about. Do you remember the names of the providers at Gillette?

A. I don't, I'm sorry.

Q. Did you pay for that trial or was that paid through Medicaid or insurance, did I ask that already?

A. So are you talking about the intensive, the summer intensive?

Q. Yeah, I'm sorry, I see from my notes I did ask. You said it was insurance?

A. Yeah, I put that through my insurance plan.

MR. SHAFER: Can you give us five minutes.

(Recess taken.)

BY MR. SHAFER:

Q. Just to remind you, you are still under [124] oath.

A. I understand.

Q. Did you talk to anybody other than your attorney or your wife during the break?

A. I spoke to my wife.

Q. I have two questions left for you after that. That's a big build up for nothing. Is A.J.T. currently receiving any services, educational services, PT, OT, anything like that, outside of the school?

A. She's not because of the pandemic concerns.

Q. Do you remember when the District or if the District provided an iPad for you, for A.J.T.?

A. I don't remember.

MR. SHAFER: I have no further questions.

MS. GOETZ: We'll read and sign. Our client would like to read the deposition transcript and sign. Yes, we would like a copy of the transcript. Exhibits attached.

MR. SHAFER: We would like two copies of the transcripts with the exhibits, please. [125]

(Whereupon, the deposition of A.T. was concluded at 1:09 p.m.)

* * *

JA-335

[STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF EDUCATION

In the Matter of:

A.J.T.,

Student,

v.

Osseo Area Public Schools, Independent School

District No. 279,

District.

* * *

OAH DOCKET NO. 8-1300-37093

MDE FILE NO. 21-007H

Via Microsoft Teams, the Due Process Hearing in the above-entitled matter came on for hearing before Eric L. Lipman, Administrative Law Judge, taken before Marcia L. Menth, Court Reporter, a Notary Public in and for the County of Wright, State of Minnesota, taken on the 12th day of February, 2021, at approximately 9:00 a.m.]

* * *

[697]

* * *

[JOY FREDRICKSON:

Direct Examination by Ms. Booth]

* * *

[703] Q. Were you part of -- did you have the opportunity to review Ava's Kentucky IEP?

A. Yes, I've reviewed Ava's Kentucky IEP, along with the other documents provided at the time of her enrollment.

Q. Did you have discussion with parents about the location of Ava's special education services as she was getting ready to enter the school district?

A. Yes, I did.

Q. And can you tell us about that?

A. Discussions about the location centered around an importance for parents to have Ava close to their home, so that in the event of an emergent situation with her seizures, they were able to get there in a timely manner.

Q. So, was there a determination made to place her at Cedar Island Elementary School?

A. Yes, Cedar Island Elementary School met those parameters that the parents had communicated.

Q. And Ava was in a Setting 3 classroom, you call it the skills program at Cedar Island Elementary?

A. Yes.

Q. And can you just generally describe, what's the structure of that program?

A. Our self-contained programs are Federal **[704]** Setting 3, so students are spending the majority of their time within the special education classroom or other special education settings, so 60 percent or more.

In the skills program we specialize in focusing on students with developmental cognitive delays within that moderate to severe profound

range, as well as students with other needs, whether it be health, medical, physical impairments, we serve students that are deaf/blind, visually impaired.

Within that program we have a licensed teacher full time, as well as two paraprofessionals that are each assigned for that six hours per day, that's the general structure.

Q. And how many students would be in that classroom with one teacher and two paraprofessionals?

A. It varied, there could be five students, there could be six, there could be seven.

Q. Okay. When Ava joined the Osseo Area Schools in the Fall of 2015 did you -- did you hire additional staff to support that classroom?

A. Yes, we did.

Q. And was that an additional education service professional?

A. Yes. At the time of her enrollment three additional hours of paraprofessional time was added to [705] support Ava's needs.

Q. And just for the record, the School District sometimes calls a paraprofessional an education service professional or an ESP?

A. Yes, that's correct.

Q. So, if we see ESP in the record we know that's a paraprofessional position, correct?

A. Yes, I'll try to be consistent in that language.

Q. That's all right. We've been using paraprofessional, but I know some of the documents say ESP. What was the regular, typical length of the school day at Cedar Island Elementary in Fall of 2015?

A. The school day at Cedar Island Elementary was 9:30 a.m. to 4:00 p.m.

Q. And did it remain 9:30 a.m. to 4:30 p.m. from October, '15 to June of 2019, the four years Ava was there?

A. Yes, it did.

Q. And in the first year that Ava attended, October of 2015 forward, what was the length of her school day?

A. Ava started at 12:00 noon and her school day at the time of her enrollment was until 4:00 p.m.

Q. Did you learn in that first school year that [706] Ava's mom was picking her up early at about 3:30 daily?

A. I did learn that later in the school year, yes.

Q. And do you recall or were you told why Ms. Tharpe was picking Ava up early?

A. I was informed that Ms. Tharpe had concerns around Ava's dismissal from the school building, specific to her safety with mobility.

Q. Did you address those concerns about safety with the IEP team?

A. Yes, those concerns were addressed at the IEP team meeting in March.

Q. Is it uncommon for -- or at that time at Cedar Island was it uncommon for there to be some modified dismissal procedure in the morning or in the evening to support a student who might have safety needs?

A. Not uncommon. We're ever coming up with transition plans that work for individual students, whether it's upon arrival, within their school day or at the end of the school day.

Q. Did you have any hesitation that you could safely provide for Ava between -- or your team could between noon and 4:00 p.m. while she was at Cedar Island Elementary?

A. No.

Q. And then, was Ava's school day extended at some [707] time during her time at Cedar Island Elementary?

A. Yes, the proposal to extend the day to 4:15 was made in Spring of that first year.

Q. And did parents accept that offer to extend the school day to 4:15?

A. Yes.

Q. And approximately when, if you recall?

A. The acceptance would have been in that Spring and prior to the start of the next year because I recall that's when it started.

Q. And was there agreement on the IEP team, including the parents, that Ava's school day would be noon to 4:15?

A. Yes.

Q. And did Ava continue to attend Cedar Island Elementary between noon and 4:15 in the '16/'17, '17/'18 and '18/'19 school years?

A. Yes.

Q. Did Ava's parents in that first year, 2015/'16 -- well, first of all, let me ask you this: You saw the IEP from Kentucky and you reviewed some other information from Kentucky. Do you recall what that was?

A. In addition to the IEP there was a psychological report provided, which is in equivalency

to our evaluation reports. Additionally there was [708] paperwork provided around a shortened day.

Q. Did the School District generally accept the goals and objectives on the IEP from Kentucky?

A. Yes.

Q. So, when you -- when you created -- when the IEP team created the first IEP that Ava was to go to school under it was -- goals and objectives were essentially the same as the Kentucky IEP?

A. Yes.

Q. Did you accept the minutes of special education service that were noted on that IEP?

A. The minutes proposed were commensurate.

Q. Okay. Did Mr. or Mrs. Tharpe describe for you the educational program that Ava was receiving in Kentucky in the Fall -- did they describe it to you in the Fall of 2015?

A. Yes.

Q. And what did you learn?

A. What was described is Ava's school day started at 12:00 noon. Her school day there ended at 3:40. After school the School District provided three days a week of 90 minutes of service for each session.

And in addition to that, outside of the school services Ava had been receiving two days a week of services from 4:00 to 6:00 from a BCBA therapist.

[709]

Q. And in October of 2015 did the Tharpes ask you to replicate the service minutes on the Kentucky IEP?

A. Yes.

Q. Did the District agree or disagree to do that?

A. The District proposed commensurate services.

Q. I'm going to ask you to take a look at the IEP from Kentucky, it is District Exhibit 105. And I'd like to have you look at the services page, which is District Exhibit 106, Page 23.

Turning your attention to the second block that says "Special Education Services," are these the services you were just describing?

A. No, what was communicated was three days a week in-home, whereas sometimes occurs -- the IEP reflects five times a week, but it was communicated consistently as three times a week.

Q. Did Ava's parents express that the IEP that Osseo developed in the Fall of 2015 was not commensurate with the services that Ava had received in Kentucky?

A. Yes.

Q. And when approximately was that?

A. Following the October IEP meeting when the District made the proposal, there was concerns expressed about length of day.

Q. In the '15/16 school year did parents more [710] than once tell the school team that Ava's school day length was inappropriate and as a result she had regressed?

A. Yes.

Q. Did -- in that school year did you get agreement on an IEP?

A. There was agreements to components of the IEP. Mr. Tharpe provided an email indicating what areas were agreed upon, as well as which areas were not yet agreed upon.

Q. And what were the disagreements, as you recall them?

A. The disagreements were around the length of school day. The District proposed language around a behavior support professional supporting the school team in approaches and practices consistent with Applied Behavioral Analysis.

And parents desired a BCBA certified therapist to provide those services within the school. There were additional areas.

Q. Were those generally the two major areas?

A. Those were the two major areas that continued to come up.

Q. Why didn't the District provide a board certified behavior analyst to be part of Ava's team?
[711]

A. We felt confident in the capacity, both the knowledge and skills, of our staff. We had District behavior specialists that had knowledge and skills in the area of applied behavioral analysis and could support the teacher in areas where the teacher felt she didn't yet have that knowledge and skill.

And we have additional members within our District in that behavior specialist group that we can lean into if we were to need further support in that area.

Q. Any other reasons why the District denied the request for a board certified behavior analyst on the IEP team?

A. How it was understood from the very beginning was that BCBA therapist was providing services to Ava separate from the school, this was through parents accessing that outside agency through State funding. So, it was separate.

Q. And in the '15/'16 school year did the parents consistently tell you that the length of the school day was impacting Ava's education?

A. Yes.

Q. And did -- go ahead.

A. I was just going to say, concerns surfaced through the evaluation process and then following at [712] subsequent due process meetings.

Q. Did you -- at the time that you proposed the October 14, 2015 IEP did you think the special education minutes of service were commensurate with the special education minutes of service that Ava received in Kentucky?

A. Yes.

Q. Did the Tharpes ask for the District to provide an in-home paraprofessional after the typical school day in the Fall of '15/'16?

A. Yes.

Q. And did the District agree or disagree to that?

A. The District rejected that request.

Q. And why?

A. The request was rejected because the instructional times were planned for based on her needs, the goals and objectives she had and the information about the time that instruction would take within that school day.

Q. So, in October of 2015 the parents had not consented to the IEP, but they had agreed essentially to the educational structure until evaluation could be completed; is that correct?

A. Yes.

Q. So, did you schedule an IEP team meeting to [713] discuss an evaluation plan?

A. Yes, an evaluation planning meeting was convened.

Q. And did you get agreement on the components of a new evaluation for Ava?

A. Yes. I would have to look back to see if it was implied consent or signed, but there was agreement and we proceeded.

Q. Okay. Other than the permission to the general structure of the IEP do you recall getting written permission or agreement from parents on any IEP between Fall of '15 and Spring of 2019?

A. Spring, 2017 there was consent obtained as well, implied.

Q. Could you explain what the terms "implied consent" mean?

A. Yeah, when I'm using the term "implied" it's meaning that within due process, if we haven't obtained a signature indicating agreement or disagreement within those 14 days, consent is implied.

Q. I'm sorry, I didn't hear the last part. Consent is?

A. Then implied.

Q. So, I'd like to have you turn to District Exhibit 177. If you go to Page 462, just review 462 [714] through 464 for me.

A. (Witness complies.)

(At this time there was a brief pause.)

BY MS. BOOTH:

Q. Are you familiar with that document?

A. Yes, I am.

Q. And as we were just discussing it indicates on Page 463 that the District accepted the terms of the

IEP from Kentucky, the goals and objectives essentially, the top of Page 463?

A. Yes.

Q. And then, the fourth bullet point says, "This IEP will only be in effect until no later than January 4 when the team can do a re-evaluation." Is that correct?

A. Yes.

Q. Does it also note that as of the date of this document, October 16, 2015, Mr. Tharpe was concerned about the modified schedule and asserting that it violated IDEA and ADA laws?

A. Yes.

Q. If you look at Page 464 did this October 14, 2015 IEP then go into implied consent?

A. It did, yes.

Q. But you recognize that the Tharpes continued to disagree with the length of the school day at that time? **[715]**

A. Yes, those concerns had been communicated through email.

Q. Okay. And then, the prior written notice is the next document at Page 465 going through Page 471. These are prior written notices asking parents to agree to a re-evaluation of Ava, correct?

A. Yes, that is correct.

Q. In the '16/'17 school year did you have agreement on an IEP?

A. In Spring of 2017 I recall having parent consent.

Q. Okay. Would you look at Page 472, this is a prior written notice dated 3/18/2016. Is this the District's proposal in the Spring of 2016 with regard

to request by parents for Ava's school day to be extended and for a board certified behavior therapist to be providing after-hours intervention?

A. Yes, both were addressed in this.

Q. And the District declined to do both at the time of this document?

A. At this time the District proposed extending the school day until 4:15. So, that was beyond the regular 4:00 school day.

Q. Did parents agree to that extension to 4:15?

A. Yes. [716]

Q. Still noting that they wished to have services between 4:00 p.m. and 6:00 p.m.; is that correct?

A. Correct, yes.

Q. This document at Page 473, the second bullet point, an explanation of why the District proposes or refuses to take action. In that first paragraph this document indicates that parents had been opting to pick Ava up at 3:30; is that correct?

A. Yes, that is correct.

Q. And that documents what we were discussing early on, correct?

A. Yes.

Q. Would you look at Page 476? Was this a proposal by the School District on June 6th of 2016?

A. Yes.

Q. Did parents agree or disagree to the proposals here? Did parents agree or disagree to the things that were proposed in this prior written notice?

A. I don't recall parents having disagreement with the IEP goals outlined there or the adaptations or the addition of the adaptive physical education services and extended school day or the location.

Q. Thank you. And then, could you turn to the next document, which is dated 3/15/2017, starts at Page 478, continues to 479. Sorry, did I just go [717] backwards on you?

A. We moved to the next school year, I think.

Q. Yes, let me just catch myself up. In the '16/'17 school year it was your understanding that the parents agreed to the goals and objectives and they agreed to a four hour and 15 minute school day, continuing to object to not having services from 4:15 to 6:00; is that accurate?

A. Yes, from the 4:00 to 6:00 time frame, yes.

Q. And the first year that Ava was a student at Osseo Cedar Island Elementary her teacher was Jocelyn Hoffarth, am I saying it right?

A. Yes.

Q. And the second year, the '16/'17 school year, she was assigned to a different classroom with Pam Kohlhepp; is that correct?

A. Yes.

Q. Did the structure of the classroom and the number of the -- general number of students and the paraprofessional support remain the same?

A. The general number of students remained the same, additional educational support professional or paraprofessional time was allocated -- my apologies, I think I cut out there.

Additional paraprofessional time was allocated [718] specific to Ava to cover the four hours and 15 minutes of her school day.

Q. And who covered that additional 15 minutes of service or who provided instruction to Ava between 4:00 and 4:15?

A. The primary provider was Pam Kohlhepp.

Q. And were there paraprofessionals assigned for that period of time as well?

A. I don't recall. They may have covered time if Pam wasn't able to.

Q. Okay. You don't remember right off the bat?

A. No.

Q. Okay. In the four years that you were part of Ava's IEP team did the parents ever lodge a complaint or criticize the work of the educational professionals working with Ava?

A. No, parents did not, they were complimentary of the staff and personnel working with Ava.

Q. In the '16/'17 school year did you ask the IEP team -- strike that. In the '16/'17 school year did the School District ask the parents for additional medical information?

A. Yes.

Q. Why did you do that?

A. Additional medical information was being sought [719] to better understand the educational implications for her seizures, as well as any implications related to medication, medication administration, development of the seizure care plan.

Q. And did you obtain authorization from parents in the '16/'17 school year to get that information?

A. Not to my knowledge.

Q. What would you have used the information -- other than the medical care plan how would you have used new information about Ava's medical condition?

A. New medical information would help the team in determining what accommodations were

necessary in order to support her within her school day.

Q. During her then school day, 12:00 to 4:15, did she experience seizures?

A. Yes.

Q. And did the School District collect data on those seizures?

A. Yes.

Q. Did the District share that seizure data with the parents?

A. Yes, at one point there was a request for all records, special education as well as those medical records.

Q. Did you – [720]

A. They may have been shared in other ways as well.

Q. During the three years that Pam Kohlhepp was the teacher for Ava you attended most, if not all, the IEP team meetings; is that correct?

A. Yes, that's correct.

Q. And did the school team share data on Ava's progress on her IEP goals during those IEP meetings?

A. Yes, progress was shared at each meeting.

Q. Looking to those medical authorizations did the Tharpes propose that maybe you could do written questions to Ava's treating doctors and get answers to your medical questions that way?

MS. GOETZ: I'm going to object, all of the questions are leading or made to pass preliminary questions.

THE HEARING OFFICER: It is a little directive, Ms. Booth, so I'm going to sustain that. And it's more persuasive, if it's -- doesn't seem focused.

MS. BOOTH: Okay.

BY MS. BOOTH:

Q. Did you ever receive authorization to provide written questions to Ava's treating doctors?

A. Yes.

Q. And when was that approximately? [721]

A. I don't recall the exact school year, but it was in one of her later years at Cedar Island.

Q. And did the District produce written questions to send to a physician?

A. We did not.

Q. Why not? A. We proposed to have a conversation with parents present for the conversation with the providing neurologist.

Q. From the Fall of '15 until that conversation with the treating neurologist did the District receive any new medical information about Ava other than an annual request to shorten her school day -- alter her school day to begin at noon?

A. No, we did not.

Q. Were you aware in any of those years at Cedar Island that Ava was receiving private therapy outside of the school day?

A. There's feedback coming from someone. There was a time when physical therapy was accessed, as well as speech therapy.

Q. Did the School District receive records of those outside therapies?

A. I do not know if records were obtained or information exchanged specific to physical therapy. And [722] speech therapy --

MS. GOETZ: Can I ask what the witness is looking at on the screen?

THE WITNESS: Who?

BY MS. BOOTH:

Q. Ms. Goetz is asking what are you looking at on a screen? A. Nothing other than all of you.

MS. GOETZ: There's no documents on the screen?

THE WITNESS: No, no.

A. Continue with the question?

BY MS. BOOTH:

Q. Sure, you were going to talk about speech therapy.

A. Yeah, the speech therapy piece, I'm aware that progress -- about progress documents, but I saw them in the exhibits.

Q. Let's look at exhibit -- let me ask you this first. In the '17/'18 school year did the dispute regarding the length of Ava's school day continue?

A. Yes, it did.

Q. Did parents advise you that they continued to want service between 12:00 and 6:00 p.m.?

A. Yes. **[723]**

Q. And was it always a static 12:00 and 6:00 p.m. or was it different times, if you recall?

A. The in-home time was -- consistently remained at 4:00 to 6:00. And the start time consistently remained at 12:00 noon.

Q. In the '18/'19 school year did parents advise that they disagreed with Ava's length of school day?

A. Yes.

Q. Did they tell you that the length of Ava's school day was creating regression in her skills?

A. Yes, they did indicate that.

Q. Okay. Did the District offer to collect data about Ava's availability for education in the home at any time?

A. There may have been consideration, but I don't recall a formal proposal to do so while at Cedar Island.

Q. Did the District offer to send a nurse into the home to be available for Ava in the morning hours?

A. I don't recall in the home. There was an offer to provide support when she would arrive at an earlier time in the school.

Q. And why were you making that offer?

A. The offer to have additional nursing services available, because each of our building is staffed with a nurse or nurses, was to further reassure parents of [724] her safety and care during that trial of extending her school day to an earlier start time. So, to support her within her seizures and also be there to support her in her recovery, in addition to having a nurse already on site.

Q. Did your school team, including the nurse, feel confident that they could support Ava if she had seizures in the morning portion of the day?

A. Yes.

Q. And as a result you were offering this extended nursing service?

A. Yes, it was an additional nursing service to further alleviate any concerns and further communicate, like, her well-being was our utmost interest, it was a priority.

Q. Did the school team -- or were you ever provided as a school team information about Ava receiving changed medication or medical treatments?

A. As a member of the team I wasn't made aware of medication changes. I recall at one point Mr. Tharpe made reference to a treatment that occurred, but at that point he was referring to it as having been this is something that occurred in the past.

So, I wasn't aware at the time it was occurring, which was during a period of time when she [725] was enrolled at Cedar Island.

Q. Would it be important for a student who has a seizure disorder to know about medication changes as an educator?

A. Yes, it's important to know about medication changes, treatments, procedures that may have educational impact.

Q. What kind of educational impact would you be looking for?

A. It would be information that would help us further understand what accommodation-type support she may need, but also supports from personnel.

So, really to have a present level of where she's at helps inform what are those needs and then how do we respond with accommodations, modifications, personnel.

Q. Other than the proposal to have additional nursing staff did the school team in those four years propose other ways to find agreement with the Tharpes on an IEP?

A. Yes.

Q. And can you describe what some of those offers or discussions were?

A. Additional offers to get support included including other outside evaluators on the evaluation

[726] team. In preparing for that transition to middle school initially the District offered an independent educational evaluation.

Q. Let's talk about those two pieces. First, you mentioned when doing a re-evaluation the District offered to have an independent person be part of the team, correct?

A. Yes, that's correct.

Q. Why did you make that offer?

A. The offer to have an outside evaluator on the team was to support parents in that trust aspect of having a neutral person as a part of that team.

And at that time it was specific to a psychological evaluation, which otherwise one of our school psychologists would complete, as well as portions specific to communication. And at that time we were looking at having Gillette have one of their team members do a portion of the evaluation.

Q. Would you look at District 177, Joy, Page 487? I'm not sure I have the date right. Was this the time that the School District offered to have an independent educational evaluation for Ava?

A. Yes, the proposal was made in May of 2018, the parents had expressed significant concerns about her [727] transition to the middle school.

And at that time this was an offer to say let's gather up all this information, have someone independent from the school do that so that we have all information available around Ava to make it a most successful transition.

Q. Did parents agree with that proposal?

A. No.

Q. And would you look at the next document, Page 489? This is a document dated 6/14/2018. It notes at the bottom of the page, the last -- looking at the last four paragraphs, "In the '17/'18 school year the District reviewed proposed extended school year services, which includes 16 three-hour sessions." Do you recall that

A. Yes, I do recall that ESY proposal.

Q. And did parents accept that ESY proposal, if you recall?

A. Yes, they did.

Q. And how were the services provided, if you know?

A. Yeah, the extended school year services being proposed here were consistent with prior year proposals. Those 16 three-hour sessions were completed within the parents' home by a licensed special education teacher.**[728]**

Q. And then, the next paragraph says, "In the '18/'19 school year the District agreed to a flexible start." What does that mean?

A. So, the flexible start was in the absence of additional information about what seizures were looking like in the home different from school, it was an offer to if there's days where she's ready sooner than other days to come into school, we were ready, we stood ready to serve.

So, if her seizures were in a way where, let's say, at 11:30 she was ready, the parent could drop her off at school and her school day would start at that point. So, it was an offer that we were there ready whatever time, we were flexible with the start.

Q. Did the -- to your knowledge did Cedar Island have other students with seizure disorders that were on a flexible start like that?

MS. GOETZ: Objection, relevance.

THE HEARING OFFICER: Overruled.

THE WITNESS: I do proceed?

THE HEARING OFFICER: Please.

THE WITNESS: Thank you.

A. There were other students with seizure conditions, I'm not aware of other students having a flexible start to their school day. **[729]**

BY MS. BOOTH:

Q. What was the general pattern for those students, if you know?

A. Students would start their school day at the regular start of school. So, at Cedar Island that would be 9:30. And we would deliver care in the event that those seizures occurred, support recovery, and then resume instruction.

Q. Would you look at Page 490? I'm looking at the third paragraph from the bottom, description of other options and why those options were rejected.

A. Yes, I'm there.

Q. Are those other options delineated in this document? I'm specifically looking at the paragraph that says for the 2018/'19 school year. I'm going to give you a minute to read that to see if that's accurate.

A. (Witness complies.)

(At this time there was a brief pause.)

A. I do not see the additional options. There were five, approximately, additional options considered as we were preparing for this transition to

middle school. I don't see each of them delineated within here.

BY MS. BOOTH: [730]

Q. Can you recall what those options were?

A. I'll do my best to go through. There was the option at Maple Grove Middle School for her school day to end at the regular end of the school day, which was 2:40.

There was an option to extend to 3:00 and have a paraprofessional or teacher available to provide instruction. There was an option to end the day at Maple Grove Middle School and then cross the street to Cedar Island Elementary School and resume instruction there through that end of the school day.

There were additional ones that I'm not recalling right now.

Q. And the IEP team did not reach agreement on any of those options, correct?

A. All other options were rejected by parent.

Q. Did the District offer -- in addition to the extended school year services that you've described did the District offer additional instructional time in June and August of 2018 -- no, it would be 2019, would be the summer?

A. Yes.

Q. What were -- what was --

A. Additional time was offered as an extension of [731] the school year in June and in August, recognizing we already had a proposal for that kind of piece of -- the initial piece of extended school year in July.

So, an additional extension of school year was going to go in the month of June and into the month of August.

Q. Did the parents reject that offer as well?

A. Yes, that offer was rejected by parents.

Q. Did they express to you why they were rejecting the offer?

A. The indication from Mr. Tharpe was that in previous summers those months had been times where new medications might be tried, new treatments might occur and outside therapies would occur.

However, when asked if that was the planned intent for that coming summer, it had not been planned for that summer as of yet.

Q. Did you receive any information in the '18/'19 school -- in any of those four school years that Ava was receiving different medical treatments or care during the summer months?

A. There was that indication I described earlier. At a meeting Mr. Tharpe indicated that in a previous summer a medication or treatment change had occurred, but I don't know the details around it. I knew about [732] the regular IVIg.

Q. Did you know when those IVIg infusion therapies occurred?

A. I understood them to be in, like, this six-week kind of increment.

Q. Following the District's re-evaluation of the student did parents request an independent educational evaluation?

A. Following the evaluation in 2016? No.

Q. Following the District's evaluation in 2018?

A. Yes.

Q. And did you participate in the planning of that independent educational evaluation?

A. Yes, I did.

Q. The parents chose Dr. Joe Reichle to do the evaluation; is that correct?

A. That's correct.

Q. Did you have the opportunity to review -- first of all, did Dr. Reichle send you a draft report of his independent educational evaluation report before the evaluation share meeting?

A. Yes.

Q. Did you contact Dr. Reichle to discuss that report?

A. I did, yes. **[733]**

Q. And tell me why.

A. I contacted Dr. Reichle because there was information included within the report that was parent reported information versus, like, substantiated -- like, doctor provided this information specific to the seizures and the timing.

And it was subjective information based on parent experiences, but it wasn't based on a doctor's professional experience.

Q. Did Dr. Reichle change his report, if you know?

A. Yes, I understood that he did remove those statements.

Q. Did you participate in the evaluation sharing meeting with Dr. Reichle?

A. Yes, I did.

Q. And he proposed a number of recommendations, 10 or 12 recommendations to the District, correct?

A. Yes.

Q. And you're smiling.

A. Yeah.

Q. Was -- were the recommendations helpful, usable?

A. Yes, absolutely. I was smiling because I thought if you asked me to name all 10 or 12 of those. [734] Yes, they were useful and helpful.

Q. All right. And did the -- the evaluation share meeting happen some time after May of 2019 when Dr. Reichle presented his report?

A. The School District's evaluation share?

Q. Yes.

A. Yes, I recall that being right at the end of our regular school year, if not just a few days shy. It's right there at the end of the school year.

Q. Did Dr. Reichle at that meeting endorse a six-and-a-half-hour school day?

A. No.

Q. Did Dr. Reichle offer to support the school team in implementing recommendations on that IEE?

A. Yes, he did offer and we accepted that.

Q. Did you participate in the implementation of those recommendations?

A. I recall those happening at the start of the middle school year. So, I was no longer a part of that team.

Q. Okay.

A. There's some sharp feedback coming through.

Q. Still hearing it?

A. No.

Q. I'm actually going to turn my mic off for a [735] minute so I can rustle through my papers.

(At this time there was a brief pause.)

BY MS. BOOTH:

Q. Ms. Fredrickson, were you present when Dr. Reichle did his observations for the independent educational evaluation?

A. No, I was not.

Q. Dr. Reichle proposed in his evaluation focusing on several modes of communication, including eye gaze, correct?

A. Yes.

Q. Was the IEP team using eye gaze as a form of communication for Ava throughout the four years she was at Cedar Island?

A. Yes. And they had an interest to use it further, but there was a stretch of time where we didn't have parent consent to focus on that.

Q. Was there disagreement on the IEP team about using eye gaze as a primary mode of communication?

A. For some time, yes, the parent requested that the focus be on the signing.

Q. Okay. Did that change eventually?

A. It did, eventually there was agreement to include the signing within the IEP, but also to look at more of that mixed communication, which included some [736] direct selection as well as the eye gaze.

Q. Did Dr. Reichle recommend that eye gaze as a mode of communication continue, the work on that continue?

A. Yes.

Q. At the evaluation share meeting was there a discussion about eye gaze technology?

A. I can't recall. Q. Was there -- in the time that you were at Cedar Island do you recall discussion about eye gaze technology even outside of that meeting?

A. I recall there being discussion. I understood at one point that parents were exploring that.

Q. Anything else that you recall about eye gaze technology?

A. I believe at one point there was an interest in the school in using that as well, to use the equipment.

Q. Do you recall when that was?

A. I don't recall the exact timing of that.

Q. I'd like you to turn to Exhibit 178, please. Have you had an opportunity to review this transcript prior to today?

A. Yes.

Q. Tell us how this discussion with Dr. Doescher came about. **[737]**

A. So, the school team was completing an educational re-evaluation and one component of that evaluation was the health/medical piece.

So, as a part of the evaluation the team was looking at, again, that -- was looking at information on what are her current kind of medical levels and needs to help guide the team in developing those accommodations and support.

So, that's kind of the context of it. We were undergoing an educational evaluation at that time.

Q. Did parents provide consent for a conversation with Dr. Doescher?

A. Yes.

Q. Was the consent -- were there details about that consent that you can remember?

A. I recall the consent was specific to, yes, three areas and that parents would be a part of the call, that was my first thought. The consent was specific to the conversation would be around seizure care plan, medications, and then seizures related to the school day.

Q. Did you record the conversation with Dr. Doescher?

A. I did.

Q. Why? **[738]**

A. I was directed to by my supervisor.

Q. Kate Emmons?

A. Correct, Kate Emmons.

Q. Did you have a discussion with Ms. Emmons about why she wanted you to record the conversation?

A. Yes, I did have a conversation with her.

Q. What -- go ahead, you understood?

A. I understood in the conversation that the purpose of the recording was for note taking.

Q. Why?

A. Following -- a few reasons. The information gathered in this meeting, there was a desire for it to be accurately understood, right? The terminology, language usage of a neurologist can be highly complex.

So, one, to accurately understand what was being put forth, but knowing that the information shared would inform our educational programming for Ava.

So, having that accuracy in order to inform programing and to document that in any future kind of due process ways would be important.

Q. Was this the sole opportunity that you had to speak with one of Ava's treating doctors?

A. Yes, this was the sole opportunity to speak with a doctor and to obtain that medical information over the course of those years. **[739]**

Q. Okay. Did you tell Mr. Tharpe that you were recording the conversation?

A. I did not think to tell him.

Q. What did you learn from the conversation with Dr. Doescher?

A. I learned information about -- furthermore about her individually and her seizures and also about how it could present more generally.

There were conversations about this is how this seizure condition presents, in generality. Here's what it specifically looks like for Ava.

Q. Did that information come from Dr. Doescher?

A. It came through the exchanges of the conversation.

Q. Did Dr. Doescher -- did you ask Dr. Doescher about Ava's ability to be in school for a longer school day or in the morning hours?

A. Yes, I asked a question about working to gradually increase the time by having her come earlier when she was able to come earlier. And I understood from that -- from Dr. Doescher that that was reasonable.

Q. Would you look at Exhibit 178, Page 514? I'd like to direct your attention to the left-hand column

starting with Line 16. Would you read the question to yourself that you were asking Dr. Doescher? [740]

A. (Witness complies.) Line 16?

Q. Line 16. Maybe I said the page number wrong, Page 515, 514?

A. I'm on 514.

Q. 514, Line 16, it starts, "Ms. Fredrickson, yes, but specifically what are those accommodations we could provide?"

A. I apologize, I was down a quadrant. Do you want me to read the question? Sorry, I missed that.

Q. Yes, just read it to yourself.

A. Yes, I did.

Q. And why were you asking Dr. Doescher about accommodations?

A. Understanding accommodations is a part of that evaluation process. And the interest in understanding, what were those pieces we could put in place, including support from personnel, in order to have her safely start her day over time at an earlier time.

So, wanting to get some specifics around what recommendations might you have, knowing her seizure condition, that we could put in place for her.

Q. Dr. Doescher's response to that was what?

MS. GOETZ: I object, the document speaks for itself.

THE HEARING OFFICER: I'm sorry, [741] there's an objection?

MS. GOETZ: The document speaks for itself. We're looking at a transcript, we have an audio recording.

THE HEARING OFFICER: So, address that piece. You want her understanding of it, Ms. Booth?

MS. BOOTH: Yes, how did she understand Dr. Doescher's response to what accommodations might be provided in a school setting to increase Ava's school day.

THE HEARING OFFICER: I'm going to allow that question. Ms. Fredrickson, what was your understanding?

A. What I understand was that accommodations could be reasonably provided, there could be, like, an array of them provided, but there wasn't, like, a specific articulation of, in my professional opinion you could do this.

BY MS. BOOTH:

Q. Would you look on Page 514, the lower quadrant on the left-hand side? And would you read the -- Dr. Doescher's response there starting on Line 7, "And if she's going to have." Just read that to yourself.

A. (Witness complies.) [742]

(At this time there was a brief pause.)

BY MS. BOOTH:

Q. What was your understanding of Dr. Doescher's opinion about having Ava be in school earlier in the day?

A. What I understood from the conversation was that Dr. Doescher felt it was a parent's choice based on their routines.

Q. This is kind of a random question, Joy, but you mentioned that there was additional education support profession -- or paraprofessional support

added for Ava. Do you recall that earlier in your testimony?

A. Yes, I do.

Q. And in your review of this record did you see a request by Jocelyn Hoffarth for additional ESP time?

A. Yes, I did.

Q. And it was a three-hour request, do you recall that?

A. I do.

Q. What does that mean?

A. The additional three-hour request is after you've looked at your current kind of amount of staffing, specific to a paraprofessional, which the standard within a self-contained skills program is 12 hours, so two six-hour paraprofessionals. **[743]**

When you have a new student coming in or a student with new needs, you re-examine. Do we have the staffing currently allocated to meet the needs of this individual, as well as the program that includes the individuals.

And at that time three additional hours were believed to be needed to meet Ava's need. So, it's based on staffing and student needs, it doesn't equate, like, hours that a student is in school or receiving instruction.

Q. Was Ava in school more than three hours a day during the time she was at Cedar Island Elementary?

A. Yes, her school day was from 12:00 noon to 4:00.

Q. And then extended to 4:15 in the '17/'18 year?

A. Yes. '16/'17.

Q. Thank you, '16/'17.

A. Yeah.

MS. BOOTH: I don't have any further questions. Thank you, Ms. Fredrickson.

THE HEARING OFFICER: Mindful that our ordinary court reporter break will be at the bottom of the hour. I'm wondering if it's agreed we could take a recess now and reconvene with cross-examination?

MS. GOETZ: That's fine with me. [744]

MS. BOOTH: And me, thank you.

THE HEARING OFFICER: Okay. We'll start precisely at 10:30, we're in recess. Thank you.

(At this time a brief recess was taken from 10:15 a.m. until 10:30 a.m.)

THE HEARING OFFICER: We're back on the record after a short recess. Cross-examination, Ms. Goetz?

MS. GOETZ: Thank you.

CROSS-EXAMINATION

BY MS. GOETZ:

Q. Ms. Fredrickson, let's start with the transcript of the Jason Doescher telephone conversation. Basically your understanding is that he supported -- that he felt it was a parent choice based on their routine. Did I understand your testimony?

A. I understood Dr. Doescher to indicate that the routines of the parents were relevant and that they had that voice within who and how those cares were delivered.

Q. Let me have you turn, please, to Page 514 of Exhibit 178. Within this transcript the pages are

numbered, if you look at Page 9, Lines 9 to 16, please. Read those to yourself, if you would. **[745]**

A. (Witness complies.)

(At this time there was a brief pause.)

BY MS. GOETZ:

Q. Are you done?

A. Yes.

Q. Do you understand that Dr. Doescher said at this meeting that there's been a consistent experience with Ava's routine of fewer seizures in the morning and it's reasonable to continue?

A. I understood him to indicate that parents reported that it had been consistent. He also used the word "sporadic" as well.

Q. Do you understand that Dr. Doescher said that it's reasonable and fair to continue a routine that works? Aren't those his words?

A. Dr. Doescher indicated that it was reasonable to try being in the school with accommodations and to collect data in doing so.

Q. Doesn't Dr. Doescher say that it's fair and reasonable to continue a routine that works?

A. I remember use of reasonable being used around trying to have her come in with support.

Q. Did you read what I just asked you to read, District Exhibit 178, Page 514, the internal page number is 9 and the lines are 9 to 16? **[746]**

A. Yes, I read that.

Q. Let me ask you to turn to District Exhibit 178, Page 516, internal page number is 16 on this page. I want you to read Lines 9 to 21, please.

A. Are we at Page 516, Page 17?

Q. Internal page is 16.

A. Okay.

Q. Lines 9 to 21.

(At this time there was a brief pause.)

BY MS. GOETZ:

Q. Are you done?

A. Yes.

Q. What do you understand from your read of this part of the transcript?

A. I understand Dr. Doescher to be indicating that he isn't able to speak to whether or not adjustments had been made to her sleep time in the morning, if re-arrangements had been made, nor the impact, nor could he speak to the after-school hours portion.

Q. Anything else you understand?

A. He made a reference to that if the sleeping proves to be provoking the seizures he could support that, which is why we wanted to collect data.

Q. Did you read Lines 9 through 21?

A. I'm at Line 15, I can read the remaining.

[747]

(At this time there was a brief pause.)

A. I've read the remaining lines.

BY MS. GOETZ:

Q. What do you understand about Dr. Doescher's medical opinion that he states here?

A. That if her routine was to be disrupted and it resulted in an increase in seizures he could be supportive of that having a late start time, but I did not understand the referencing data he had.

Q. Did you ask him to reference data that he had?

A. I recall seeking to understand how the seizure activity in the morning looked different than the seizure activity during the day in which we had been serving her from 12:00 and 4:15.

Q. Did you ask him to supply data on her seizure activity?

A. Sorry, Ms. Goetz, it broke out near the end, could you repeat that?

Q. Did you ask Dr. Doescher to supply data on Ava's seizure activity? A. I recall him indicating he didn't have data.

Q. I'm sorry, my question is, did you ask Dr. Doescher to supply data on Ava's seizure activity?

A. I asked for his knowledge, I didn't ask -- in [748] his response I heard him to say he didn't have it. A follow-up question was not then asked can you provide it to me, he didn't have it.

Q. Was there a previous request that Dr. Doescher provide data on Ava's seizure activity?

A. All of the authorizations to release medical information to the varying doctors that served Ava over the course of the years she was at Cedar Island sought to understand seizure care plan development, which includes information on seizures, medication administration, which is specific to her seizures, as well as the educational impact.

Q. So, I still don't understand your answer. Was there a request that Dr. Doescher provide data on Ava's seizure activity to the school?

A. The consent specifically referenced those three areas earlier indicated. The consent was to obtain information regarding -- in order to inform her seizure care plan, information specific to medication

administration, as well as seizures that were relevant to the school day.

Q. So, is your answer yes, the District asked Dr. Doescher to provide seizure activity data?

A. Seizure activity data is connected to all three of those pieces, yes. [749]

Q. And so, you're referring to the authorization that permitted that telephone conversation?

A. I recall language being consistent on our consents to release and authorize that exchange of information, those elements were consistent to our releases, not just specific to this one, that was as a part of the evaluation.

Q. Okay. So, is your testimony that there were multiple requests of Dr. Doescher to provide seizure activity?

A. The doctors varied over the course of the year. I believe Dr. Doescher was the first one, but the releases would identify which specific doctor they were sent to.

Q. So, I'm asking your recollection, is it your testimony that whoever was treating Ava, I think it was Dr. Doescher from 2015 to 2019, but whoever was treating her it's your recollection that there were consents and specific requests that a neurologist provide seizure activity data to the school?

A. Yes, we were seeking to understand the seizure activity.

Q. Any idea why -- and you never got that; is that correct?

A. We would get the letter each year that in a [750] brief statement or so indicated the need for a shortened day, but beyond that there was not additional medical information.

Q. And what medical doctor, neurologist does the District have that would review that data had it been provided?

A. Restate that, Ms. Goetz, what medical doctor does the District have?

Q. Correct.

A. The District has on staff licensed school nurses, they are RNs or LPNs and some have their public health nursing license as well.

Q. Is that who was going to review the data that was requested?

A. Yes, licensed school nurses, including we have a District nurse, a licensed school nurse assigned to Cedar Island Elementary, yeah.

Q. So, if the District was asking repeatedly for seizure activity data from Ava's treating neurologists year after year, do you know why it was not provided?

A. Parents declined authorizations to release information. Parents would anecdotally share things, like, it's heavy.

Q. Any other reasons?

A. I don't know further why they continued to year [751] after year.

Q. So, I'm confused now. I thought your earlier testimony was that the parents consented to release seizure activity data year after year and now you're saying that they refused to consent. Which is it?

A. When we provided parents with that authorization release medical records, what we would get is that one document I described, which stated she needed a shortened day.

However, in the case of Dr. Doescher they did agree within that evaluation plan to have a phone call in which medical information would be exchanged.

Q. But you understood that that authorization limited Dr. Doescher and prohibited him from providing seizure activity data?

A. I did not have an understanding of a limitation.

Q. So, then why, if you know, did Dr. Doescher not send seizure activity data to the District?

A. If you're still speaking specific to the evaluation share, the consent was specific to a phone conversation. The consent didn't reach beyond him sending us something, it was very specific to that one phone call.

Q. Let's look at it, I want to make sure you have [752] the benefit of looking again. District Exhibit 130, would you look at that, please?

This is the authorization that we're talking about that permitted the telephone call with Dr. Doescher, right?

A. Let me review it quickly, please. (At this time there was a brief pause.)

BY MS. GOETZ:

Q. Okay?

A. Yes.

Q. It is not your testimony that this authorization does not permit Dr. Doescher to release seizure activity data to the District, is it?

A. I indicated we were seeking information specific to these pieces noted here, the care plan, medication administration and medical needs during

the school day. I indicated seizure data would be relevant to those pieces.

Q. So, this authorization would permit Dr. Doescher to provide seizure activity data to the District, right? A. I understood that he could speak to what he knew about the frequency, the intensity, the data around her seizures.

Q. And he could send records, too, right? [753]

A. I did notice that there, yes.

Q. Okay. And this is the only authorization that you recall in the school record that permitted any treating physician to send medical information to the District, is that your testimony?

A. The District sent a number of authorizations to release and obtain that private data on a form just like this. Information was not received.

Q. This is the only one that the parents signed, is that your testimony?

A. I recall this one being signed.

Q. Is this the only one you recall being signed?

A. I know that this one was signed, yes.

Q. Is this the only one you recall being –

A. Sorry, just a second.

Q. Is this the only –

A. This is the one I recall being signed.

Q. Do you recall any others?

A. Not off the top of my head.

Q. In the roles that you described that you served Ava's IEP team wouldn't you have access to all the educational records?

A. Yes, I do have access in that role.

Q. Wouldn't you be expected to know what's in the records from year to year? **[754]**

A. I did have knowledge over the course of the year, but I continued to hear that nothing was received from school team members year after year.

Q. Let me ask you to turn to Student Exhibit 1. Tell me when you're there.

A. I've got to switch binders. Yes, I'm there.

Q. Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. This is the form used to request an additional allocation of paraprofessional hours.

Q. Are you at Exhibit 1, Page 7?

A. I'm at Exhibit 1.

MS. BOOTH: May I assist, Ms. Goetz? We tabbed these documents, I think, differently than you did. So, it's actually at Tab 2, Page 7.

MS. GOETZ: I'm not sure we're going to be looking at the same documents if we're tabbed differently.

MS. BOOTH: They're in exactly the same order, we just put a tab for each individual document. So, it's your Exhibit 1, Page 7, it just happens to be separated from the initial document.

BY MS. GOETZ:

Q. Can you identify this document, please? **[755]**

A. Yes, this is a medication administration consent form.

Q. And when is it signed?

A. This one is 2015.

Q. Is this signed every year by parents?

A. Yes, that's my understanding.

Q. As long as their child is receiving medication at school or could, then parents have to sign this form every year, right?

A. Yes, they're updated annually.

Q. Okay. And has this changed from year to year, do you know?

A. Have the medications that she receives at school changed year to year?

Q. No, my question is, has this form changed from year to year?

A. Oh, gosh, I don't know.

Q. This form says it was revised 3 of '98 at the bottom, does it not?

A. Yeah, it does down there.

Q. And this particular form was signed on September 28 of 2015?

A. Yes.

Q. Okay.

THE HEARING OFFICER: Ms. Goetz, I [756] don't mean to interrupt here in the examination, and the case is yours, I guess I'm expressing the concern that you have a little over four hours left for the remainder of the District's case. Is this the most beneficial use of Ms. Fredrickson's time and the remaining witnesses' time?

MS. GOETZ: I think so.

THE HEARING OFFICER: Okay. Fair enough. Ms. Goetz.

BY MS. GOETZ:

Q. So, did you not understand -- read Paragraph Number 5 to yourself there, will you please?

A. (Witness complies.)

(At this time there was a brief pause.)

A. Yes, I've read it.

BY MS. GOETZ:

Q. So, if the form didn't change isn't it fair to conclude that every year Ava's been in the district her parents have signed a form that gives the District permission to contact the physician that administers her medication to discuss her medical condition?

A. No, it is not. Parents in their actions were not open to us just reaching out to any physician to begin asking questions about medications or medical conditions. We respected that. [757]

And we wanted to be very clear if and when we were to reach out to a doctor that we had their consent. I do not believe -- though this form states that, we didn't have that from the parents.

Q. But this form does state that, doesn't it?

A. It does, but we didn't have it.

Q. Any reason that you can think of why all of the subsequent signed medication administration consent forms aren't in the record?

A. In the exhibits in front of us or in her records?

Q. In her records.

A. Repeat the question now that you've clarified that.

Q. Any reason you can think of why these subsequent signed medication administration consent forms are not in her record?

A. I do not know why they wouldn't be in her record.

Q. When you decided not to tell Ava's parents that you were going to record that conversation with Dr. Doescher did you and your supervisor consider

that you were creating a private protected health record?

A. No, we did not, the recording was for note taking. **[758]**

Q. Had no discussion about the creation of a private protected health information record?

A. No, there was no discussion about that.

Q. Were you told not to tell the parent that you were recording the conversation?

A. No, I was not told that, I hadn't considered it.

Q. Did you make any other recordings of meetings regarding Ava Tharpe that you didn't tell her parents about?

A. I made no other recordings, no.

Q. Do you know that her parents were advised not to make recordings of meetings?

A. I have no knowledge of her parents being advised not to record a meeting.

Q. Do you have any knowledge they were told that they had to leave their cell phones out of IEP meetings so that they wouldn't record the meetings?

A. I do have knowledge of a meeting in which I asked Mr. Tharpe, "Are you recording the meeting? It's okay if you do, we would just do the same." He left the table, exited the meeting space and said he was going to leave his phone in the hallway. I reassured him he did not need to do that, he can record the meeting, we would do the same and **[759]** welcomed him back into the space and to record if he desired. He indicated he was not going to record.

Q. So, your practice is to permit parents to record meetings so long as the District has an equal opportunity to record the meeting?

A. If a parent is recording a meeting we as a District would record the meeting.

Q. But you did not give that same opportunity to the parents with respect to the meeting with Dr. Doescher, right?

A. I was recording the meeting to support note taking to ensure accuracy of information.

Q. You said that there was an interest in the school in eye gaze technology. What interest was there?

A. I understood that parents were exploring that technology and they were willing to have the school use it, that's what I meant by interest, that they had access at some point in time and that the school could try using it.

Q. Do you know that, in fact, the family obtained eye gaze technology from Gillette Childrens through their insurance and brought it to school for Ava's use?

A. I recall equipment being brought, I don't know that it was usable, maybe a battery wasn't charged or something. **[760]**

Q. And who did you hear that from?

A. My communication would have been with the case manager.

Q. Who was that?

A. Pam Kohlhepp.

Q. And so, did you get her a battery charger?

A. I understood that that was parents' equipment that they had sent in to the school and I don't recall them pursuing getting that technology, a change in insurance or something.

Q. My question is, did you get a battery charger so the equipment could be used?

A. I myself did not ask the parents for a battery when I was informed of it.

Q. Did anybody in the District get a battery charger so that equipment could be used at school?

A. I don't know.

Q. Any knowledge that that equipment was ever used at school?

A. I don't know if it was used.

Q. Any idea how long it remained at school?

A. I don't remember specifics, but it was short, short term.

Q. Any offer by the District to ever trial the use of eye gaze technology and a speech generating device or [761] evaluate Ava's use of one?

MS. BOOTH: I'm going to object to the form of the question, I believe it's compound.

THE HEARING OFFICER: Sustained. Can you split it up, Ms. Goetz?

BY MS. GOETZ:

Q. Any offer to trial or evaluate Ava's use of eye gaze technology?

A. Eye gaze was being used within the school.

Q. Do you know what I mean by eye gaze technology?

A. Are you picturing the piece of equipment where they're using their eye gaze? It's a computer operated version, where they were using a lower tech version to have her complete the eye gaze. That's what I believe you're referencing.

Q. Any offer to trial or evaluate Ava's use of eye gaze technology by the District?

A. I do not recall.

Q. Any offer to trial or evaluate use of a speech generating device with Ava?

A. There was use of BIGMack that generates voice output.

Q. Anything else?

A. I don't recall if some of the more complex ones that might have two speech pieces, I don't recall [762] specifically on that.

Q. You said there was a stretch of time where there was not parent consent to have Ava communicate using eye gaze; is that accurate?

A. Parents wanted the IEP goal to focus on continued use of hand signing. Whereas, the District team members, speech pathologist and case managers, were seeing promise with the eye gaze.

Q. I'll interrupt you because it's really a yes-or-no question. I'm asking if that's an accurate account, summary of your testimony. You said there was a stretch of time where there was no parent consent to use eye gaze; is that accurate?

A. Yes, there were a number of conversations to obtain Mr. Tharpe's consent around use of eye gaze and focus on it within the IEP.

Q. Was using eye gaze as communication stopped at some point?

MS. BOOTH: Ms. Goetz, I'm sorry, I didn't hear the first part of the question.

BY MS. GOETZ:

Q. Is it your testimony that the use of eye gaze with Ava as a communication tool stopped at some point?

A. No, eye gaze continued to be used within the classroom setting, it just wasn't one of those [763]

priorities named within the IEP. They continued to utilize that for communication.

Q. Okay. At the IEP team meeting with Dr. Reichle you said he did not endorse a six-and-a-half-hour school day; is that accurate?

A. I do not hear -- I do not recall hearing Dr. Reichle explicitly endorse a six-and-a-half-hour school day.

Q. Do you recall whether he was asked?

A. I don't recall in the meeting if he was specifically asked that.

Q. You testified that the parents rejected the District's offer for an independent educational evaluation, correct?

A. Yes, they objected to the independent educational evaluation.

Q. And then, pretty soon after that date, in fact, they requested an independent educational evaluation, didn't they?

A. They did not do so pretty soon after.

Q. How long was that -- how much time in between those two events?

A. So, the District proposed an IEE in May of 2018 in anticipation of getting all the possible information about that transition to middle school. There was a [764] signature indicating they didn't agree with it on the prior written notice.

And then, over that summer months there was some indication they might be exploring it, but they weren't getting back to the District. Time continued to pass, it wasn't a shortened period of time.

The District continued to reach out about that. And ultimately at that point it was time for the District to complete their own re-evaluation.

Q. Okay. So, you don't know; is that fair?

A. No, I do know, the parents rejected the IEE. And it was not a short period of time after which they asked for it.

Q. Let me interrupt, I've got a limited amount of time, I'm sorry. My question is, do you know how much time elapsed between those two events?

A. It was months because the District evaluation was due in January and months had passed.

Q. And then, the parents requested an independent educational evaluation, do you recall that?

A. I do, yes.

Q. And what was the District's response, do you recall?

A. The District rejected their request of the IEE based on the 2016 evaluation. Parents had not indicated [765] dispute with the 2016 evaluation at any point prior to this. And at that point it was over two years-plus later in which they were making the request.

And it was at such time we were already planning our next re-evaluation.

Q. Who made that decision?

A. To reject?

Q. Yes.

A. That was me within the IEP team.

Q. Do you recall when?

A. The eval was coming due in January, so it was just prior to the time frame in which we needed to start getting consent for the evaluation and having the 30-day time frame in order to complete it.

Q. So, it was an IEP team decision to reject the request for an IEE, is that your testimony?

A. Yeah, the IEE would have been rejected by members of the IEP team.

Q. And the IEP team includes the parents, correct?

A. Yes, it does.

Q. The parent didn't agree to reject their own request, did they?

A. No, the parent did not.

Q. You testified about some offer of additional [766] extended school year service in the summer of 2019, do you recall that testimony?

A. Yes, I do.

Q. And that additional extended school year service was conditioned on the parents' agreement to cut back Ava's school day to 3:00 p.m. to stop; isn't that true?

A. No, that is not true.

Q. So, they could have taken the extended school year service and also rejected the District's offer in the same document to end her school day at 3:00 p.m.?

A. Yes. And parents had a history of doing that, they would often agree to portions of the IEP, but not the IEP in its totality. So, yes, they had that since the first year.

Q. You testified that there were five options considered when Ava was matriculating to middle school. And that all -- you named three of them. And

you said that all the options were rejected by the parents; is that accurate?

A. Yes, at that time I was saying there were five or so. I was able to articulate three of them, none of them were agreed upon by parent. They're one of the exhibits, I believe.

Q. Let me have you look at Student's Exhibit 1, [767] Page 80. Tell me when you're there.

A. Okay. Did you say 80?

Q. Eight-zero.

A. My student exhibit goes through 56.

MS. BOOTH: Joy -- again, Ms. Goetz, do you mind if I orient the witness?

MS. GOETZ: No.

MS. BOOTH: The Parent's exhibit have five large exhibits, we've broken them down in smaller bundles for you. So, Page 80 is at Tab 28. And, Ms. Goetz, do I have the right document, it's Exhibit 1, starts at Page 77 and goes to Page 80 that you're looking at?

MS. GOETZ: It actually goes through Page 81.

MS. BOOTH: I just wanted to make sure I was on the right spot. Thank you.

BY MS. GOETZ:

Q. Turning your attention to Page 80.

A. Uh-huh.

Q. Does this refresh your recollection when you look at the six options the parents presented in the bulleted paragraphs at the bottom of this page that, in fact, the parents proposed six different ways to deal with this problem? [768]

MS. BOOTH: I'm going to object to the form of the question, I think it misstates the evidence. Ms. Fredrickson testified about what the District had previously offered, not parents offered.

THE HEARING OFFICER: I'm going to allow it. Is that your understanding of what the parents were proposing?

A. No, these options were generated by the District. These detailed options weren't exclusively parent. Mr. Tharpe and I had a conversation around these and then there was an IEP held to go through each of them as District proposals.

BY MS. GOETZ:

Q. In fact, you had two meetings before the IEP team discussed what to do about Ava matriculating to the middle school, you and the parents; isn't that right?

A. I don't recall.

Q. Do you recall having any meetings with the parents before the IEP team discussed Ava's move to middle school?

A. I had conversations with Ms. Tharpe around two different middle schools and her interest in seeing them.

Q. Do you recall any meetings with Mr. and Mrs. Tharpe to talk about Ava's move to the middle [769] school on 2/28/18 and 3/16/18?

A. Could you clarify, Ms. Goetz? Are you referencing me meeting with the two parents, team meetings? Are there exhibits that go along with your reference?

Q. I'll repeat my question. Do you recall having two meetings, you and the parents, on February 28,

'18 and March 16, '18 to discuss Ava moving to the middle school?

A. I don't recall.

Q. You testified there are other students with seizure conditions, but there's no flexible start time with them. Do you recall that testimony?

A. Specific to Cedar Island Elementary I recall testifying that there were other students there with seizure conditions. I was not aware of them having a different start time from the regular start of the school day.

Q. How many of those students had doctor's recommendations that they are medically unavailable to start at the beginning of the school day?

A. I can think of a student -- sorry, as we're speaking, I can think of a student that had a doctor's note that modified their school day.

Q. So, that student did not start at the beginning [770] of the school day?

A. The student started, I recall, at the beginning of the school day, but didn't come to school every day of the week.

Q. You testified that if Ava needed to come -- if Ava was ready to come to school early that the District wanted a flexible start time. Do you recall that?

A. Yes.

Q. What information did you have at that point that Ava would be available to start school before noon?

A. Information from the parent was that the seizures could -- while they were heavy, they could be different and that the current routine was to start her day at that time.

Q. Anything else?

A. Additional medical documentation was not provided.

Q. Why was extended school year provided -- the service provided to Ava at home?

A. The extended school year service specific to 2015, '16, '17, each of the years, is that what you're referencing?

Q. Was there ever a year she was provided extended school year service at school? **[771]**

A. No, there was not. I just didn't know if you were isolating a year. In the four years she was at Cedar Island her extended school year was provided in the home because the regular extended school year day ended at noon or before noon.

So, if she were to come at noon there were no other peers to even be a part of her learning experience, their day had ended there.

Q. Did peers go with the teacher to her home to provide ESY when it was delivered at home?

A. No, they did not, peers were accessible within the regular school at ESY.

Q. What was your understanding through the time that you worked with Ava Tharpe's IEP team of her seizure activity in the morning, more than you testified to already?

MS. BOOTH: I'm going to object to the question, she's already testified to it, it's been asked and answered.

THE HEARING OFFICER: I'm going to allow it. What's your understanding of morning seizure activity?

A. Parents described the morning seizure activity as heavy was the word I recall hearing, but that it was -- it's sporadic. [772]

BY MS. GOETZ:

Q. Did you read the five physician letters in the District record that described her seizure activity and her inability to start school until noon?

A. The five physician letters, are you referencing the annual one that would come that was about a sentence long?

Q. Let's look at them. I didn't see a one-sentence one. District Exhibit 106, do you see that?

A. Yes. The document from Kentucky?

Q. District Exhibit 120?

A. Yes, I see that.

Q. District -- and had you seen that when you were working with Ava's team?

A. Yes, with Dr. Wirrell, yes.

Q. District Exhibit 136?

A. I don't know if I saw this one, this was during her transition to the middle school, I believe.

Q. When did you stop working with her?

A. The school year 2018/19, if that makes sense.

Q. The end of the '18/19 school year you were done working with her?

A. There were some pieces that carried over into the summer. However, I don't know if I was still a part [773] of the team on the 29th of August.

Q. Have you reviewed all the educational records in preparation for your testimony today?

A. Yes, I did see this in reviewing, yes.

Q. And how about Student Exhibit 2?

MS. BOOTH: Joy, it's going to be at Tab 42 in your book.

THE WITNESS: Thank you.

MS. GOETZ: Page 130 for the rest of us.

MS. BOOTH: I'm sorry, Tab 43.

THE WITNESS: Okay.

BY MS. GOETZ:

Q. Are you in the Student exhibit book?

A. I'm on the -- yes, I'm in the Student's, Page 130, it's a letter from Gillette.

Q. Dated 9/4/19?

A. Yes.

Q. Did you read that in preparation for today's testimony?

A. I don't believe I did.

Q. What about Student Exhibit 2, Page 131?

A. I didn't read that either. I wasn't a part of the team, so I didn't review ones that I wasn't a part of. [774]

Q. Did you know that Ava's altered school day that started at noon in Kentucky was based on a physician's statement?

A. Yes, I believe parents provided that paperwork at enrollment.

Q. You testified that the initial IEP and the initial re-evaluation when Ava moved to the District went into effect by what you termed implied consent; is that right?

A. Yes.

Q. So, let me ask you to look at Student Exhibit 1, Pages 10 to 12. A. Uh-huh.

Q. Do you recognize –

A. Yes, I do recognize this.

Q. What is this?

A. This is a document that was sent by Mr. Tharpe to the school indicating agreement with portions of the IEP. Let me revisit it. Okay. It documents the items provided to the School District.

Q. Let me ask you a different question. Is this parent consent to re-evaluate dated 10/20 of '15?

A. Is the evaluation plan dated 10/20/15, is that your question?

Q. Is this document you're looking at, parental [775] consent to evaluate Ava, dated 10/20/15?

A. Parental consent for evaluation is done on a separate document that specifically outlines the assessments that will be completed and why they were selected. This isn't that document.

Q. Not that document, but is it your testimony this is not parent consent to re-evaluate Ava?

A. No, there's a separate consent document that outlined the evaluation plan.

Q. And is it your testimony that this is or is not parent consent to implement the IEP dated -- and that that consent is dated 10/20 of '15?

A. I didn't follow your question, I apologize.

Q. Does this document represent parent consent to implement the IEP and is that parent consent dated 10/20 of '15?

A. I apologize. I can review it further if that would be helpful. It indicates things the parent is in agreement with and would like seen working on, yeah. Sorry, I just needed another minute. It points out what the parents expect to see in the IEP and carried out.

Q. You testified that the District rejected in-home after-school instruction because the instructional times planned for were based on her IEP and the time needed to implement it; is that accurate? [776]

A. Sorry, I heard two different parts in there. Could you restate the question?

Q. You testified that the District rejected the parents' request for after-school instruction in home based on her IEP and the time needed to implement it?

A. What I testified was the School District rejected that time because based on the educational needs that were addressed through the goals and objectives there was instructional time within that school day to address those and result in progress.

Q. So, is every student's school day calibrated to the IEP and not the other way around?

A. I'm not sure what you're asking there.

Q. Do you calibrate the length of a school day depending on how long it takes to implement a child's IEP?

A. The service minutes within the IEP outline the amount of time it will take to address the related goals and objectives. And there are times that those goals and objectives are addressed outside of regular school day, if that's what you're asking.

Q. So, are children sent home when their special ed service minutes are done being provided? A. The special ed service, that isn't how it happens. The special ed services are outlined based on [777] the needs, the goals and objectives in the time that the team believes they can make progress with that.

There are -- other students may have other things within their instructional goals, so they don't go home, they may be going to a music class or they may be in keyboarding or doing another course.

So, there are other things within their day. Whereas, Ava's day was very intensely focused on her IEP goals and objectives within that time frame she was there.

Q. What about other children in her Setting 3 program, assume that they had special education hours 100 percent of the day, that they never went into the general education, there's plenty of those children, right?

A. There are some children that don't access general education.

Q. Okay. And so, they get 100 percent of their days in the resource room; is that right?

A. Within a self-contained special education program they could.

Q. Right. And so, those children get a full day of special education?

A. They have activities within their class throughout their day. What I was attempting to describe [778] with Ava is she always had an adult or two adults intensively working on her goals and objectives.

Some students, though they're within a special ed room, they may have times where they're, like, it's read to self, they're going to go and pick up a book.

And they're going to engage in that activity independent of an adult. Or they may have other -- so, there's direct instructional time that happens and then there's other time.

So, Ava never had those times independent of getting direct instruction from a licensed special education teacher or reinforcing skills from a paraprofessional. They might do other things, like I described.

Q. Why did Ava not get anything other than direct instruction or reinforcement from a paraprofessional?

A. Ava required one-on-one adult attention throughout her day, that's well documented throughout her IEP. So, she always had an adult with her.

Q. You testified that there was no BCBA to provide direct instruction, direct service to Ava because there were BCA on staff for support; is that correct?

A. That is not correct, that's not how I stated that.

Q. You were confident in the staff and you had [779] BCBA on staff for support, you did not testify to that?

A. I did not testify to having BCBA certified staff members. I testified to having staff with knowledge and skills specific to applied behavioral analysis, the approaches and techniques that supported and delivered those services.

Q. So, your behavior specialists are not board certified behavior analyst?

A. They can be. We did have one that worked with Ava for a bit of time.

Q. And how did she work with Ava and when?

A. It was during extended school year and it was to -- there were observations completed in the home, interactions with the student. And then she further

helped ensure that this provider was knowledgeable in the approaches and techniques, collecting data that would be useful for the next school year.

Q. What summer was that, do you recall?

A. I do not recall, I'd have to look back at documents.

Q. Who was that BCBA?

A. Erin Farrell.

Q. Any other BCBA ever work with Ava, to your recollection? **[780]**

A. As far as a school staff member I wasn't aware of anyone else with that certification.

Q. No BCBA ever trained staff other than Erin Farrell one summer?

MS. BOOTH: I'm going to object to the form of the question, Erin Farrell wasn't a trainer.

THE HEARING OFFICER: Do you want to rephrase, Ms. Goetz?

BY MS. GOETZ:

Q. Any BCBA at the District ever train staff in working with Ava?

A. Not during her time at Cedar Island.

Q. Any BCBA ever monitor her fidelity of implementation of ABA methods?

A. Not while at Cedar Island was there a monitoring.

Q. And you didn't work with her in the middle school; isn't that right?

A. Correct, I did not.

Q. You testified about requesting three hours of additional hours of paraprofessional time at the beginning for Ava. Do you recall that?

A. Yes, I do.

Q. Not related to the number of hours she was at school, though; is that right? **[781]**

A. Correct, one does not equate the other.

Q. When she first started you testified about a couple of documents from Kentucky that you reviewed. Do you recall that?

A. Yes.

Q. Do you recall whether anyone ever requested additional records from Kentucky when Ava came to Osseo?

A. I don't recall.

Q. You left the District in November of '19?

A. Yes.

Q. Why did you leave?

A. Sorry, it cut out there.

Q. Why did you leave?

A. I left and now have an educational consulting company.

Q. What do you do in your educational consulting company?

A. I work with school districts.

Q. And what do you do?

A. It's dependent on the need that they would identify and seek services around.

Q. So, the District never agreed to give Ava a full school day during the time you worked with her; is that correct?

A. Full school day defined by the IEP team or by **[782]** parents' definition of a full school day?

Q. How do you define a full school day?

A. Ava's school day –

Q. That's not my question. My question is, how do you define the term "a full school day"?

A. School days have set hours and within those set hours there are instructional times to a school day and non-instructional times to a school day.

Q. The School District never agreed to give Ava a full school day from over a six-hour or six-and-a-half-hour time period like other students get; isn't that right?

A. Ava's school day was not six, six and a half hours, as you framed the question.

Q. That's not my question.

MS. BOOTH: We will stipulate that the District never provided six hours or six and a half hours for Ava during the course of her education at the Osseo Area Public Schools.

MS. GOETZ: Thank you.

BY MS. GOETZ:

Q. Who decided that while you were working with Ava?

A. Ava's school day was a decision of the IEP team, including parents. **[783]**

Q. So, the parents agreed to a shortened school day?

A. The parents continued to indicate her day started at 12:00, yes.

Q. Did her parents agree to a shortened school day?

A. Parents sought a school day identical to that of Kentucky.

Q. Which was six hours?

A. Her day was from 12:00 to 3:40. I don't know what their hours are.

Q. Did her parents ask for instruction at home in addition to her school hours in Osseo from 4:00 to 6:00?

A. Yes, they did.

Q. So, her parents were asking for instruction from noon to 6:00; is that fair?

A. With some transportation time in between, I would imagine, yes. They had an interest, they would say, from 4:00 to 6:00.

Q. And you say that the decision that Ava couldn't have that was made at the IEP team meeting; is that accurate?

A. That is accurate.

Q. You never came to an IEP team meeting having [784] had a discussion with just school folks about the position you would take on that issue?

A. No, I came with ideas and options, as I always did, but those decisions were made within the team.

Q. Did every member of the team speak to that question?

A. I couldn't -- this was a large team at times. I don't know. I can't speak to whether everyone weighed in at every single meeting.

Q. Do you recall whether anybody at any of the IEP team meetings, other than the parents, expressed an opinion that Ava needed a full day of school?

A. No.

Q. Do you recollect whether anybody at the IEP team meeting except you recommended that Ava get less than a full day of school?

A. Yes, other team members were supportive of the proposals put in writing, yes.

Q. Who exactly was?

A. With ever changing IEP teams I'm not able to detail, but the members of the team were supportive.

Q. I'm just asking your recollection. Who do you recall spoke in support of a reduced school day for Ava?

A. Team members' contributions at the IEP team meeting were supportive of it, there was never a [785] dissension from a member of the school team.

Q. And I'm asking if you recall anybody in particular. Do you recall anybody speaking in support of a reduced school day for Ava?

A. Our conversations at those meetings specific to school team members were about a school day starting at 12:00, per parent request, and continuing until initially 4:00 and then to 4:15.

Q. I'm struggling and I'm sorry, maybe I'm not asking the question clearly. But my question is, do you recall any team member other than yourself agreeing that Ava could have a shortened school day?

A. Yes, I answered that, yes, I do recall.

Q. And who do you recall speaking in support of that?

A. In me stating there was no dissenting opinions from school team members, it was school team members saying that.

Q. Do you recall any person in particular who spoke in support of that?

A. I can begin to name the IEP team members. Because there was no disagreement with it.

Q. Tell me the ones who spoke in support of that, please.

A. IEP team members that spoke would be, we'll [786] start the first year, Jocelyn Hoffarth, I think

Peggy Riley was part of that team. The following year we had Pam Kohlhepp joined the team.

We had -- I forget what year Peggy Riley and the other speech path, Erica, switched. We had Cheryl Katz a part of our IEP team meetings. Struggling to remember everyone's names.

Laurie was the occupational therapist, a part of the team, Dan Wald was the principal who attended in those initial years. I'm thinking through various team members.

We had Jackie Adamson was our licensed school nurse, a part of those conversations in the first few years. That changed later to Doris Oyinloye.

Q. Anybody else you recall speaking in support of a reduced school day for Ava?

A. Those are the key team members I'm remembering off the top of my head.

Q. What do you recall Jocelyn Hoffarth saying about that?

A. I don't -- I do not remember a specific statement she made in 2015/16 school year.

Q. What do you recall about Peggy Riley saying?

A. I recall her contributions being towards that of the day being outlined and not in disagreement with [787] it.

Q. What do you recall that she said about supporting a reduced school day?

A. I don't recall specific statements. My recollections are based on they were contributing to an IEP proposed by the District with that school day from 12:00 to 4:00 and later 4:15 and not putting forth, "I disagree with this" statements.

Q. Pam Kohlhepp, what do you recall about her statements?

A. I don't recall individual statements.

Q. So, is that the same answer to the same question that you said to every other person you just named?

A. I don't recall specific statements as years have passed, but I do recall them supporting what was proposed in writing on the prior written notice and that there was not a disagreement.

Q. You indicated -- strike that. There was no basis to conclude that Ava could start school before noon, was there?

A. Outside of parents indicating that and a doctor making a general statement in the early years, there wasn't specific data.

We never knew how those seizures looked [788] different than what we were caring for effectively day in and day out from noon to 4:15.

Q. Wasn't there a consistent report that Ava has the fewest seizures between noon and 6:00 p.m.?

A. I recall parents indicating that.

Q. Do you recall that her doctors consistently indicated that she was unavailable or unable to attend school before noon?

A. I recall those statements being made. And we cared for her seizures each and every day from 12:00 to 4:15 effectively and safely. And we had confidence that we could gradually work towards caring for her there as well.

Q. Right, but it didn't seem that the child's physicians had that same confidence, does it?

A. They indicated that a noon would be beneficial.

Q. Is that your recollection, beneficial?

A. I'd have to look back at the exact wording, but that was their recommendation, maybe that is a better word to use for it.

We knew, though, we had cared for other kids with seizures with great intensity and effectively and we wanted to have her there more.

Q. Do you think her doctors didn't know that you had a school nurse? [789]

A. Would the doctors have known that we had a licensed school nurse?

Q. Sure.

A. They would have been the ones that reached out to them.

Q. So, the answer is yes, the doctors would know that you have school nurses, right?

A. They would have seen that we did. Not all schools do, yes.

Q. And Ava's doctors would know that the -- that there were folks who cared for her seizures when they happened in the afternoons, right?

A. Yep.

Q. There was no basis to conclude that Ava could not benefit from a full day of school, was there?

A. Ava was benefiting from the school day that she had, she was continuing to make progress within the hours she was provided.

Q. And this is a different question.

A. Okay.

Q. Was there any basis to conclude that Ava could not benefit from a full school day?

A. Ava had the school day defined through her IEP and was making progress. I'm not sure what you're seeking there. [790]

Q. I'm just seeking an answer to a question and I'm trying to just ask it straightforward and I'll ask it again. Was there any basis to conclude that Ava could not benefit from a full school day?

A. We were looking at ways to have her come for additional time, so I think I've answered the question.

MS. GOETZ: Can we take a lunch break? And then I think I will be concluded shortly after we return.

THE HEARING OFFICER: We can certainly do that. I just want to make note, Ms. Goetz, I haven't done the precise calculation of the minutes, but I think you've spent as much time with Ms. Fredrickson on cross as Ms. Booth spent on direct.

Again, it's your case, I'm just worried about the time elapsing. Ms. Booth –

MS. GOETZ: How much time as elapsed today?

THE HEARING OFFICER: Let me -- hold the line a second while I do some calculation.

MS. GOETZ: Almost two and three-quarter, two and a half hours?

THE HEARING OFFICER: Yeah, I don't break it out separately by day, but hold on just a second. [791]

(At this time there was a brief pause.)

THE HEARING OFFICER: On cross and redirect we spent 150 minutes between both sides with Ms. Fredrickson so far.

MS. BOOTH: May I ask a question?

THE HEARING OFFICER: Sure.

MS. BOOTH: I think I might have three questions in redirect so far. If the cross-examination could be finished it would be very helpful to the scheduling of the rest of our witnesses. I know Ms. Goetz is anxious to have Ms. Kohlhepp testify and she's scheduled for 1:00.

THE HEARING OFFICER: And I have three or four.

MS. BOOTH: After that, yes.

THE HEARING OFFICER: Between Ms. Goetz and you, Ms. Booth, that would be another round. So that, both you and Ms. Goetz could have an opportunity to question following my query.

MS. BOOTH: Thank you.

THE HEARING OFFICER: My turn would follow Ms. Goetz, that's how I try to do it so we start a new round. I try not to break the furniture, but sometimes I do.

So, I want to give everybody an [792] opportunity to follow on questions. Ms. Goetz, if we were to steam ahead how much time do you imagine?

MS. GOETZ: I would suggest that we take a break now for a half an hour and return and then I anticipate I will have maybe 10 or 15 minutes. I want to be able to consult our expert in the mean time here.

THE HEARING OFFICER: Well, I'll tell you what, why don't we -- how about I compromise and we take a court reporter break and then come back at five after the hour. And you can consult with Dr. Reichle in that time. We'll try to finish up with Ms. Fredrickson and reconsider the question of lunch after that. Does that sound fair?

MS. GOETZ: That would be fine.

THE HEARING OFFICER: So, we're going to take our early court reporter recess and then hopefully finish up with Ms. Fredrickson and then think about lunch. With that, we're in recess for 15 minutes until five after the hour.

(At this time a brief recess was taken from 11:50 a.m. until 12:05 p.m.)

THE HEARING OFFICER: We're back on the record after a short recess. Ms. Goetz?

MS. GOETZ: Thank you. [793]

BY MS. GOETZ:

Q. Ms. Fredrickson, is it your testimony that Ava does not need a full school day because she's making progress with an IEP on a shortened day?

A. My testimony is that she's making progress during the time from 12:00 until 4:15.

Q. And that's the reason why she doesn't need a full school day?

A. That was not my testimony.

Q. Why does she not need a full school day?

A. At this point we've continued to honor that 12:00 start time -- or I should speak to the time at Cedar Island, we were honoring the parents' 12:00 start time.

In the time that we had her from 12:00 to 4:15 she was receiving intensive programming from one to two adults throughout her day and continuing to show progress in areas within our IEP.

Q. And that's the reason why she doesn't need a full school day?

MS. BOOTH: I'm going to object to the question. It's been asked and answered multiple

times in multiple ways. The witness has answered to the best of her ability, I believe.

THE HEARING OFFICER: I'm going to [794] allow it. Do you want to try one more time, Ms. Fredrickson?

A. Is there a way you could rephrase the question, Ms. Goetz? That might be helpful.

BY MS. GOETZ:

Q. Why do you think Ava does not need six hours of instruction in her day?

A. Thank you for restating it. I believe that in the hours she's currently able to come to school she's continued to demonstrate progress. And her IEP goals and directives as outlined by the team have been addressed and she's continued to show that growth.

Q. Does the District reduce or shorten the school day of all students with disabilities if they make progress? A. I'm not sure how you're trying to ask that. We have students that have school outside of the regular school hours.

Q. That's not my question.

A. Okay.

Q. Does the District reduce or shorten the school day of all students with disabilities if they make progress on their IEP?

MS. BOOTH: Objection, relevance.

THE HEARING OFFICER: Overruled. [795]

A. When students are showing progress during their school day there are pivots that are made in their programing.

There are additional maybe opportunities that could be included with peers or with additional

course work or other ways to interact with those same goals and objectives within their IEP or other opportunities within the school day.

We adjust our practices. They aren't taking hours away, as your question seems to ask.

BY MS. GOETZ:

Q. Would Ava make more progress with more hours in her school day?

A. We didn't have the opportunity to explore that as we attempted to do through various approaches.

Q. Do you have any reason to believe Ava would not make more progress with more hours in her school day?

A. It isn't always that simple, right? It's complex, right? If you're working on a skill, simply more time on a skill that you've already achieved the level at which you're going to demonstrate that skill, more time wouldn't be beneficial. So, that's a complexed question.

Q. Well, I want to give you an opportunity to fully answer the question, but I feel like I'm not [796] getting answers to the question. I'm going to ask again.

A. Please do.

Q. Do you have any reason to believe Ava Tharpe would not make more progress if she had more hours in her school day?

A. I don't know. That would be a data driven process to make that determination.

Q. Would more instructional objectives be available to Ava Tharpe if she had more time in her school day?

A. Maybe, maybe not, that would be dependent on the IEP team's determination of what's going to be a focus of her programming. I don't know.

MS. GOETZ: That's all I have. Thank you.

THE HEARING OFFICER: I have a few questions, Ms. Fredrickson. It won't count against anybody's time. It's my understanding that you were part of the IEP team for Ava roughly in the period of the 2015 school year through the end of the 2019 school year. Have I got that about right?

THE WITNESS: The 2018/'19 school year. The next school year would be '19/'20. [797]

THE HEARING OFFICER: So, from the autumn of 2015 you were a team member through some time at the end of the school year or the summer of 2019?

THE WITNESS: Yes.

THE HEARING OFFICER: And I assume that during that period you were familiar with student instruction at both Cedar Island Elementary School and Maple Grove Middle School. Is that fair to assume as well?

THE WITNESS: My time was specific to her being serviced at Cedar Island Elementary School.

THE HEARING OFFICER: But generally during that time you knew what was going on at Cedar Island for students beyond Ava and also generally what was happening at Maple Grove; is that fair?

THE WITNESS: Yeah, generally, yes, I had experience supporting middle school, so I generally had that understanding.

THE HEARING OFFICER: So, during that time, that time period that we're talking about, are

you aware of any student who received instruction from the Osseo Schools after 4:15 in the afternoon?

THE WITNESS: Yes, I am aware of students that received instruction.

THE HEARING OFFICER: Can you tell me [798] how many, roughly?

THE WITNESS: Well, I supervised a transition program for four years. So, a number of our students received their instruction and support outside of the school hours.

I also -- over my years in Osseo I also supervised homebound instruction for a period of time. And likewise, a number of students received their instruction outside of the school hours.

THE HEARING OFFICER: Okay. So, setting aside the folks who are receiving transition services, not talking about those, what kind of instruction generally was happening with these students after 4:15? You mentioned homebound. What other kinds of things were happening?

THE WITNESS: What kind of activities were the students engaged in?

THE HEARING OFFICER: Yeah, can you give me a sense of whether it was general ed, it was special ed, it was modified phys ed? I have no idea.

If you have a general sense of the kinds of things that you say you were doing, not including transition, after 4:15. Do you recall any examples?

THE WITNESS: So, are you speaking to [798] extracurricular activities beyond the school day?

THE HEARING OFFICER: I'm trying to understand with some more depth your answer that school activities were occurring after 4:15. I'm trying

to figure out if you can describe in a general way what those were.

THE WITNESS: So, school-based activities after that day, of course, were a full range of extracurricular activities that students with and without identified disabilities participated in.

THE HEARING OFFICER: So, homebound, extracurriculars, any other broad categories?

THE WITNESS: I don't know that there would be other broad ones that I can think of at this time.

THE HEARING OFFICER: Fair enough. So, help me understand. I understand your testimony that the Osseo School District was interested in sending a nurse to the Tharpe's home in the mornings to either alternatively collect data on seizure activity or provide help and support to a teacher who might be delivering instruction in the morning. Have I got that understanding correct?

THE WITNESS: I don't recall that happening during her time at Cedar Island. There may [800] have been conversations about that, but I don't know if there was a formal proposal or anything.

THE HEARING OFFICER: Okay. So, there was discussion -- and I don't want to put words in your mouth, I want to understand.

Is it your testimony that there was discussion about sending a nurse to the Tharpe's home in the morning to support an educator who might be there in the morning, have I got that right?

THE WITNESS: I'd have to go back to final proposals in the summer of 2019 to recall with certainty.

THE HEARING OFFICER: You don't recall that?

THE WITNESS: The idea sounds like I recall it, but I don't know if it happened while she was at Cedar Island or if it's something that I saw in here later. I don't know.

THE HEARING OFFICER: And you don't know whether that was made while she was at Cedar Island or happened later at Maple Grove?

THE WITNESS: Correct, I don't know with certainty.

THE HEARING OFFICER: Okay. Do you know if the Tharpes were asked to provide underlying [801] data in support of a 12:00 noon start time?

THE WITNESS: We asked how -- what the seizures looked like beyond the description of heavy, sporadic, to better understand that.

And there wasn't more quantifiable data that was provided in conversations and seeking to understand or through the call with Dr. Doescher.

THE HEARING OFFICER: And mindful that Osseo was very eager to understand the nature of the seizure activity occurring with Ava in the morning, but it seems to me, and again, let me know if you think this inference is unfair, that a 12:00 noon start time was fairly uncritically accepted. Sure, arrive at noon.

Whereas, when it comes to she's really not available for instruction in the mornings, no, I need to go beyond the doctor's letters and understand the underlying data and the nature of the seizures, that was less uncritically accepted. Is that understanding fair?

JA-413

THE WITNESS: Maybe not entirely because we didn't understand the seizures and the comparableness to the 12:00 to 4:00 from that 4:00 to 6:00 range with that level either. We just didn't know enough on either end.

THE HEARING OFFICER: Thank you very **[802]** much. Ms. Booth, redirect?

* * *

JA-414

Kentucky Department of Education
Division of Learning Services Services
NOTICE OF SHORTENED SCHOOL DAY
and/or WEEK
2012-2013

Date of Request: 9/12/12

Special Education Cooperative	Northern Kentucky Special Education Cooperative		
District:	Boone County	District Number:	035
Director of Special Education:	Pam Eklund	Phone Number:	[REDACTED]
School:	Longbranch Elementary		
Principal:	Erika Bowles		

Student Information			
Full Name:	Ava Tharpe	Disability:	Other Health Impairment
Age:	7	[REDACTED]	[REDACTED]

Teacher Information			
Full Name:	Chris Bolanos	Grades Taught:	K through 4
Classroom Type:	Separate Class		

Special Education Code:	Select from drop list
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Type of Request (Check all that apply)

Shortened Week Shortened Day

Shortened School Week (SWD)

1a. What are the days of attendance for this student according to current IEP?

--

1b. Describe the reason(s) why this student requires a Shortened School Week:

--

1c. Provide the typical beginning and ending time for students in this school?

BEGINNING TIME: ENDING TIME:

1d. Provide the beginning and ending times for this student according to current IEP?

BEGINNING TIME: ENDING TIME:

Shortened School Day (SSD)

2a. Describe the reason(s) why this student requires a **Shortened School Day**:

Ava's school day is from noon until 3:40. Ava is diagnosed with a seizure disorder and has heavy seizure activity in the morning upon waking. The committee agrees that Ava needs the shortened school day so that she can come to school during the time of day that optimum learning can take place. Monday, Wednesday, and Friday from 4:00 to 6:00 pm. Ava receives school in the home from 4:00 to 6:00pm.

2b. Provide the typical beginning and ending time for students in this school?

BEGINNING TIME: 8:40 ENDING TIME: 3:40

2c. Provide the beginning and ending times for this student according to current IEP?

BEGINNING TIME: Noon ENDING TIME: 3:40

3. Is this student returning to school after being in a Home/Hospital Instruction Program?

Yes No

If yes, describe circumstances:

4. Identify steps the ARC will take to promote full attendance for this student in the future?

Student hours are dependent on nature of the seizure disorder

Has a shortened school day been requested for this student in previous years?

Yes No

If yes, list the previous school years?

2011-2012

6. Is there a signed Physician statement?

Yes No

* * *

JA-417

Osseo #0279
Osseo Area Schools ·
11200 93rd AVE N
Maple Grove, MN 55369
Phone: 763-391-7000
Fax: 763-391-7275

[Logo omitted]

Prior Written Notice

Date: 06/14/2018

Student Name:
Tharpe, Ava J.

Home Phone:
[REDACTED]

Date Of Birth:
[REDACTED]

Home Address:
[REDACTED]

Student No.:
[REDACTED]

Student State ID:
[REDACTED]

Age: 12	Gender: Female	Grade: 05	Home School: Basswood Elementary	Attending School: Cedar Island Elementary
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Parent/Guardian:

Name: Aaron Tharpe	Home Phone: [REDACTED]	Name: Gina Tharpe	Home Phone: [REDACTED]
Address: [REDACTED]	Work Phone: [REDACTED]	Address: [REDACTED]	Work Phone: [REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]	
	Emergency Phone: [REDACTED]		Emergency Phone: [REDACTED]

To be given to parents prior to an action to change or refuse to initiate the identification, evaluation, educational placement of a child with a disability or provision of FAPE. Notice will be given at the same time the district requests parent consent on such actions requiring consent.

DESCRIPTION OF ACTIONS PROPOSED OR REFUSED BY THE DISTRICT:

At parent's request, the district continued to include Functional Skills/Communication objective to address use of modified hand signs. The district also proposed objectives to address use of direct selection and partner assisted eye gaze scanning program.

At parent's request, the district proposed to add the following objectives to the amended Individualized Education Program (IEP): Academic Performance objectives for identifying basic colors and placing knobbed puzzle pieces into a puzzle/template and an Activities of Daily Living objective related to voiding on the toilet.

At parent's request, the district proposed to increase the current criterion on the Activities of Daily Living objective for picking up and putting instructional materials into a container when finished with them,

JA-419

with visual prompts, from criterion of 60% to 70% of the time.

The district proposed the addition of an accommodation statement to address need for district staff to accompany Ava in the ambulance in the event that an ambulance would be called to transport Ava to the hospital and parent(s) had not yet arrived.

The district proposed to add the following to Ava's Evacuation Plan: access to and use of noise canceling headphones and support from two adults to ambulate outside in emergency drill.

At parent's request, the district proposed changing Developmental Adapted Physical Education sessions from 3 - 15 minute sessions per week to dividing 45 minutes per week into 2 sessions.

For the 2017-18 school year, the district reviewed proposed Extended School Year services which includes 16 - 3 hour instructional sessions in the home.

For the 2018-19 school year, the district agreed to a flexible start time to Ava's school day. The district also proposed an extension of Ava's school day beyond regular school hours until 3:00 pm with individualized support from an Educational Support Professional under the direction of a Special Education Teacher. Additionally, the district proposed specialized instruction and services beyond the regular school calendar in June and August. These 15 - 4 hour instructional service times would be provided by a Special Education Teacher in the home. The district denied parent request for services

identical to services contained within the Kentucky IEP dated 3/12/2015.

The district proposed Authorization to Release/Obtain Private Data which included permission to obtain written and verbal information from doctor. The district noted that parent could note specific areas agreed with on the consent and modify the consent. The district proposed an additional option to have an Individualized Education Program (IEP) meeting that included the doctor by-phone and associated fees for the doctor's time would be covered by the district. These two options were in response to parents request that the district provide a written list of specific questions to be asked of the doctor.

Explanation of why the district proposes or refuses to take the action:

The district proposed Functional Skills/Communication objectives to address use of modified hand signs as well as use of direct selection and partner assisted eye gaze scanning program to afford Ava with total communication approach. Varied modes allow for Ava to functionally communicate with a variety of communication partners across settings and when impacted due to seizure activity.

The district proposed to add objectives in the area of Academic Performance to address identifying basic colors and placing knobbed puzzle pieces into a puzzle/template based on parent request. The district will address these skills during dally math instructional lime as well as other functional math skills. The district proposed adding an objective in

the area of Activities of Daily Living related to voiding on the toilet as this had been included on previous Individualized Education Programs and is something that has and will continue to be worked on dally during Ava's school day.

The district proposed to increase the current criterion on the Activities of Daily Living objective for picking up and putting instructional materials into a container when finished with them, with visual prompts, from criterion of 60% to 70% of the time because of the reasonableness given Ava's present level of performance in this area.

The district proposed the addition of an accommodation statement to address need for district staff to accompany Ava in the ambulance in the event that an ambulance would be called to transport Ava to the hospital and parent(s) had not yet arrived in order to ensure that a familiar adult was with Ava during an emergent situation.

The district proposed adding access to and use of noise canceling headphones and support from two adults to ambulate outside to Ava's Evacuation Plan in order to ensure responsiveness to Ava's sound sensitivity and safety during duration of emergency drill.

The district proposed changing Developmental Adapted Physical Education sessions from 3 - 15 minute sessions per week to dividing 45 minutes per week into 2 sessions to address length of transition to the instructional area in the middle school and maximize instructional time in Ava's school day.

The district proposed eligibility for Extended School Year services based on self-sufficiency. The district

proposed 16 - 3 hour instructional sessions in the home to support Ava's progress toward self-sufficiency and maintenance of skills.

For the 2018-19 school year, the district agreed to a flexible start time to Ava's school day based on consideration of medical restrictions shared by parents and doctor's recommendation for altered start to school day. The district proposed an extension of school day beyond regular school hours until 3:00 pm with support from an Educational Support Professional under the direction of a Special Education Teacher in order to provide Ava with additional time for individualized support on IEP goals/objectives. The district proposed in-home, specialized instruction and services from a Special Education Teacher beyond the regular school calendar in June and August to afford Ava with additional instructional time. The district denied parent request for provision of service minutes contained within the Kentucky IEP dated 3/12/2015 because the Kentucky IEP does not reflect Ava's present levels of performance and Ava has demonstrated progress. In addition, the district proposal for flexible schedule would provide Ava additional minutes of instruction to extent consistent with seizure activity.

The district proposed Authorization to Release/Obtain Private Data which included permission to obtain written and verbal information from doctor or inclusion of doctor by-phone in IEP meeting at district expense in order to further inform educational programming and development of Ava's Seizure Care Plan for the upcoming school year.

Description of each evaluation procedure, assessment, record or report used as a basis for the proposed or refused action:

The district. used the following as a basis for the proposed and refused action: most recent Individualized Education Program, Evaluation Summary Report dated 1/19/2016, review of medical records available and most recent Seizure Care Plan, prior year Extended School Year information, input from parents at IEP team meetings, and consideration of doctor's note provided by parents.

Description of other options considered and why those options were rejected:

The district proposed a number of other options to address instructional hours in prior meetings. These options were rejected by parents based on their position that Ava continue to receive the same number of instructional hours per school day.

The district denied parent request to provide a written list of specific questions to be asked of the doctor given other options afforded.

Description of the factors relevant to the actions proposed or refused are:

The district completed an evaluation of Assistive Technology through SETT (Student, Environment, Tasks, Tools) Framework in 2016. This was shared with parents at the IEP meeting. The district previously proposed completion of an Independent Educational Evaluation on 5/4/2018.

This decision is proposed to be implemented on: 06/28/2018

* * *

JA-424

CONSENT

- I agree with the decision, and I give my permission to the school district to proceed as proposed.
- I do not agree with the decision, and I do not give permission for the district to proceed as proposed.
- Implied consent – 14 day elapsed.

/s/ Aaron C. Tharpe
(Parent/Legal Education
Decision Maker)
Aaron C. Tharpe

Date: 06/27/18

* * *

Osseo #0279
Osseo Area Schools ·
11200 93rd AVE N
Maple Grove, MN 55369
Phone: 763-391-7000
Fax: 763-391-7275

[Logo omitted]

Prior Written Notice

Date: 04/02/2018

Student Name:
Tharpe, Ava J.

Home Phone: [REDACTED]

Date Of Birth:
[REDACTED]

Home Address:
[REDACTED]

Student No.: [REDACTED]

Student State ID:
[REDACTED]

Age: 12	Gender: Female	Grade: 05	Home School: Basswood Elementary	Attending School: Cedar Island Elementary
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Parent/Guardian:

Name: Aaron Tharpe	Home Phone: [REDACTED]	Name: Gina Tharpe	Home Phone: [REDACTED]
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Address: [REDACTED]	Work Phone: [REDACTED]	Address: [REDACTED]	Work Phone: [REDACTED]
[REDACTED]	Emergency Phone: [REDACTED]	[REDACTED]	Emergency Phone: [REDACTED]

To be given to parents prior to an action to change or refuse to initiate the identification, evaluation, educational placement of a child with a disability or provision of FAPE. Notice will be given at the same time the district requests parent consent on such actions requiring consent.

DESCRIPTION OF ACTIONS PROPOSED OR REFUSED BY THE DISTRICT:

The district has refused parent request for grade-level retention which would result in Ava remaining at Cedar Island Elementary School. The district has proposed grade advancement which would result in Ava transitioning to Maple Grove Middle School. The district has proposed that Ava's instructional day be extended to 3:00 pm and instruction be provided beyond the regular school day by a licensed special education teacher or service be delivered by Educational Support Professional under the direction of a licensed special education teacher. The district proposed to gather data on Individualized Education Program (IEP) goals/objectives to determine educational progress and meet as a team

JA-427

to review progress and modify programming based on data.

Explanation of why the district proposes or refuses to take the action:

The district denied parent request for retention based on two prior grade-level retentions requested by parents. Ava was retained as a third grade student in prior out of state district and as a fifth grader last year in the district. Additionally, the request was denied in order to ensure Ava access to instruction in a setting with same/more similar aged peers, age appropriate instructional materials, and additional programming opportunities in areas of functional daily living and community involvement. The district proposed a school day extension to 3:00 pm in order to provide Ava with additional instructional time (20 minutes beyond end of regular school day) given her medical need to start her school day at 12:00 pm. Ava requires access to licensed nurse in order to effectuate her Seizure Care Plan.

Description of each evaluation procedure, assessment, record or report used as a basis for the proposed or refused action:

The district used the following as a basis for the proposed and refused action: most recent Evaluation Summary Report and Individualized Education Program, Progress Report, Seizure Care Plan and health records, and input from parents at meetings, including medical information.

Description of other options considered and why those options were rejected:

The district considered the option of Ava attending Maple Grove Middle School during regular school hours (8:10 am - 2:40 pm) from 12:00-2:40 pm per doctor note dated January 19, 2018 indicating start time at noon due to seizure activity in the morning. The district proposed collecting data to determine educational progress given the reduction in instructional time from the current year. The district rejected this option as the extension of school day allowed for additional instructional time and collection of data to determine educational progress.

The district considered the option of Ava attending Maple Grove Middle School from 12:00-2:40 pm and then receiving specialized transportation to Cedar Island Elementary (across the street) in order to extend the instructional and service time. The district rejected this option as it didn't afford continuity in environment for programming and access to institutional materials and similar aged peers.

The district considered the option of extending Ava's instructional day at Maple Grove Middle School beyond 3:00 pm however, this was rejected because it is not consistent with the care outlined in the current Seizure Care Plan.

The district considered the option of Ava attending Maple Grove Middle School from 12:00-2:40 pm and receiving 1 hour/school day of instruction in the home. This option was rejected given the restrictiveness of the educational environment, consideration for access to instructional materials

JA-429

and assistive technology, and need for data to substantiate this programming change.

Description of the factors relevant to the actions proposed or refused are:

Due to seizure activity and doctor's note dated January 19, 2018 for altered start to school day, Ava's school day starts at 12:00 pm. Ava will start her school day earlier when medically able to do so. The district stands ready to provide services.

This decision is proposed to be implemented on: 04/16/2018

* * *

CONSENT

- I agree with the decision, and I give my permission to the school district to proceed as proposed.
- I do not agree with the decision, and I do not give permission for the district to proceed as proposed.
- Implied consent – 14 day elapsed.

/s/ Aaron C. Tharpe
(Parent/Legal Education
Decision Maker)
Aaron C. Tharpe

Date: 04/09/18

* * *

JA-430

* * *

RE: [EXTERNAL] Re: Ava J Tharpe

Aaron.Tharpe [REDACTED]
Mon 4/30/2018 11:42 AM

To: Fredrickson, Joy Lee (ESC)
[REDACTED]; Gina
Tharpe [REDACTED]
Cc: Kohlhepp, Pamela (CI)
[REDACTED]

Joy,

Thanks for taking the time to meet me on Friday to go over responsive documents to my April 23, 2018 request.

As we discussed, a copy of complaints filed with the MN Dept of Education, US Dept of Education Office for Civil Rights and US Dept of Justice Civil Rights Division was mailed to the Superintendent last week. If she does not receive the packet by Wednesday, please let me know and I'll send a second copy.

As for next steps, I suggest we focus on the outstanding requests from my April 23, 2018 e-mail:

- Please provide a detailed description of Ava's current 4.25 educational hour school day, in fifteen (15) minute or less increments, showing tasks performed and IEP goal alignment, including but not limited to lunch, toilet training, breaks for physical activity, OT, PT, Speech, DAPE, etc. Last year, at my request,

Pam Kohlhepp provided a breakdown of Ava's day in fifteen minute increments so these documents should already be in existence in some shape or form.

- Please provide a detailed description of the District's proposed 3.00 educational hour school day, in fifteen (15) minute or less increments, showing tasks to be performed and IEP goal alignment, including but not limited to lunch, toilet training, breaks for physical activity, OT, PT, Speech, proposed increase in DAPE (District proposed during our only IEP meeting to discuss goals on 04/05/18), etc., similar to above. To understand the impact of the District's proposed daily reduction of 1.25 educational hours, please expressly show what tasks/goals will be eliminated and/or reduced. If the District proposes to combine tasks and goals arguing that such is a more effective educational strategy, please provide an explanation in writing for each explaining why such tasks and goals are not combined today.
- In the 04/03/18 PWN, the District denies parental accommodations of (i) retention or (ii) having the IEP effectuated at a school that can meet Ava's needs and provide the most instructional hours (e.g., Cedar Island) to "ensure... age appropriate instructional materials, and additional programming opportunities." Please provide documents and information on the above, with specificity, as this information was not provided at past meetings.

JA-432

In addition to incorporating the alleged new materials and opportunities when describing Ava's shortened 3.00 hour day, please provide a written description, with specificity, as to the "additional programming opportunities" available to Ava next year at the Middle School not available at Cedar Island or other appropriate schools that provide instruction for 4.25 hours. Also, please explain in writing how "age appropriate instructional materials" allegedly only found at the Middle School align with current Ava's IEP and how similar materials are not found at Cedar Island or other appropriate schools that provide Instruction for 4.25 hours.

Unfortunately, I cannot consider the District's continued requests to schedule mediation or conciliation, or other possible next steps, until the above information is provided. If you'd like to cover the above at an in-person meeting, I can e-mail dates/times to schedule. If we are having an in-person meeting, I'd like Pam Kohlepp to attend in case there are questions regarding Ava's current school day.

Thanks for your continued help. Talk soon.

Aaron

From: Fredrickson, Joy Lee (ESC)

Sent: Friday, April 27, 2018 10:08 AM

To: Aaron.Tharpe

Gina Tharpe

JA-433

Cc: Kohlhepp, Pamela (CI)

Subject: [EXTERNAL] Re: Ava J Tharpe

Hello Aaron and Gina,

The purpose of this message is to follow up on your request for information. The education records, including health records, which already exist and are held by the district have been copied. You are welcome to pick up the education records at Cedar Island Elementary today. I will be available at the school from 3:00-4:00 pm today to answer questions related to the education records. Please let me know if another date and time is needed to answer questions related to the education records and provide some options.

Thank you for surfacing additional areas that you would like to better understand as it relates to Ava's Individualized Education Program, including what her day looks like now and will look like in middle school along with the related instructional materials.

As a result of disagreement with the district's proposal documented on the PWN dated 4/2/18, we need a meeting. We look forward to working toward resolve of this matter through a Conciliation Conference or Mediation. Of these resolution processes, which are you interested in pursuing?

As previously noted, the district does not have School Board Policy or Procedure specific to student retention.

I look forward to hearing from you and continuing to engage In the process.

JA-434

Sincerely,
Joy Fredrickson
Student Services Coordinator
[REDACTED]

From: Aaron.Tharpe [REDACTED]
Sent: Monday, April 23, 2018 1:47 AM
To: Fredrickson, Joy Lee (ESC)
Cc: Kohlhepp, Pamela (CI); [REDACTED]
[REDACTED]; Gina Tharpe

Subject: Ava J Tharpe

Joy,

A follow-up to the PWN (04/02/18) regarding my daughter, Ava J. Tharpe (DOB [REDACTED]).

In an effort to better understand the District's 04/02/18 PWN, engage in the IEP interactive process, and determine next steps, it is requested that the District provide the below information. If it is customary for the District to charge parents for copying and/or other clerical costs related to gathering and copying such records, please provide an estimate of such charges in writing before documents are gathered and copied, and upon my approval of such costs, a written invoice when production is made.

If the District refuses to provide any requested documents, please provide a detailed written explanation for its refusal.

JA-435

If possible, I would like to obtain documents and written responses to the below by close of business on Friday, April 27. Please provide a few dates/times that a representative can meet me at Cedar Island so that I can obtain responsive documents, and for the representative to answer questions relating to production.

REQUEST FOR INFORMATION

1. Please provide a detailed description of Ava's current 4.25 educational hour school day, in fifteen (15) minute or less increments, showing tasks performed and IEP goal alignment, including but not limited to lunch, toilet training, breaks for physical activity, OT, PT, Speech, DAPE, etc.
2. Please provide a detailed description of the District's proposed 3.00 educational hour school day, in fifteen (15) minute or less increments, showing tasks to be performed and IEP goal alignment, including but not limited to lunch, toilet training, breaks for physical activity, OT, PT, Speech, proposed increase in DAPE (District proposed during our only IEP meeting to discuss goals on 04/05/18), etc., similar to above. To understand the impact of the District's proposed daily reduction of 1.25 educational hours, please expressly show what tasks/goals will be eliminated and/or reduced. If the District proposes to combine tasks and goals arguing that such is a more effective educational strategy, please provide an explanation in writing explaining why such tasks and goals are not combined today.

3. From our previous discussions, including but not limited to our meetings on 2/28/18 and 3/16/18, it is my understanding there is no written Cedar Island school or District policy or practice regarding student retention. If a written policy or practice exists, please provide a copy, and an explanation as to why we were told no policy or practice exists in prior meetings and discussions.
4. In the 04/03/18 PWN, the District denies retention to “ensure. . . age appropriate instructional materials, and additional programming opportunities.” First, let the record reflect that such opportunities or materials have not been communicated to Gina or me. In addition to incorporating these alleged new materials and opportunities in request #2, please provide a written description, with specificity, as to the “additional programming opportunities” available to Ava next year at the Middle School not available at Cedar Island. Also, please explain in writing how “age appropriate instructional materials” allegedly only found at the Middle School align with current Ava’s IEP and how similar materials are not found at Cedar Island? Finally, please explain in writing how and why the District made the placement and retention decision (PWN 04/02/18) before the first IEP meeting was held for the 2018 and 2019 school year (04/05/18) to discuss Ava’s progress, and next year’s goals, objectives, etc.
5. Please provide a copy of all educational and medical documents received from Ava’s prior schools in Boone County, Kentucky, including but not limited to IEPs, student progress, test results and progress.

6. From 01/01/2014 to date (covering Ava's tenure as a student in the District), please provide a copy of all documents, notes, correspondence (including e-mails), whether drafted by the District, parent or other party, relating to Ava's education at the District, including past and current IEPs (all proposals and final versions), PWNs, Conciliation meetings, tests, evaluations, dally teacher/parent correspondence, parental notice of regression and/or lack of progress.
7. In past IEP meetings, conciliation conferences, and related e-mails, Gina and I have consistently argued that Ava has regressed and/or failed to progress at the same rate as she did at her prior school(s) in Boone County, KY. Gina and I have consistently argued that the regression and/or lack of progress is due to the District's failure and refusal to adopt all accommodations provided at her prior schools in Boone County, KY. It is our position that the proposed reduction in educational hours will only lead to further regression and/or lack of progress. Although captured in request #6 above, from 01/01/14 to date, please provide a copy of all documents, e-mails and/or correspondence relating to parental notice to the school of regression and/or lack of progress.

After receipt of the above, and a reasonable time to review, I will contact you regarding next steps.

04/02/18 PWN

As background, Ava currently attends Cedar Island Elementary (with parental agreement), instead of her home school (Basswood Elementary), since Basswood

is not equipped to meet her medical and educational needs.

For the record, we met on 2/28/18 and 3/16/18 for the sole purpose to discuss placement and retention. The PWN was received on 04/02/18. There has only been one IEP meeting to discuss next year's goals and objectives, which occurred after the PWN on 04/05/18.

As previously stated during our meetings on 2/28/18 and 3/16/18, as well as my e-mail on 4/11/18, the 4/2/18 PWN fails to accurately describe parental accommodations and reasons/rationale for such proposals.

Again, Gina and I proposed that Ava's yet-to-be finalized IEP be effectuated at a District or non-District school that provides:

- Hours of Instruction similar to those currently provided (12 :00-4:15PM),
- An appropriate classroom that can meet the student's needs with a licensed educator who can effectuate the IEP, and
- A reasonable driving proximity to the family's home due to medical need.

To meet this objective, we proposed the following six accommodations:

- Ava would progress to the 6th Grade, the IEP would be effectuated at the Middle School until 2:40PM (end of the traditional school day), and additional instruction be provided by a licensed educator at the Middle School until 4:15PM.
- Ava would progress to the 6th Grade, the IEP be would effectuated at the Middle School until 2:40PM, and additional instruction would be

provided by an Aide at the Middle School until 4:15PM.

- Ava would progress to the 6th Grade, the IEP would be effectuated at the Middle School, and an Aide would provide additional Instruction in the home on agreed upon days and times.
- Ava would progress to the 6th Grade, the IEP be would effected at the Middle School until 2:40, and Ava would be transported across the street to the Elementary School to finish instruction with a licensed educator until 4:15PM.
- Ava would progress to the 6th Grade, but the IEP would be effectuated at the Elementary School.
- Ava would be retained in the 5th Grade and the IEP would be effectuated at the Elementary School.

We also proposed our willingness to consider changing the Seizure Care Plan so that an educator is authorized to administer medication (instead of a nurse) and/or for the Cedar Island nurse (located across the street) to be responsible to administer medication if Ava attends the Middle School until 4:15pm for instruction (we were told the Middle School nurse leaves at 3:00pm).

The District made one proposal, that Ava would progress to 6th grade and attend the Middle School, and receive instruction from 12:00PM to 2:40PM; and one counter-proposal, that Ava would progress to 6th Grade, attend the Middle School, and receive an additional 20 minutes of instruction to 3PM.

As previously stated, due to the District's unreasonable position(s) and in the interest of our

daughter, by this correspondence, the family rescinds the cost effective offers that an Aide provide instruction at Osseo Middle School or in the home to compensate for lost Instructional hour between 2:40 and 4:15PM.

Since not clearly written or described in the PWN, let the record reflect that Ava has always been under a modified educational scheduled, unable to attend class before Noon due to seizure activity, that the parents provided medical documentation to the District supporting the modified schedule before and during enrollment in 2014, that Ava's prior school(s) in Boone County, KY also accommodated such schedule, and that the parents provided additional medical documentation supporting the modified schedule again in 2018 at the request of the District.

NOTICE OF NONCOMPLIANCE AND DISCRIMINATION

Based on the District's refusal to adopt all accommodations offered by her prior school located in Boone County, KY, Ava's subsequent regression and/or lack of progress while a student in the District compared to her performance at Boone County, KY; the District's decision that during the 2018 and 2019 year Ava's Instructional hours will be reduced from 4.25 hours per day to 3.00 hours per day; and the District's placement and retention decision (evidenced by the 04/03/18 PWN) before the one and only IEP meeting on 04/05/18 with 2018-2019 goals and objectives yet to be drafted, properly discussed and/or finalized; it Is our position that the District's actions and positions are unlawful, discriminatory and/or retaliatory for many reasons, including but not limited to, Ava's race, sex, disability and/or

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protected class, and/or parental protected activity (advocating for Ava during the IEP interactive process), and that the District is not in compliance with *Enders F v. Douglas County School District* and other state and federal laws.

As with all correspondence, please include this e-mail in Ava's IEP record.

Sincerely,
Aaron Tharpe

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SCHOOL LAW CENTER, LLC.

Securing Student Success

[Logo omitted]

Amy Jane Goetz

Attorney at Law September 14, 2020

VIA EMAIL and US MAIL

Kate Emmons, Special Education Director

Tim Palmatier, General Counsel

Osseo Area Schools

11200 93rd Ave North

Maple Grove, Minnesota 55369

RE: Ava Tharpe

Birthdate:

Address:

School: Cedar Island Elementary School

Grade: Sixth

**COMPLAINT and REQUEST FOR
HEARING**

Dear Director Emmons and Mr. Palmatier:

As you know we have been retained to represent the Student, Ava Tharpe, and her Parents, Aaron and Gina Tharpe, in their claims against the District for violations of the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act. Because our clients have devoted significant time and effort to informal dispute resolution with the District and because Ava continues to make inadequate progress,

we must now request an administrative hearing to address and resolve those claims without further delay. In that regard we are requesting the appointment of a hearing officer from the Minnesota Department of Education to initiate an administrative due process hearing. We are by copy of this Complaint requesting the appointment of a hearing officer from MOE. An updated authorization to release information signed by Ava's parents is enclosed.

Ava's disability and educational needs have been mishandled and misunderstood by the district since she enrolled. Ava suffers from intractable epilepsy as well as a significant cognitive disability. Ava suffers from Lennox-Gastaut syndrome, which causes seizures. Ava's seizure activity occurs mostly in the morning and the evening. Disrupting Ava's sleep schedule, which requires her to sleep into the late morning, causes an increase in seizure activity in the daytime. Altering her care and treatment regimen to meet the standard school day poses an unreasonable and unacceptable risk of increased seizure activity and resulting damage to her brain. Ava's medical providers and her parents are very clear on this requirement and have repeatedly demonstrated this to the District in support of their request for a full school day. Additionally, the syndrome has caused motor limitations on the left side of her body. The seizure activity and motor limitations create obvious safety concerns as well as clear obstructions to learning. As a result, Ava is best suited for a school day which starts later and ends later.

Unfortunately, the District has been intractable in its position that she must alter her care and treatment

schedule to accommodate the standard school day, rather than to alter the hours of her instruction to accommodate her care and treatment schedule and her needs for a full day of instruction just like every other student. Instead of implementing the full day IEP in effect upon her enrollment into the District in 2015, consistent with medical advice and her parents' request to maintain full-time instruction beginning at noon, the District has refused to provide full-time instruction to Ava when she is safely available for instruction because it is inconvenient. This is not a legitimate justification for depriving Ava of the full-time instruction she sorely needs and which is due her.

Ava and her family moved to the District from Kentucky where she received full-time education starting at noon, consistent with both her medical and educational needs. Her school day was appropriately adjusted to begin at 12:00 and provided her with school-based and home-based services to respond to her significant needs. Ava's disabilities make her needs for special education and related services *greater* than most students, yet the District refused to implement the existing level of services once she moved to Minnesota, and unilaterally reduced her hours from 5.75 hours per day to 4.25 hours per day. This was despite her parents' objections and the District has refused to comply with its obligations to Ava with continued requests since then to reinstate a full day program. The Kentucky full-day IEP was based on Ava's individual needs and produced progress. The Osseo shortened-day IEPs have been based on District convenience and have produced regression. The Osseo partial programs have also discriminated against Ava on the basis of her

disability because students without disabilities uniformly enjoy full-time school programs. The District determined that provision of after-school services was categorically outside the scope of its responsibility as the basis to deny full-time instruction to Ava. The categorical denial of after-school or extended day services violates the IDEA and Section 504 of the Rehabilitation Act of 1973. *See, Ind. Sch. Dist. No. 623*, 31 IDELR 17 (MN SEA 1999); and *Madison (WI) Metropolitan Sch. Dist.*, 352 IDELR 585 (OCR 1988).

Since enrollment in the District, rather than honoring Ava's right and her Parents' requests for full-time instruction, the District has repeatedly attempted to shorten and reduce further her school day, efforts that her Parents have properly rebuffed as contrary to her needs, unjustified, and discriminatory. When Ava was matriculating from elementary to middle school, the District proposed to shorten her school day further to correspond with the earlier school closing at the middle school. Our clients met with Joy Fredrickson, special education administrator, on February 28 and March 16, 2018, to discuss the District's proposals to shorten Ava's school day to end at 2:40 when the middle school day ended. Our clients rejected that proposal and offered five or six options to maintain Ava's instructional hours despite her transition to middle school. On April 2, 2018, the District issued a Prior Written Notice rejecting all of her Parents' options and still proposing to shorten Ava's school day to end at 2:40. Our clients objected. Then, on April 4, 2018, the District convened Ava's IEP Team to discuss her present levels of performance, progress, needs and program, *after it had unilaterally pre-determined its proposal to*

shorten her school day. Obviously that proposal was unrelated to Ava's educational needs.

Later, in an effort to strong-arm her Parents into capitulating to further *reductions* in her school day, the District went so far as to *initiate an adversary administrative due process hearing against Ava* on February 2, 2019. Once counsel was retained, we entered an appearance, an objection to the proceedings, and raised the issue of the unjustified reduction in instruction. See, Letter from Goetz to Palmatier and Palmer-Denig dated February 21, 2019. Because that suit had no merit, it was withdrawn by the District on March 14, 2019, and an independent educational evaluation to address Ava's long-neglected need for intensive instruction and supports to develop her communication skills was finally initiated. Ava's Parents wanted to continue to try to work cooperatively with the District to restore a full day of instruction rather than pursue a claim at that juncture, and have done so for now more than an additional year. All this time Ava has continued to be deprived of full-time instruction to her significant detriment.

The District has failed to provide Ava with a full day of instruction since the 2015-2016 school year because it is inconvenient and because District officials appear to harbor the mistaken belief that Ava cannot benefit from more than part-time instruction. In fact, the available data supports a conclusion that Ava needs maximum instruction to receive a free appropriate public education. There is no support for the mistaken belief of District officials that Ava's education is little more than babysitting based on their misconceptions of the value of education to her

due to the significance of her disabilities. That attitude was made clear to our clients when Director Emmons suggested that, instead of providing Ava increased educational services, her Parents should simply “hire a personal care attendant.” Such a stereotyped comment is as insulting and derogatory as it is mistaken. There is simply no basis to conclude that Ava cannot benefit from a full day of instruction just like the rest of her peers, those with and those without disabilities. And, since there is no genuine dispute that Ava needs full-time instruction like every other student, it is inescapable that the provision of full-time instruction is the District’s unequivocal obligation to provide and her unquestionable right to enjoy. Anything less is pure discrimination on the basis of disability and without question the denial of a free and appropriate public education. The District’s claims to the contrary are simply pretext and excuse.

Not surprisingly, Ava has not made adequate progress since enrollment in the District because of the withholding of full-time services. While the District has shown no interest in fully educating Ava, Dr. Joe Reichle provided many recommendations for expanding critical instructional supports to improve her limited communication skills, designed to improve skills in the most important area of education for Ava that will make the difference in her trajectory of progress in school and over a lifetime, in self-sufficiency, self-determination, and interpersonal relationships. Dr. Reichle’s IEE Report makes clear that Ava has demonstrated an ability to benefit from instruction and certainly can learn with the proper goals, objectives and instructional methods. Dr. Reichle is an internationally-recognized expert in

the communication needs and skills of persons with significant disabilities. He also endorsed the provision of instruction to Ava between 12:00 noon and 6:00 p.m., consistent with past practices, medical advice and her Parents' requests.

In sum, the District has failed to provide Ava with enough instructional opportunity to provide a FAPE and to provide her with equal opportunities to benefit from educational services like her peers without disabilities. This situation should be rectified by ordering the District to provide Ava a full day of instruction beginning immediately, and to make up for the lost instruction from the past in the form of compensatory education services. The deprivation of instructional hours can easily be measured by the difference between a full-day of instruction (6.5 hours) and the 4.25 hours begrudgingly provided by the District over the past two years. But the true measure of Ava's need for compensatory education is multiplied by the exponential impact of that deprivation on the critical development of communication skills during optimal periods of development that have now passed.

The District should now be ordered to provide Ava with compensatory education services to make up for the lost benefit of full-time instruction for two years without further delay, including an appropriate multiplier to compensate for the delay in provision of needed instruction. *See Strawn v. Mo. State Bd. of Educ.*, 210 F.3d 954,959 (8th Cir.2000) (noting that a child may be entitled to compensatory education for a time period longer than the period within the statute of limitations, if necessary to compensate the child for the denial of a FAPE). Missed instructional hours

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alone amount to 495 hours per year (2.25 hours x 180 regular school days plus 40 ESY days), or 990 hours of compensatory services without any enhancement. An enhancement of one additional year's services is appropriate and brings the total compensatory education services claim to 1,485 hours. This is the relief known and available to our clients that is sought.

There is no genuine dispute of any material fact necessary to a determination as a matter of law and this claim is proper for summary disposition.

Our clients continue to want to avoid litigation to resolve this matter and urge you to consider cooperating in a problem-solving manner to settle this matter immediately before further delay or the unnecessary expenditure of resources or relationship capital.

Please contact me to discuss how this can be accomplished.

Regards,

SCHOOL LAW CENTER

/s/ Amy J. Goetz

Amy J. Goetz

Attorney at Law

* * *

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**THIS DOCUMENT
CONTAINS
NOT PUBLIC DATA**

OAH 8-1300-37093
MOE 21-007H

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF EDUCATION

In the Matter of A.J.T. **FINDINGS OF FACT,
v. CONCLUSIONS OF
Osseo Public Schools, LAW
Independent School AND ORDER
District 279**

This matter came before Administrative Law Judge Eric L. Lipman for an evidentiary hearing on February 9, 10, 11, 12 and 18, 2021.

Amy J. Goetz, School Law Center, appeared on behalf of the Student or “Gamma”, A.J.T., and her Parents. Laura Tubbs Booth, Ratwik, Roszak & Maloney, P.A., and Timothy R. Palmatier, General Counsel, appeared on behalf of the Osseo Public Schools, Independent School District 279 (the School District).

The hearing record closed following the receipt of the parties’ post-hearing briefs on Friday, March 15, 2021. For good cause shown, the due date for this decision was extended until April 21, 2021.

STATEMENT OF THE ISSUES

1. Whether the student’s Individualized Education Plan (IEP), including the hours of instruction, is reasonably calculated to enable the

Student to make appropriate educational progress in light of her circumstances?

2. If the School District's offering is not appropriate, how many hours of compensatory educational services are needed to remediate the denial of a free appropriate education?

SUMMARY OF CONCLUSION

The Student established that an educational program which did not include supplemental instruction home in the afternoon, did not afford her a free appropriate public education (FAPE). The Student likewise established that 495 hours of such instruction would fairly remediate the School District's denial of a FAPE.

Based upon the contents of the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Introduction

1. Gamma is a fifteen-year-old girl who suffers from a rare and severe form epilepsy that makes her unavailable for school before noon each day. [Footnote with citations omitted.]

2. Because of this condition, Gamma's parents requested, and the School District has long agreed, that she be permitted to start her school day later than her non-disabled peers. [Footnote with citations omitted.]

3. Notwithstanding their agreement as to when Gamma should be allowed to start her school day, the parties and the School District have never agreed as to when it is appropriate to end the school day for Gamma. [Footnote with citations omitted.]

4. In fact, this matter is the second due process proceeding between the parties to resolve this question. The first due process complaint was filed by the School District on February 1, 2019. In urging that Gamma's school day should end at 3:00 p.m. during the school year, it noted that it had proposed:

- (a) A flexible start time during the 2018-19 school year (*i.e.* [Gamma] would not have a designated start time of 12:00 noon but instead would begin instruction at 8:10 a.m. or as soon as she is able);
- (b) An extended instructional day during the 2018-19 school year (*i.e.* extended to 3:00 p.m. compared to the 2:40 p.m. for all other students);
- (c) Extended School Year Services of 16 (3-hour) instructional sessions in the home during the summer.....; and,
- (d) Additional specialized instruction of 15 (4-hour) instructional sessions in the home. [Footnote with citations omitted.]

5. The proposed 3:00 p.m. end-time was a winnowing of the hours Gamma had in elementary school. In the spring of her first year at Cedar Island Elementary School (Cedar Island), Gamma's educational program extended between noon and 4:15 p.m. [Footnote with citations omitted.]

6. The 2019 dispute was resolved by the parties agreeing to an Independent Education Evaluation (IEE) of Gamma, and a later triennial evaluation, and using these materials to guide later educational planning. Additionally, the parties agreed that Dr. Joe Reichle would serve as the independent evaluator. [Footnote with citations omitted.]

7. The appropriate number of hours of services is still disputed. For her part, the Student maintains that there are no medical risks posed by providing her instruction between 4:15 p.m. and 6:30 p.m., and that she is legally entitled to a school day that is equal in length to her non-disabled peers - six and one-half hours. [Footnote with citations omitted.]

8. On September 14, 2020, the Student and her parents filed their own due process complaint. The complaint requested an order that directs the School District to provide Gamma with a program of special education and related services that begins at noon each school day and concludes at 6:30 p.m. [Footnote with citations omitted.]

II. Gamma as a Learner

9. Gamma has a severe form epilepsy known as Lennox-Gastaut Syndrome (LGS). LGS is a rare and very challenging seizure disorder. Most LGS patients have a lifetime of near-daily seizure activity, consisting of different types of seizures. [Footnote with citations omitted.]

10. Gamma's parents report that Gamma experiences more frequent, and more significant seizure activity, during the mornings and in the evenings after dinner. [Footnote with citations omitted.]

11. Gamma's treating physicians have assumed, based upon their knowledge of the disease, and the parent's very credible reports of their daughter's seizures, that Gamma is unavailable for needed health care treatments during the morning hours. [Footnote with citations omitted.]

12. In fact, as to Gamma, St. Paul Children's Hospital has adjusted its regular infusion therapy

protocols so that she could arrive at the hospital for treatment later in the day, at a time that was safer for her. Such adjustments in the infusion therapy protocols are neither routine nor commonplace for St. Paul Children's Hospital. [Footnote with citations omitted.]

13. Significant cognitive disabilities often accompany LGS, because each seizure takes a toll on the young person's brain. As the District's education expert, Deborah West, observed during the evidentiary hearing: "[E]very seizure takes you out of the learning environment" and affects the student's learning. [Footnote with citations omitted.]

14. For this reason, a key goal for Gamma's educators and physicians has been to minimize the total amount of seizures that she is having during her school day. [Footnote with citations omitted.]

15. Gamma's seizure activity has undoubtedly interfered with her cognitive ability and development. Notwithstanding that Gamma is a teenager, developmentally, she presents much like an 18-month-old girl. [Footnote with citations omitted.]

16. Gamma is largely nonverbal and uses eye-gaze technologies to communicate. Eye gaze technologies are applications that follow the movement of the user's eyes, such that a non-verbal person can look at an object, or at a specific place on a keyboard, in order to make selections between items or to communicate ideas. [Footnote with citations omitted.]

17. Gamma also utilizes signs adapted from American Sign Language. [Footnote with citations omitted.]

18. Gamma requires assistance for walking and balance as well as toileting.

19. Among the skills that Gamma is working on at school are:

- (a) using pictures, picture symbols, or modified signs, to communicate her needs;
- (b) picking up and put a variety of objects in their appropriate place;
- (c) using modified hand signs for the terms: eat, drink, treat, more, want, swing, music, ball;
- (d) practicing the steps of hand washing;
- (e) catching a 10" soft Gertie ball and riding an adapted tricycle;
- (f) pointing to a named picture; and,
- (g) answering simple questions about a story that was read to her. [Footnote with citations omitted.]

20. Gamma's teachers and caregivers describe her as a fun-loving, engaged learner who thrives on personal interaction with the adults who are teaching her new skills. As her father noted at the evidentiary hearing:

She wants that recognition. She wants that praise. She thrives off of that. Her motivation is not a treat. Her motivation is not a toy. Her motivation is that she wants praise and recognition from teachers and us as her parents. [Footnote with citation omitted.]

21. Dr. Reichle, the independent evaluator hired by the School District in 2019, agrees: "By telling her she's doing great and when you get enthusiastic, she's all over it. So she's a pretty easy learner to motivate

to work for a period of time.” “[I]t was fairly impressive,” Dr. Reichle continues, “how quickly she gained skill in a reasonably short period of time.” [Footnote with citations omitted.]

22. The District’s seizure data shows that Gamma has also a consistent pattern of seizures during her school day. During the period between September 5, 2019, and March 12, 2020, the District logged 72 seizures - a rate of approximately one seizure per school day.” [Footnote with citations omitted.]

23. Notwithstanding the severity of her health challenges, Gamma is a resilient learner. As one of her special education teachers described, Gamma “gets back up when things, you know, don’t go well for her[,] and she gets back up and tries again.” [Footnote with citations omitted.]

III. The Educational Program in Boone County

24. Before Gamma and her family relocated to Minnesota, they resided in Boone County, Kentucky. Gamma attended Boone County Schools until the fall of 2015. [Footnote with citations omitted.]

25. Based upon statements from Gamma’s physicians, Gamma had a modified school schedule. She started school at 12:00 p.m. and concluded at 3:40 p.m. [Footnote with citations omitted.]

26. Gamma also received additional special education instruction three times per week at home, between the hours of 4:00 and 6:00 p.m. [Footnote with citations omitted.]

27. During the afternoons of the remaining two school days of the week (ordinarily Mondays and Wednesdays), Gamma received instruction under a Medicaid waived service program offered by the State of Kentucky. [Footnote with citations omitted.]

28. During the period between December of 2013 and October of 2015, Marygrace Ott, a board certified behavior analyst (BCBA), worked with Gamma on functional communication and adaptive daily living skills on these days. [Footnote with citations omitted.]

29. Most of the instruction that Gamma received under the waived services program was focused on modified sign language. Ms. Ott provided Gamma one-to-one instruction through “discrete trial training.” [Footnote with citations omitted.]

30. Discrete trial training is a method drawn from applied behavior analysis. It breaks down a particular skill into component parts, has the teacher cue one of the component parts (for example, completing a selection between two alternatives) and then rewarding and reinforcing particular responses. With repetition and reinforcements, done in quick succession, some developmentally-disabled students have been able to acquire new skills. [Footnote with citations omitted.]

31. Ms. Ott also implemented a behavior support plan with Gamma. The primary objective of the plan was to provide “intensive instructional methods to increase functional communication, independent play and interaction with others in her environment.” [Footnote with citations omitted.]

32. In this way, the supports that Gamma received from the waived services program were closely related to the language acquisition goals and objectives of Gamma’s IEP. [Footnote with citations omitted.]

33. The program was demanding, and during the fall of 2013 and winter of 2014, Gamma was showing

signs of regression in initiation of skills. [Footnote with citations omitted.]

34. By the following spring, an integrated psychology report completed by Boone County Schools, indicates that Gamma: (1) had “mastered the signs for ‘treat’ and ‘food’ in the home setting” as reported by her parent; (2) was using approximations of the signs for “eat,” “drink,” and “snack” at school and was consistently signing both “eat” and “drink.” [Footnote with citations omitted.]

35. Gamma’s most recent IEP from Boone County Schools, dated March 12, 2015, provides that “[t]hough [Gamma] shows a great deal of variability in performance, likely due to seizure activity levels for the day, she is showing increases.” [Footnote with citations omitted.]

36. For her part, Ms. Ott, is more sanguine about the gains that were made during this period. She maintains that by late 2015, Gamma was consistently and independently using seven signs (up from four) and was successful in voiding on the toilet nearly half of the occasions that she was given an opportunity to do so. [Footnote with citations omitted.]

37. Improvements in appropriate toileting was a key focus of the Boone County plan because of the direct relationship between successful, independent toileting, and Gamma’s later independence and dignity. [Footnote with citations omitted.]

IV. The Educational Program Offered by the Osseo Public Schools

38. Gamma’s IEP team met prior to her beginning school as student in the Osseo Public Schools. The meeting was arranged so that Gamma’s parents and school officials could discuss how the

School District could best meet Gamma's needs. [Footnote with citations omitted.]

39. When establishing an education program for Gamma, the District generally accepted the goals, objectives and minutes of service in Gamma's most recent IEP with the Boone County Schools. [Footnote with citations omitted.]

40. The Parents requested, and the School District agreed, that Gamma's school day begin at 12:00 p.m. in order to permit the family to manage her seizure activity. [Footnote with citations omitted.]

41. Each year, Gamma's parents provided the District with a letter from Gamma's treating neurologist. These letters request, on the Student's behalf, that she be exempted from attending school in the mornings, in order to manage her seizure activity and recovery. [Footnote with citations omitted.]

42. A note from a physician or a licensed mental health professional stating that the child cannot attend school is a valid excuse under the compulsory attendance laws. Such notes entitle the child to be "excused from attendance for the whole or any part of the time school is in session during any school year." [Footnote with citations omitted.]

43. For a time, the notes from Gamma's physicians uncritically accepted by the School District. Initially, school officials simply assumed that Gamma was not available for instruction during the morning hours of the school day. [Footnote with citations omitted.]

44. The District serves other students with LGS as well as students with other seizure disorders. [Footnote with citations omitted.]

45. The District has a seizure action plan for Gamma. Gamma frequently has seizures at school and school staff know how to respond appropriately when such events occur. [Footnote with citations omitted.]

46. When Gamma first enrolled in the Osseo Public Schools, she was placed in a Setting 3 classroom referred to as the “skills program,” at Cedar Island Elementary School (Cedar Island). The skills program focuses on students with developmental cognitive delays within the “moderate to severe profound range” as well as other students with other medical needs or physical impairments. [Footnote with citations omitted.]

47. Following her enrollment, additional paraprofessional support was secured for that classroom in order to support Gamma’s needs. [Footnote with citations omitted.]

48. During the timeframe that Gamma attended school at Cedar Island, the typical school day schedule ran from 9:30 a.m. to 4:00 p.m. Initially, Gamma attended school from 12:00 p.m. to 4:00 p.m. [Footnote with citations omitted.]

49. In March of 2016, the School District proposed extending Gamma’s school day beyond the end of the regular school day to 4:15 p.m., and providing instruction during this additional 15-minute segment.⁴⁹ 50. This arrangement also permitted Gamma to wait until most of the other students at Cedar Island had dispersed to waiting school busses or cars, before she began making her egress from the school. [Footnote with citations omitted.]

51. The IEP team thus agreed to extend Gamma's school day. [Footnote with citations omitted.]

52. While the Parents agreed to the four hour and fifteen minute schedule, they maintained their objection to not having services provide between 4:15 p.m. and 6:00 p.m. each day. They pressed this objection during the 2015-16 school year and later, during the 2016-17 school year. [Footnote with citations omitted.]

53. After being retained at Cedar Island for an additional year, Gamma matriculated to middle school in the fall of 2019. [Footnote with citations omitted.]

54. The District also agreed to extend Gamma's school day beyond the typical school day at MGMS. A typical school day for non-disabled student at MGMS begins at 8:10 a.m. and concludes at 2:40 p.m. Gamma attends MGMS from 12:00 p.m. until 4:15 p.m. [Footnote with citations omitted.]

55. While at school, Gamma receives very intensive services. She receives services in a Setting 3 self-contained classroom. She has either one or two adults with her at all times providing services and working on her goals and objectives. [Footnote with citations omitted.]

56. The District emphasizes that, unlike most special education students, Gamma receives the undivided attention of one or more adults for the full four hours and fifteen minutes that she is at school. [Footnote with citations omitted.]

57. The School District's seizure disorder expert, Dr. Shams, opined that for a student who was not available for learning until the afternoon, one or two

hours of instruction was “good,” “fine” and sufficient. [Footnote with citations omitted.]

V. The Record Evidence on Educational Progress

58. Gamma made some progress during her time at Cedar Island. The record reflects that Gamma made progress:

- (a) using eye gaze methods to make choices and answer questions;
- (b) hand-washing; and,
- (c) using modified signs as a means of communication. [Footnote with citations omitted.]

59. Much like the experience in Kentucky, Gamma’s progress in the Osseo Schools varied - with school staff reporting that “there were periods of progress and then there were periods where [her signing skills] would wane.” [Footnote with citations omitted.]

60. The District maintains that because of the severity of Gamma’s condition, there was a real risk of a regression in Gamma’s skills. At the evidentiary hearing, Dr. Karen Wills, a pediatric neuropsychologist, and the School District’s expert on assessment and interventions, noted that she looked for signs of deterioration in Gamma’s communication skills over the five years that Gamma has been enrolled in the Osseo schools. She maintains that she did not see any evidence of regression. [Footnote with citations omitted.]

61. Likewise Teresa Elliot, Gamma’s case manager at MGMS, maintains that Gamma made progress during the 2019-2020 school year. Pointing

to a progress report during the 2019-2020 school year, she states that Gamma increased her ability to:

- (a) use direct selection for communication;
- (b) choose who she wanted to work with or do an activity;
- (c) communicate choices (e.g., whether she wanted a bite of avocado or a bite of something else); and,
- (d) self-initiate handwashing. [Footnote with citations omitted.]

VI. What Program Does Gamma Need?

A. Eye-Gaze Technologies

62. Pamela Kohlhepp, who taught Gamma for a period of three school years at Cedar Island, notes that there were active discussions between school staff and Gamma's Parents about Gamma using eye gaze methods. She confirmed, however, that these methods were not always used with Gamma. [Footnote with citations omitted.]

63. The parents agreed that eye gaze technologies would be useful for Gamma, but were likewise eager for their daughter to retain the signs that she was using. [Footnote with citations omitted.]

64. Eventually the IEP Team agreed that Gamma's IEP should shift to focusing on mixed communication skills, including both hand signs and eye gaze applications. [Footnote with citations omitted.]

65. Gamma's parents procured a speech generating device with eye gaze technology and delivered it to MGMS for use. The equipment went

unused, however, because the staff could not get the unit to power on. It is unclear from the record whether any efforts were made to charge the battery on the unit, or to repair or replace the item. [Footnote with citations omitted.]

66. Ms. Kohlhepp maintains that eye gaze technologies were the most efficient and versatile means of communication for Gamma. As Ms. Kohlhepp reasoned, “with eye gaze [technology,] we could expand [Gamma’s] choices and the number of things she was able to communicate more than... with signs because of the dexterity that so many signs require and because of the fact that many signs require both hands,” which poses a challenge for her. Gamma is not “as capable with her left hand as she is with the right [hand].” [Footnote with citations omitted.]

67. Ms. Kohlhepp urges use of eye gaze technology with a speech generating device for Gamma. [Footnote with citations omitted.]

68. Dr. Reichle and Ms. Deborah West, the District’s expert, both agree that eye gaze applications are a good fit for Gamma, because Gamma can use these applications “reliably and quickly” to communicate. [Footnote with citations omitted.]

69. As Dr. Reichle explained, signing and gestures are difficult for Gamma due to motor limitations, making that mode of communication less understandable and limited, whereas graphic mode communication has the potential for her to communicate at further distances and with a greater number of listeners. [Footnote with citations omitted.]

70. Dr. Reichle recommends that a trial of eye gaze technology ought to occur immediately because “[i]f it was successful it would change her life dramatically.” [Footnote with citations omitted.]

B. Additional Hours of Instruction

71. The School District has struggled in making progress on Gamma’s IEP goals and objectives with a four-hour and fifteen minute school day. Indeed, as Dr. Reichle was preparing the IEE, Gamma’s current special education teacher and case manager, Teresa Elliot, confided that some of the instructional objectives in Gamma’s IEP could not be implemented in the time available during her shortened school day. [Footnote with citations omitted.]

72. Because of her seizure condition, and the toll that repeated seizures has upon her, Gamma does not learn as efficiently as a typical student. Accordingly, three hours of instruction for Gamma will not render the same progress as three hours of instruction for a peer. [Footnote with citations omitted.]

73. In the autumn of 2020, the parents, at their own expense, hired Dr. Reichle to conduct a series of discrete trial tests and to assess how interventions in the mid and late afternoons might impact Gamma’s learning. A series of tests were performed by Dr. Reichle and his aides between the hours of Noon and 1:15 p.m. and then later between 4:15 p.m. and 5:30 p.m. [Footnote with citations omitted.]

74. Dr. Reichle now recommends more hours of instruction for Gamma. As he explained during the evidentiary hearing:

My opinion is it’s likely she would make more gains with additional instruction....

My opinion is that had she been given a larger amount of time to work on those communication and social skills she would have made additional gains. And I believe that those additional gains are critical given my earlier statement that every year [Gamma] is falling further and further behind communicatively. [Footnote with citations omitted.]

75. Ms. Ott concurs. As she observed at the evidentiary hearing: “The more severe the disability, the more time [students] need. The more time to rehearse and the more time we need to develop new skills.” [Footnote with citations omitted.]

76. For its part, the School District agrees that the amount of instruction should be based upon the number of hours that Gamma can remain engaged, active and alert. [Footnote with citations omitted.]

77. Dr. Breningstall testified that Gamma would benefit from school time between 4:15 p.m. and 6:00 p.m. “[b]ecause that is the time of day that is her best time for functioning” and would provide “more opportunities for the instruction that was delivered at that time to be beneficial for her.” [Footnote with citations omitted.]

78. In both Boone County, and later during Dr. Reichle’s autumn 2020 discrete trial tests, Gamma was able to work easily without breaks, stay on task with a high rate of responding, without significant seizure activity, between 4:15 p.m. and 6:00 p.m. [Footnote with citations omitted.]

C. Discreet Trial Training

79. As noted above, the seizures that follow from LGS impact the rates at which Gamma can acquire new skills. Thus, when making educational plans for Gamma, key questions have been the total “amount” of instruction; the number of distractions in the settings where that instruction occurs; and the intensity of the “dosing” of such instruction. [Footnote with citations omitted.]

80. Dr. Reichle described the key components of the discrete trial approach as including: (1) one-to-one instruction that minimizes distractors; (2) amassing a series of instructional opportunities; and (3) instructional trials administered at a brisk pace. [Footnote with citations omitted.]

81. Dr. Reichle urged such approaches as an effective means of having Gamma learn new skills, fairly quickly, that can then be generalized to the broader environment. [Footnote with citations omitted.]

82. Dr. Reichle further maintains that during the autumn 2020 sessions with Gamma, she made material and meaningful improvement, using these methods to acquire skills in a short period of time.

83. Dr. Wills, the School District’s assessment and intervention expert, agrees that Gamma needs direct instructional methods like discrete trial training. [Footnote with citations omitted.]

84. Moreover, as the District’s education expert, Ms. West, testified, “people are probably more easily able to get and maintain [Gamma’s] attention in a one-to-one situation.” [Footnote with citations omitted.]

85. Marygrace Ott agrees. She opined that Gamma requires intensive, one-to-one instruction in order to learn. She also recommended a distraction-free environment and close proximity between Gamma and her teacher during instruction. [Footnote with citations omitted.]

86. Dr. Reichle observed that the academic literature regarding intensity of instruction and learners with intellectual disabilities, suggests “that higher dosages result in quicker acquisition.” Dr. Reichle’s opinion with respect to Gamma was likewise clear - “I think more is better.” [Footnote with citations omitted.]

87. Dr. Reichle also recommended more frequent repetition in order for her to maintain skills and avoid deteriorating performance. [Footnote with citations omitted.]

D. Educational Programming Alongside Her Peers

88. A key fault line of the dispute in this case is the importance and priority that should attend giving Gamma opportunities to obtain socialization skills by learning alongside peers. The District maintains that it has opposed the parents’ requests for a longer school day, and suggestions to have afternoon instruction for Gamma to occur at their home, because such plans would deprive Gamma of opportunities to learn alongside her peers and would not be education in the least-restrictive environment. [Footnote with citations omitted.]

89. The hearing record reflects that these proffered reasons are more pretextual than real. The record reflects that:

- (a) Gamma's current IEP and the District's methods instruction provides minimal opportunities to interact with her peers;
- (b) Gamma's IEP does not have her participating very often in group learning activities;
- (c) Gamma's IEP does not have her practicing skills in a supervised social context;
- (d) no IEP Team member has suggested that Gamma should have more time with her peers at school or that her school schedule should change to provide more time with peers;
- (e) there is no data in the record on the effect of Gamma learning in an integrated environment;
- (f) during Dr. Reichle's IEE, he observed that Gamma rarely reciprocated the attention of a peer who repeatedly approaching her; and,
- (g) the School District has not implemented the social integration methods urged by its expert, Dr. Wills. [Footnote with citations omitted.]

90. As Dr. Reichle noted in his evaluation report, Gamma is very inconsistent attending to others unless they are engaged in amusing activities and that more generally she is more apt to attend to staff than to peers. [Footnote with citations omitted.]

91. Additionally, Gamma learns best with one-to-one discrete trial training and not during instruction with peers. [Footnote with citations omitted.]

92. Although interaction with peers is a laudable and desirable goal, it is a less pressing need for Gamma. There are other skills that she more urgently requires. Thus, prioritizing peer interaction for Gamma comes at an unacceptably high opportunity cost. [Footnote with citations omitted.]

93. There are also significant practical problems in following this path. As Dr. Reichle explained, in order to be meaningful, learning opportunities with peers would need to be carefully planned to focus on simple activities that involve things like turn-taking. He cautioned against merely adding Gamma to a group of other students, because she is not a good imitator and would not greatly benefit under such circumstances. [Footnote with citations omitted.]

VII. The School District's Inquiries into Gamma's Availability in the Morning

94. During the 2016-2017 school year, the District requested additional medical information regarding Gamma. The proffered reason for the inquiries was to "better understand the educational implications for [Gamma's] seizures, as well as any implications related to medication, medication administration, and development of the seizure care plan."

95. More particularly, the School District wanted to assess for itself whether Gamma could be in school for more hours of a typical school day. The School District proposed that a school nurse be sent to Gamma's home during the morning hours so as to develop and track data relating to Gamma's seizure activity before noon-time. The School District hoped to establish through this tracking that Gamma was available for instruction in the morning hours.

96. At the evidentiary hearing, Dr. Wills urged the parties to “be a little more creative... and a little more flexible about the scheduling” for Gamma. The creative solution that Dr. Wills urged was instruction at home between 10:30 a.m. and Noon.

97. Dr. Breningstall opined that Gamma’s sleep schedule should not be adjusted to try to start her school day earlier. He warned that doing so would lead to “inevitable worsening of her problems.” As Dr. Breningstall reasoned, morning seizures “have been consistently more likely to occur if Gamma’s sleep schedule is disrupted,” such that an earlier start-time would have an adverse impact on Gamma’s well-being and readiness for school. [Footnote with citations omitted.]

98. The hearing record includes a number of different explanations, offered by the School District between the autumn of 2015 and late 2020, as to why instruction services were not available in the late afternoon. [Footnote with citations omitted.]

99. The School District asserts that the school schedule for Gamma was flexible, and that 4:15 p.m. is not a rigid barrier on the delivery of services to Gamma, but those claims are not credible. [Footnote with citations omitted.] In reality, there was no flexibility in the instruction schedule for Gamma beyond 4:15 p.m.

100. The activities that occur in the School District after 4:15 p.m. are homebound instruction for students who cannot attend school, transition services for those exiting the school system and extra-curricular events.¹⁰⁰ 101. The hearing record reflects that the School District’s aggressive press for an earlier start time for Gamma did not follow an

individualized assessment of Gamma's needs, but rather the need to safeguard the ordinary end-of-the-workday departure times for its faculty and staff. As described above, the District offered nursing services to address increased seizure activity if Gamma would attend school in the mornings, but refused at-home instruction by lesser skilled professionals in the late afternoon. [Footnote with citations omitted.] Such outcomes are only sensible, in terms of costs to the District and risks to Gamma, if ending the workday by 4:15 p.m. is a hard-and-fast requirement.

102. Likewise, the School District's claim that instruction at home is available only to those students who do not have opportunities to learn in school, [Footnote with citations omitted.] blocked an individualized assessment of the instruction and methods that Gamma needed.

VIII. Gamma's Compensatory Education Claim

103. To remedy the School District's failure to offer an educational program that was based upon an individualized assessment of Gamma's needs, the Student requests entry of an order awarding hours of compensatory education. [Footnote with citations omitted.]

104. During the evidentiary hearing, Dr. Reichle asserted that a fair calculation of educational benefits that Gamma has lost would be to assess "the number of instructional hours that she did not have if she were in a full day of school and that those would represent the compensatory hours . . ." [Footnote with citations omitted.]

105. Gamma requests an award of 1,935 hours in comprehensive education. Gamma asserts that she is entitled to remediation of 2.25 hours of missed

instruction for each of the 860 school days since September 14, 2016. [Footnote with citations omitted.]

106. On March 1, 2021, the U.S. District Court for District Court of Minnesota issued its opinion *In the Matter of Minnetonka Public Schools, Independent School District No. 276, v. M.L.K.*, Civil No. 20-1036 (DWF/KMM). In that case, the U.S. District Court held, in part, that the applicable statute of limitations in special education disputes like this one, is two years. Additionally, the limitations period is calculated by moving backwards from the date that a due process complaint is filed. As Judge Frank explained:

Instead, unless and until the Eighth Circuit Court of Appeals rules otherwise, the proper statute of limitations under the [Individuals with Disabilities Education Act (IDEA)] is two-years. Because Parents filed their due process complaint on August 8, 2019, any claims based on District actions before August 8, 2017, are untimely. [Footnote with citations omitted.]

107. One month prior to the issuance of the decision in *Minnetonka Public Schools v. M.L.K.*, the undersigned Administrative Law Judge issued a Sixth Prehearing Order that calculated a different, and more generous, limitations period.

108. Because the supervisory role of the federal district courts in special education disputes, and the power of the district courts to review the legal conclusions of administrative law judges *de novo*, the holding in *Minnetonka Public Schools v. M.L.K.*, is more than mere persuasive authority. [Footnote with citations omitted.]

109. The two year limitations period announced in *Minnetonka Public Schools v. M.L.K.*, is binding on tribunals in Minnesota, “unless and until the Eighth Circuit Court of Appeals rules otherwise. . . .” [Footnote with citations omitted.]

110. The weight of the evidence is that Gamma is available for instruction and nearly seizure free, during the hours between 4:30 p.m. and 6:00 p.m. each weekday. [Footnote with citations omitted.]

111. Moving instruction beyond 6:00 p.m. to 6:30 p.m. invites significant risks to Gamma’s health and well-being. In fact, none of the educational programs detailed in the hearing record undertook instruction at, or near, 6:30 p.m. [Footnote with citations omitted.]

112. One and a half hours of missing instruction, on 165 days of a Minnesota school year, multiplied by the two school years with the limitations period, equals 495 hours of instruction. [Footnote with citations omitted.]

113. Such a program of relief is rigorous, to be sure, but is administratively practicable if both the School District and the parents commit to its completion. For example, July and August each have approximately 22 week days. A six-hour program of instruction at home on each of those week days, over the course of the next two summers, could result in the School District providing 495 hours of compensatory educational services to Gamma before she matriculates from the Osseo Public Schools. [Footnote with citations omitted.]

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Education and the Administrative Law Judge have jurisdiction to consider the Student's request for a due process hearing. [Footnote with citations omitted.]

2. The parties received proper and timely notice of the time and place of the hearing and the disputed issues. This matter is properly before the Department and the Administrative Law Judge.

3. The burden of proof is on the Student to demonstrate by a preponderance of the evidence each of the alleged violations. [Footnote with citations omitted.]

4. Under the IDEA, the Student is entitled to receive a free appropriate public education (FAPE). [Footnote with citations omitted.]

5. A FAPE is provided by means of an individualized program formulated by the child's IEP Team and based upon her individual needs.

6. In this case, the Student established that education and planning did not always account for "the special instruction and services which are appropriate to [the student's] needs." [Footnote with citations omitted.] Instead, whenever there was a conflict between the need to maintain the regular hours of the school's faculty, and the student's need for instruction, the regular hours of the faculty was always the prevailing and paramount consideration.

7. Gamma's educational programming was thus constrained by limitations imposed upon, and outside of, the IEP Team. [Footnote with citations omitted.] Gamma was legally entitled to an educational program that was appropriate to her needs.

8. Additionally, Dr. Shams' suggestion that one or two hours of instruction was "good," "fine" and sufficient for a student like Gamma, is not well taken. [Footnote with citations omitted.]

9. As to the reasons for limiting Gamma's instructional program to 4:15 p.m., District officials did not offer "a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of [her] circumstances." [Footnote with citations omitted.]

10. The Student established that her educational program was not "appropriately ambitious in light of [her] circumstances" and that she did not have "the chance to meet challenging objectives." [Footnote with citations omitted.]

11. The Student established that an educational program, which did not include supplemental instruction at home, did not afford her a FAPE.

12. In this particular case, the opportunity to access hours of afternoon instruction at home - particularly discrete trial opportunities - would be beneficial, meaningful and appropriately challenging to Gamma. Moreover, instruction at home assures that there will be a distraction free space for effective discrete trial testing. [Footnote with citations omitted.]

13. There is a two year limitations period on I DEA claims. [Footnote with citations omitted.]

14. The Student established that 495 hours of instruction would fairly remediate the denial of a FAPE.

15. The Student established that the following additions to her IEP would result in an educational

program that is responsive to her individual needs and appropriately ambitious in light of her circumstances:

- (a) instruction at home that includes discrete trial training interventions between 4:30 p.m. and 6:00 p.m. each school day;
- (b) compilation and review of the discrete trial training intervention data;
- (c) direct and indirect services of a Speech and Language Pathologist to design, deliver and monitor the implementation of a communication intervention program; and,
- (d) the provision of eye gaze technology with a speech generating device to effectively augment her communication capacities.

16. The Student did not establish that a board certified behavior analyst was needed in order to design or deliver the discrete trial interventions. [Footnote with citations omitted.]

Based upon these Conclusions of Law, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. The School District shall revise the Student's IEP so as to include the interventions and supports consistent with Conclusions 14 and 15 above.
2. The Student is entitled to 495 hours of compensatory education instruction.

JA-478

Dated: April 21, 2021.

/s/ Eric L. Lipman

ERIC L. LIPMAN

Administrative Law Judge

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

A.J.T., a minor child,
by and through her
Parents,
A.T. and G.T.; and A.T.
and G.T.,
individually and jointly,
Plaintiffs,

Court File
No. 21-cv-1760
(MJD/DTS)

v.
Osseo Area Schools,
Independent
School District No. 279;
and Osseo
School Board
Defendants.

**AFFIDAVIT OF
AARON THARPE**

STATE OF MINNESOTA)
COUNTY OF WASHINGTON)

Aaron Tharpe, under penalty of perjury, states:

1. I am one of the Plaintiffs in this matter and the Father of A.J.T., the subject of these proceedings, and make this Affidavit on behalf of her Mother and I in response to the motion for summary judgment.

2. Since she was six months old, our daughter has had intractable epilepsy and developmental delay for which we have diligently sought medical care and treatment. Her medical condition substantially limits several major life activities and she has always been eligible for special education. Accordingly, during her

educational career, she has always had an Individualized Education Program (IEP).

3. Our daughter's medical providers have advised us to avoid any morning activities, including school, medical appointments, or recreational activities. They have determined that she needs an uninterrupted sleep schedule into mid-morning, and then a slow preparation for the day in order to minimize seizure activity. We have followed that medical advice.

4. We have attempted to alter her morning care and treatment regimen many times over the years and doing so definitely increases her seizure activity.

5. We have been advised by her medical providers to do all we can to avoid increased seizure activity in order to reduce damage to her brain and body, as well as the suffering that accompanies seizures.

6. Every school our daughter has attended has agreed to excuse her attendance in the morning based on her medical care and treatment needs as documented by one neurologist after another, and in Kentucky the Boone County School District provided a modified schedule as a reasonable accommodation based on her disabilities and needs for a full school day like her peers.

7. Over the years, the noon start time has been recommended by numerous neurologists providing care to my daughter, including those at Cincinnati Children's Hospital, Mayo Clinic, Gillette Children's Specialty Healthcare and Minnesota Epilepsy Group. Ex. A. [Footnote omitted.] Each of these recommendations was provided to the District.

8. The Kentucky schools provided our daughter instruction outside “regular” school hours, from noon to 6:00 p.m. in order to avoid disability discrimination by providing her a school day that was not equal to her peers, and because she needs maximum instruction to learn. Full-time services were provided starting in 2011 with in-school instruction from noon to 3:45, and in-home instruction from 4:00 to 6:00, three days per week from a special education teacher and two days a week from a publicly-funded behavior specialist, Mary Grace Ott. Ex. B. Ms. Ott confirmed these hours in her attached affidavit as well as in her testimony at hearing. We discovered that her last Kentucky IEP did not accurately reflect all of her hours of instruction only when we began the second hearing, but we did not discover this mistake during our time in Kentucky because our daughter received the full day of service her IEP Team agreed to provide her, from 12:00 noon to 6:00 p.m.

9. When deciding to provide our daughter with late afternoon instructional hours, Pam Eklund, Boone County Schools (Kentucky) Special Education Director, told me that the school was providing services outside regular hours to typical students for clubs, sports and other educational activities, so it only made sense that it would provide a full day of services to our daughter as well.

10. In May 2014, I accepted a new job at Target in Minnesota. For the first fifteen months of my employment, I commuted between an apartment in Minnesota and my home in Kentucky where my wife and daughter lived.

11. In Spring 2015, we began considering if my wife and daughter would relocate to Minnesota. Whether or not they moved was dependent upon us

finding appropriate medical providers and a school that could provide a similar or better education to what our daughter received in Kentucky.

12. I contacted Osseo School District (District), as well as other Minnesota districts, to discuss our daughter's Kentucky IEP. In May 2015, I provided the IEP to Paula Rackner (Osseo Special Education Coordinator) and John Norlander (Osseo Special Education Coordinator). During e-mails between Rackner and me on May 13, 2015, a telephone conversation with Rackner on May 14, 2015, and follow-up e-mails between me and Norlander on May 15, 27, 29, June 8, and 11, 2015, we discussed the fact that our daughter received instruction from noon until 6:00 p.m., and I was told that the Kentucky IEP would be adopted in its entirety. Relying on the promise, we decided to move from Kentucky to Minnesota, and selected a home in the District.

13. On July 13, 2015, I sent an e-mail to Rackner and Norlander informing them that my family would be moving to Minnesota, providing our new home address in Minnesota. In the e-mail, I also provided a letter from my daughter's Developmental Pediatrician, Patricia Manning-Courtney, MD, and offered to provide additional medical information if needed. Rackner responded with an e-mail hoping that our move went smoothly.

14. In August 2015, during open enrollment, I again provided the District my daughter's Kentucky IEP, as well as a large packet of medical information (though such was not requested) supporting my daughter's disabilities and school related accommodations, including her need for a full school day from noon to 6:00 p.m.. As part of enrollment, I also signed a release for Boone County Schools to

provide the District with all medical records, assessments and special education records (including verification of “handicap” as described in the language of the release). And, before her first day, and prior to each school year thereafter, my wife signed a release providing the District the unfettered right to contact our daughter’s neurologist to discuss her medical condition. Ex. C. During enrollment, I also introduced myself to Rackner and we briefly discussed our daughter’s transition to the District which would occur in October 2015.

15. On September 21, 2015, I attended an IEP Team meeting with District officials to discuss our daughter’s transition to Cedar Island Elementary School in the District where we again discussed her need for and provision in Kentucky of a full day of school on a modified schedule.

16. In early October 2015, our family moved to our home in Minnesota. Our daughter was scheduled to start school on October 21, 2015.

17. On October 14, 2015, I attended another IEP Team meeting with District officials – seven days before our daughter was to begin school. During this meeting, Amy Stafford, Special Education Coordinator, for the first time, told me the District would *not* adopt the Kentucky IEP in its entirety, refusing to provide instructional hours from until 6:00 p.m. as provided by the Kentucky IEP. Stafford stated that the District was not required to provide instruction outside regular school hours, and was prohibited from providing both in-school and at-home instruction. Ex. D. Instead, Stafford stated that the District would only provide instruction from noon to 3:15 p.m. (though the regular school day ended at 4:00 p.m.). The early 3:15 p.m. end time was proposed by

the District for “safety reasons” because my wife provided transportation and the buses blocked the egress door to transport students without disabilities. There was *no* discussion about whether our daughter needed less than a full school day.

18. When the District decided to reduce her instructional hours, our daughter had not started school at Cedar Island Elementary School. Nobody from the District had taught or even observed her. The District had not completed an evaluation. I had signed all releases for information requested by the District. The District had not requested additional medical information. And the District had not requested additional educational records.

19. During the October 14, 2015 meeting, I specifically told the District that its decision to give our daughter less than a full day of school equal to her peers was discriminatory and did not comply with the Americans with Disabilities Act. My complaint of disability discrimination was documented in the notes of Dan Wald, Principal, Cedar Island Elementary School, and Amy Stafford, Coordinator. Ex. D.

20. On October 15, 2015, I sent an e-mail to Amy Stafford. Again, I told her that “...the accommodation was proposed [instruction from noon to 6:00 p.m.] because [our daughter] is not able to attend school until after noon due to regular morning seizure activity. It is our position she should be afforded similar hours of instruction as nondisabled students and that the proposed modification to instructional hours is reasonable.” In the same e-mail, I told Stafford that the District had not told me its position to reduce hours in conversations and e-mails before I chose to move to the District, during open enrollment,

or in our prior IEP meetings. In the same e-mail, I told Stafford the delay in the District informing me of its decision “. . .materially impacted my ability to participate in the interactive process required under the ADA, IDEA and other state and federal laws.”

21. On October 19 or 20, 2015, I had another meeting with District officials at Cedar Island Elementary School. During that meeting, I again complained that the District’s refusal to even consider providing instructional hours beyond the end of the regular school day was discriminatory.

22. On October 20, 2015, in response to the decision to reduce hours, I provided the District a document alleging that “. . . the District had not scheduled sufficient IEP meetings to discuss appropriate accommodations from an education and safety perspective and/or engage in the interactive process to meet the needs of [our daughter].”

23. Although I made specific allegations of discrimination with facts supporting my concerns, the District did not inform me of its non-discrimination policy. And the District did not investigate my complaints.

24. Early in the 2015-2016 school year we convinced District officials to provide our daughter instruction from noon to 4:15 p.m., but we never agreed this was fair, equal or sufficient to meet her needs.

25. For the next six years, in countless IEP Team meetings, Conciliation Conferences, and other school meetings with District officials, we consistently complained that our daughter was being discriminated against, regressing (or not progressing at the same rate as when she was in Kentucky), and

that she deserved a full school day similar to typical students and as she received in Kentucky.

26. Not once was there an IEP Team discussion or decision about our daughter's need for a shortened school day and there was no consideration of opinions on that topic from any of her teachers, any evaluators, any medical providers or us as her Parents. We were simply told by the Coordinator who attended as the District's official representative, time after time, that "the District" decided it would not provide the full school day we requested. The stated reasons included: a) on 10/16/15 - "The district has denied this request saying state law does not mandate this support from the school district"; b) on 3/18/16 - "The District stands ready to provide services and programming in school for a full day or prior to 12:00 pm each day as [A.J.T.]'s medical needs allow"; and c) on 6/6/16 - "The district discussed an extended school day and decided against it due to the precedent it would start. For Osseo School District and other districts across the area [sic]." The District continued to propose experimenting with alterations to our daughter's morning care and treatment routine that we repeatedly rejected as against medical advice and too risky.

27. On February 18, 2018, Joy Fredrickson, Special Education Coordinator, asked to meet with my wife and me. In that meeting, she told us that when our daughter matriculated to middle school, her instructional hours would be further reduced to noon to 3:00 p.m. (from noon to 4:15 p.m.). She told us her hours would be reduced since the regular school day ended at 2:40 p.m. without any discussion of whether our daughter needed less than a full school day or reduced hours. We were distraught that the District

wanted to further reduce our daughter's instructional hours just because the standard hours of school operation were changing. The proposed reduction had nothing to do with our daughter's needs and did not accommodate her disability.

28. On March 16, 2018, we met again with Fredrickson. During that meeting, we proposed six options so our daughter could at least keep current instructional hours, including: (1) she would progress to the 6th grade and the District would provide educational services until 4:15 p.m.; (2) she would receive instruction at the middle school from noon to 2:40 p.m. and additional instruction would be provided by an aide at the middle school from 2:40 p.m. to 4:15 p.m.; (3) she would receive instruction at the middle school from noon to 2:40 p.m. and an aide would provide additional instruction in our home on agreed upon dates and times; (4) she would receive instruction at the middle school from noon to 2:40 p.m. and then at the elementary school directly across the street until 4:15 p.m.; (5) she would progress to the 6th grade but be instructed at the elementary school until 4:15 p.m.; or (6) she would be kept in the 5th grade and instructed at the elementary school from noon to 4:15 p.m. When making these proposals, we were not abandoning our position that our daughter deserved a full day of school, but trying to find a way to avoid having her instructional hours further reduced.

29. On April 2, 2018, the District sent a Prior Written Notice refusing all our suggested accommodations and offering only to provide instruction from noon to 3:00 p.m. at the middle school.

30. Three days later, on April 5, 2018, the District held its first IEP meeting for the upcoming year. Incredibly, someone at the District made the decision to reduce hours before we had an IEP Team meeting to discuss progress, goals and objectives for the next year, our daughter's needs or whether she needed a shortened school day.

31. On April 23, 2018, I sent an e-mail to Fredrickson summarizing the above and informing her that it was my position that "... the District's actions and positions are unlawful, discriminatory and/or retaliatory for many reasons, including [our daughter's] race, sex, disability and/or protected class, and or parental protected activity [advocating for our daughter during the cooperative IEP Team process], and the District is not in compliance with [*Andrew F. v. Douglas County School District*] and other state and federal laws."

32. Just as in years prior, the District did not inform us of its nondiscrimination policy or its complaint procedures. And the District did not investigate or resolve our complaints.

33. This is when the District began treating me differently than in the past. In my April 23, 2018 e-mail, considering the District's proposal to further reduce hours, I asked Fredrickson to provide a "detailed description of the District's proposed 3.00 educational hour day, in fifteen minute or less increments, showing tasks to be performed and IEP goal alignment ...". I explained that I wanted to understand the impact of the reduction of 1.25 educational hours so I knew what would be reduced or eliminated, and if the District chose to combine tasks why they were not combined before. I explained that our daughter's teacher, Pam Kohlhepp, had

easily provided this breakdown in past years so the District should be willing to do for the upcoming year.

34. In her May 4, 2018 response e-mail, and in future responses, Fredrickson refused to provide a breakdown as had been done in past years, instead only provided general categories so we would not know the specific impact of a reduced school day.

35. On April 30, 2018, I sent an e-mail to Fredrickson, informing her that I had filed disability discrimination complaints with the Minnesota Department of Education, the U.S. Department of Education Office for Civil Rights, and the U.S. Department of Justice Civil Rights Division. and that copies of the complaints had been mailed to Superintendent Kate Maguire. In a response e-mail, Fredrickson stated the District received the complaints.

36. On February 1, 2019, the District started this litigation, filing for a due process hearing to reduce our daughter's instructional hours. After we retained counsel, the District's request was withdrawn.

37. In June 2019, the District covertly recorded a conversation between District officials, our daughter's neurologist, and me while we discussed her medical condition without my, or the neurologist's, prior notice or consent. It is my understanding that recording parents, students and their medical providers while soliciting private health information without prior notice and consent is contrary to the law and District practices. Still, the District offered the a transcript of that recorded private health information as an exhibit during the second due process hearing we initiated to finally obtain a full day of school for our daughter.

38. Dr. Joe Reichle, preeminent expert in the field of speech, language, communication and assistive technology for children with severe communication disorders, was retained by the District as an independent educational evaluator as a term of agreement when the District withdrew its hearing against us in 2019. Dr. Reichle made numerous sound recommendations to improve our daughter's communication skills, including providing her instruction from noon until 6:00 p.m. and providing her with eye gaze technology with a speech generating device, many of which were not implemented by the District without discussion, justification, or IEP Team agreement. Ex. E.

39. After the April 21, 2021 administrative decision finding that the District violated our daughter's special education right to a free appropriate public education, the District continued to show animus towards our family and the retaliation intensified. To bolster its legal position, the District sought to create new evidence to show that the additional instructional hours it was ordered to provide made no difference, or suddenly caused an increase in seizure activity during that time, and did so in ways that further harmed our daughter and us. We have personally provided instruction to our daughter between 4:15 and 6:00, as did her educators in Kentucky, and as did Dr. Reichle in his intervention evaluation, and she not only tolerates well but makes meaningful progress during those times. Her seizure status between 12:00 noon and 6:00 p.m. has been stable and there is no reason to believe that her seizures have increased simply because the District was ordered to provide additional services.

40. First, although ordered on April 21, 2021, the District failed to secure eye gaze technology until October 12, 2021 – almost six months later. And, the device was only provided for instruction at school during the hours of noon to 4:15 p.m., not during the late afternoon sessions at home where the District sought to show lack of progress. Only after repeated requests did the District provide the eye gaze device for the afternoon home sessions in March 2021.

41. Second, the District consistently cancelled instructional sessions. The following instruction was cancelled and not made up by the District: In 2021, November 5, 2:30-4:15; November 12, 2:30-4:15; November 18, 4:30-6:00; November 23, 4:30-6:00; November 24, 4:30-6:00; November 29, 4:30-6:00; December 1, 4:30-6:00; December 3, 4:30-6:00; December 7, 4:30-6:00; December 8, 4:30-6:00; December 10, 4:30-6:00; December 14, 4:30-6:00; December 15, 4:30-6:00. In 2022, January 4, 2:30-4:15; February 2, 4:30-6:00, February 3, 4:30-6:00, April 20, 4:30-6:00; April 29, 2:40-4:15; June 3, 4:30-6:00; June 7, 4:30-6:00 and June 9, 4:30-6:00. While not an exhaustive list of cancellations, this reflects a significant amount of missed instruction, mostly in the afternoon sessions during times the District sought to show that our daughter cannot make progress. Our daughter has also missed additional instruction when staff were late, causing her to miss ten to fifteen minutes and sometimes up to thirty minutes of instruction that was not made up. In 2021, this occurred on September 20, September 29, October 18, November 1, November 11, November 22, November 30, December 2, and December 16. Staff were only late during afternoon instructional sessions

during times the District sought to show that our daughter cannot make progress.

42. Third, the District removed one of our daughter's afternoon teachers, assigning her to another student. On November 18, 2021, Jan Bitzer, Special Education Coordinator, sent an e-mail stating that our daughter's afternoon teacher, Linda Tangren, who was providing services from 4:15 p.m. to 6:00 p.m. in the home on Tuesdays, Wednesdays and Fridays "will no longer be providing services."

43. I responded to the e-mail that I knew the District chose to reassign Linda Tangren, and that it was the reason the teacher is no longer available. In the e-mail, I told the District that I felt the reassignment was continued animus and retaliation against our family.

44. On December 14, 2021, Bitzer sent me an e-mail apologizing for the teacher's removal and informing me that the previous teacher, Linda Tangren, would be reassigned again to our daughter. I was told the teacher would be reinstated January 4, 2022.

45. Fourth, the District demonstrated animus when it failed to comply with the agreement of the IEP Team to schedule an IEP Team meeting once baseline data was secured so that new goals and objectives could be agreed upon and progress measured. The District did not comply with the Team agreement so it could hastily try to supplement the record in its appeal of the adverse administrative hearing. On May 7, 2021, at our first IEP meeting after the April 21, 2021 Order, due the lost 2020-2021 academic year when in-person instruction was not available, the Team agreed that goals and objectives

would not be altered until baseline data was secured so that goals and objectives could be discussed and agreed upon and progress properly measured.

46. On November 4, 2021, Bitzer stated that she would like to schedule an IEP Team meeting. On November 29, 2021, I attended an in-person IEP Team meeting. This was the first meeting where District officials discussed with me proposed baseline data. On December 13, 2021, I attended a follow-up in-person IEP Team meeting. On January 2, 2022, the District filed a motion to supplement the record with “progress data” in the special education appeal. On January 3, 2022, the District provided me with its proposed IEP based on its understanding of baseline data. Fueled by its animus towards my family, for months, the District failed to inform me it had alleged baseline data so that we could discuss an IEP. Instead, it secretly tracked “progress” in an attempt to hastily show that our daughter can’t progress with additional instructional hours.

47. Fifth, District educators began to act differently around my wife and me. Beginning in January 2022, we noticed educators no longer told us how our daughter’s day was with any specificity. They were noticeably quiet and no longer engaged in friendly banter. And they stopped calling us if they were running late, had to cancel, or needed to communicate for any other reason. All communications between our family and educators began to flow only through Jan Bitzer. In particular, educators seemed uncomfortable around me. I felt like my role as our daughter’s advocate and District animus were hurting her education. So, I no longer worked in my home during instructional hours, travelling instead downtown to work, in an attempt

to make educators more comfortable and hopefully reduce the impact it had on our daughter's education.

48. Sixth, the District consistently refused to obtain medical information from our daughter's providers despite having constant authorization, instead attempting to create its own seizure tracking and medical information and complaining about lack of data. When the District filed for a due process hearing on February 1, 2019, one of its stated reasons was to obtain more medical information. Inexplicably, the District did not seek any medical records in the special education hearing although we agreed to provide it or again authorize its release. And, the District did not seek any medical records in this case, though we signed releases for Cincinnati Children's Hospital, Mayo Clinic, Gillette Children's Specialty Healthcare and Minnesota Epilepsy Group and the District subpoenaed those records. In my February, 2022 deposition, I told the District that our daughter participated in an FDA approved drug study for Fintepla (Fenfluramine) for several years, beginning in or around 2018, where seizure data was tracked. I also told our daughter's elementary school teacher, Pam Kohllepp, when the study began, so she would inform us of seizure activity at school. And, each year we signed a release giving the District the unfettered right to contact our daughter's neurologist to discuss her medical condition. Still, the District refuses to obtain our daughter's medical records or to disclose those records if obtained.

49. Seventh, the District is currently retaliating against us by refusing to hold a second IEP Team meeting. During our many years in the District, we have had multiple IEP Team meetings to discuss goals and objectives because our daughter's needs are

so complex and extensive. These are regularly offered to any parent wanting to discuss their child's IEP. On July 11, 2022, although I informed her of our long history of having multiple IEP meetings when needed, Kate Emmons refused in her e-mail response to permit the convening of a second meeting. Instead, she only offered a conciliation conference, mediation, facilitated IEP meeting, or a due process hearing.

50. In her deposition, Kate Emmons testified that she knew nothing about this dispute and had not spoken to anyone about it. But we personally met more than once with Ms. Emmons as the Special Education Director and 504 Coordinator to complain about the District's discriminatory treatment of our daughter. She told us that we should hire a personal care attendant after school hours instead of extending her school day, reflecting stereotyped misperceptions that our daughter was not worthy of a full day of instruction. Ms. Emmons also testified that she supervises the Coordinators who, over the years, dictated the shortened school day for our daughter and heard but ignored our discrimination complaints. We believe that the District, through its Coordinators, acted at the direction of Ms. Emmons.

51. The District's retaliatory actions towards me and our family have worn us down, dampened our advocacy efforts, required extraordinary efforts to resist, impaired our time with family and work, harmed our relationships with teachers, and affected our daughter's education by reducing our collaboration and her instructional time.

52. The District's disability discrimination has harmed our family by creating intense conflict to resolve a simple problem, by impairing the cooperative IEP Team relationship that should serve

our daughter, by reducing her instructional time and the critical progress she needs to move towards independence and success in life, and has drained our personal and financial resources put aside for her future to date in the amount of \$ 364,425.70 for costs and fees of experts and litigation.

53. The District's discrimination and retaliation have caused additional damages to our daughter as appropriately identified and quantified by Dr. Reichle in his expert damages reports. Ex. F.

54. Unless permanently ordered to provide our daughter a full school day, the communication assistive technology she needs, and to pay the costs to obtain these modest results, the District will persist in its efforts to treat our daughter and our family unfairly, and our family will continue to suffer harm from the damages inflicted on us by the District.

Date: August 18, 2022

By: s/ Aaron Tharpe

JA-497

Name: Ava Jacqueline Tharpe DOB: [REDACTED]
Date of ARC: 05/04/2011

Notes Page - 3:

All evaluation pieces and progress was discussed with the committee. Ava is currently eligible for services as a student with a developmental delay. The committee discussed Ava's progress and her evaluations and her eligibility. Ava has a diagnosed seizure disorder as well as significant communication delays. Mrs. Strater discussed what the eligibility means in that her services will not change but it is the most appropriate eligibility. Mrs. Ekund described various other eligibilities. Mrs. Eklund stated that once Ava progresses, the committee will continue to discuss eligibility. Dad agrees that Ava's weaknesses are impacted by her seizure disorder. Dad requested that he have the time to research the different eligibilities and ask any questions he may have. Mrs. Strater and Mrs. Eklund explained what a developmental delay is and that the child is expected to be at the same level of achievement as her same age peers. Mrs. Eklund explained that at any point and time any member of the ARC team can

Dad requested that the committee spend the last couple of minute of the meeting to discuss the agenda for the next meeting. Parents would like to talk about what her IEP would consist of, the hours of her school day. Dad wanted to discuss the hours that they would like to see for Ava next year. Ava is very heavy with her seizures late at night and when she wakes up in the morning. When this happens, Ava has usually recuperated by about noon. Currently, Ava is having her worst seizure at 8:30

in the evening. Parents want Ava to have the same number of school hours that any student would be afforded. Parents feel Ava would be most successful between the hours of noon and 6. Mrs. Eklund stated that when we discuss her IEP at the next meeting, it is requested that the parents have a doctors note stating why a modified school day (hours_ would be helpful for Ava. Parents do not feel like a shortened school day is appropriate for Ava. Dad stated that he would like the options of the county of what a modified school day could look like for Ava. Mrs. Eklund stated that specific hours are not put on the IEP, but the amount of service minutes needed and the location of services would happen. The hours of her school day would happen in the conference summary in the ARC meeting. Mrs. Strater stated that we could send a draft copy of the IEP would look like. Dad stated that they have had the chance to work with Ava over the past four years in many different settings. Dad asked the question to the committee if the committee members feel like Ava's current setting is appropriate for Ava. Dad wants to have a discussion of Ava's current program and what is going on. Dad feels like he needs to understand everyone's view on her current program before he agrees to what an IEP would consist of. Mrs. Melville stated that she does not want the parents to think that all of our multi-handicapped classrooms are not perhaps what they saw at the Perlman center. Dad stated that medically, Ava cannot function in a room where there are several kids in the room with various activities going on. Mom stated that she did observe 2 different multiple handi-cap rooms.

JA-499

The committee agreed to stop the meeting and continue.

* * *

Date of ARC: 05/16/2011

The committee looked at the short term goals for communication. See IEP for full explanation of goals and objectives. Under communications the committee agreed that with a baseline of 3 signs, Ava will increase her sign vocabulary to a list of 10 signs that will be developed between outside agency, parents, and school personnel. Ava will continue to work on receptive vocabulary beyond present level. Ava will work with familiar objects and when presented with a minimal field, Ava will use eye gaze, reach, or towards the requested object. Mrs. Tharpe asked if the committee could focus on reaching the object. Mrs. Bautista, OT, and the speech therapist agreed that eye gazing is a pre-reading skill and can help with tracking while reading. Mrs. Tharpe asked if the goal is to recognize things that are not in her regular routine and to expand on the objects that she receptively knows. Mrs. Strater stated that this was the goal for Ava. The committee also agreed that Ava would work on increasing her receptive vocabulary to non-preferred items. Mrs. Lawson stated that the inconsistency between locations in regards to the signs that Ava uses has been an issue and that is why we are coming up with the list of signs. During a language activity, Ava will use an output button during repetitive parts of a story or game. Ava will show the function of items: for example, if she has a ball would she throw it. Mrs. Strater also stated

that it would be helpful to have a list of items and activities that Ava would be working on.

Mrs. Webb stated that she is interested in looking into Ava's vision. Mrs. Webb stated that Mrs. Goetz, the vision teacher for Boone County, can come in and work with Ava once the parents send in an eye report. Mrs. Webb stated that once the eye report was sent to Mrs. Goetz. Mrs. Goetz would report to us if she could provide any services for Ava. Mrs. Tharpe stated that there is a concern with the use of light and that it may trigger seizure activities. Mrs. Bautista, OT, also stated that during her last seizure, Ava's eyes were very sciatic and then they became fixed. Mrs. Bautista indicated that since her visual responses are increasing, the neurologist may want to be consulted with by the parents to check into the visual perception skills of Ava.

Supplementary aids and services were discussed. There needs to be an adult with Ava at all times due to safety and her seizure disorder. See IEP for full list of items under supplementary aids and seizures. A parent request is also that the school let them know if there is a large illness circulating around the school. Mrs. Eklund stated that the positive reinforcement should be added so that the reinforcement is over the top and excitable.

Programs and modifications were discussed with the committee. See IEP for full details. The committee agreed that there should be open communication and release of information between and schools and agencies

Mrs. Bautista, was permitted to leave the meeting.

Service minutes were discussed with the committee. From now until the beginning of the IEP until the beginning of the school year will be 125 minutes, 5 times per week. This will be for the remainder of Kindergarten. At the beginning of the school year will be for 360 minutes, fives times per week.

Mrs. Eklund asked Mr. Tharpe what he expects her stamina to be for the next school year. Mr. Tharpe stated that Ava does not nap. Ava leaves twice early a week and is not here another day through the week. Mrs. Eklund asked if Ava would not be attending school for an outside therapies. Mrs. Tharpe stated that it would be his hopes to move the therapies around so that they would not interfere with the school hours so much. Mr. Tharpe did provide a letter from the doctor that provides his recommendation that Ava come a modified school day because of her seizure disorder. Mrs. Eklund stated that it is the ARC recommends that Ava start her school day at noon. Mrs. Eklund stated that Ava would still stay at school until 3:45, the end of the typical school day. At that point, school staff could work with Ava in the home for services. Mrs. Eklund stated that it would be our recommendation that Ava's outside therapies be scheduled after 3:45. Mrs. Eklund stated that the services would be considered home-based. Mrs. Eklund stated that Mr. Tharpe asked the committee thought that this was an appropriate setting. Mrs. Eklund stated that these services and IEP could be delivered here at Longbranch or at Ava's homeschool, Stephens.

* * *

JA-502

Student Full Name: Ava Jacqueline Tharpe

SSID: [REDACTED]

Birth Date: [REDACTED]

ARC Date: 08/23/2013

SUMMARY NOTES

<p>Summary Notes</p>

<p>This meeting is to discuss Ava's progress and discuss the addition to add extended day school. Mom waived the attendance of a regular education teacher to attend the meeting as Ava is only in the complex needs classroom.</p>

<p>Mr. Bolanos shared the progress with the committee. He reviewed the end of the year goals as well as Ava's benchmark for the beginning of the year. Ava's progress is about where it was last year.</p>
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<p>Mom wanted to discuss the desire for Ava to spend an extra year in primary. The committee discussed that students with significant disabilities typically do not use the extra year in primary. Mrs. Tharpe stated that if they can get the seizures under control there is a possibility for Ava to really make some gains. Mrs. Stambaugh also stated that students with severe disability sometimes stay an extra year in 5th grade. Also, students that have significant disabilities can stay in high school until the age of 21. The committee will re-visit this conversation later in the school year.</p>

<p>The committee asked Mrs. Tharpe if Ava could come to school earlier. Mrs. Tharpe stated that Ava is seizure overnight and sleeps in the</p>
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JA-503

morning. She can also be very seizure heavy in the morning so it would be nearly impossible for Ava to come in earlier.

The committee agreed that it would be best for Ava to add on 2 days at 90 minutes each day. Carrie will be coming to the house 5 days per week. Even with her scheduled to come 5 days a week, but mom has to cancel on her because of seizure activity. The committee agreed that this would be most appropriate for Ava.

The committee reviewed the Alternate Assessment and Ava is going to do attainment task B.

* * *

ARC Date: 09/02/2011

SUMMARY NOTES

Summary Notes

This meeting is to review the IEP and discuss start to the school year. Parent rights were offered. Parents waived the attendance of a regular ed teacher.

Mom is very happy with Mrs. Dillion that is doing her home services.

The committee talked about the skills list that were being developed. The committee went over the list and then the list will be sent to everyone so that we can review them and make any changes. The committee agreed that pictures of Ava or staff working with Ava doing the signs that

Ava is using so that everyone has a picture of the sign and we can be consistent. On receptive identification, the committee needs to work on making sure the list is comprehensive of what Ava is using. Kristina will be going to ABS to observe Ava. Parents told Mrs. Lawson that she could go observe at ABS as well. Courtney Brandt is working with the family as a home services provider and Linda Dillion is working with Ava at home on Monday, Wednesday, and Friday from 4:00 to 6:00 pm. so that Ava gets her full day of school. Ava's school day is from noon until 3:40.

The committee discussed what to do with a seizure that is long. Mom stated that she would always like to have a call. If the seizure seems to be done and Ava is resting, but she still is having a twitches that were fairly rhythmic. Mrs. Lawson stated that if Ava is sleeping a prolonged amount of time just to call and mom can come and check it out. If Ava is still sleeping before school, mom will not wake her up to school. Parents stated that Ava is on the lowest amount of her medication is not on seizure control. They are currently trying some new supplements.

Mom requested that we make sure to let her know if Ava does not get lunch so that they can feed her when she gets home. Dad just asked that we communicate so that we can be sure that Ava is getting what she needs.

Mrs. Lawson wanted to go over the potty information. Mrs. Lawson stated that currently on the IEP it states that Ava will work on the potty during behavior. If we know that Ava has a big drink, they will sit her on the potty. Mom does

sit Ava on the potty in the morning for about 30 minutes and she does potty. The committee agreed that Ava will still work on going to the potty but it will be a measureable goal.

Mom requested that an I-pad for Ava to use her at school. Mom stated that Ava uses a couple of programs. Kate Strater stated that it would be nice to have a list of the programs that she is using at home. Kate stated that the committee would fill out a AT trigger to get the team to look at the use of an I-Pad. Ava was evaluated last year and the report stated that Ava was not ready for the use of an I-pad. Mom stated that she has used it over the summer and she knows how to utilize it.

* * *

ARC Date: 02/21/2013

SUMMARY NOTES

preferred items that Ava will select. Ava will independently respond to directions that are not part of her routine. Ava will initiate or return a greeting with a button push. Prompting or fading will decrease as she makes progress on this goal. OT and PT stated that they would provide strategies and instruction for those working with Ava to aide the teachers in working with her.

Mrs. Jurgens asked if she had been to the dentist. Dad stated that her drooling when she lost her teeth. Dad stated that they have a new helmet at home that covers her face as well. Dad stated that last summer Ava had some genetic testing last summer and it showed unique gene sequences but they were not necessarily a link to anything. They

are getting ready to have a newer genetic test. It has been a while since they have had an MRI, they plan to do it all over the summer and at the same time. Ava is not doing any other outside of therapy.

The committee agreed that the IEP is appropriate for Ava.

Mr. Bolanos stated that her seizure activity is handled and under control in the classroom. Mr. Bolanos stated that Ava's lack of self defense and reactions to protect herself. Mr. Bolanos stated that he is worried that Ava will get hurt as the other children get bigger and stronger. Mr. Bolanos will write up the precautions and the room set up that we have in place for Ava to keep her safe. Dad stated that he is aware of the precautions and the what ifs that may happen. Dad stated that he is aware and we would take that day by day and as Ava gets older. Dad stated that they have discontinued ABS they would like to propose that Ava gets her home school to 4 or 5 days a week as opposed to the current 3 days. Dad would prefer to keep Carrie if at all possible if the increase was able. Dad stated that if the committee does not agree that it makes sense for Ava then we do not want to do it. Kate stated that was our initial proposal when Ava began home school. Mr. Tharpe stated that he would let Mrs. Stambaugh know how to proceed after her talks to Mrs. Tharpe.

The committee talked about Alternate assessment for Ava. Mrs. Strater explained the alternate assessment with the committee.

JA-507

* * *

ARC Date: 05/01/2014

SUMMARY NOTES
<p>The committee talked about Ava's school day next year. Dad stated that they would like her to have a more typical schedule but at this time due to seizure activity her current schedule would be best for Ava. The committee agreed that the current schedule works well for Ava.</p> <p>The committee talked about the need for summer school. The committee agreed that due to the severity of her disability, Ava would qualify for summer services. The main area of focus will be choice making and her communication objectives.</p> <p>The committee talked about Ava's state assessment. Ava currently just finished the alternate assessment. The committee feels like Ava still needs to remain on alternate assessment given the nature of her disability. The committee reviewed her data. Due to the severity of Ava's disability, formal cognitive scores could not be obtained. It is the committee's professional opinion that Ava would be best assessed on alternate assessment. The committee reviewed the alternate assessment paperwork. Ava will participate in attainment task B.</p>

JA-508

THIS DOCUMENT IS NOT PUBLIC

OAH Docket No. 8-1300-37093
MDE File No. 21-007H

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA
DEPARTMENT OF EDUCATION**

In the Matter of A.J.T.,
by and through her
Parents, AT. and G.T.,

Student,

v.

**AFFIDAVIT OF
MARYGRACE OTT**

Osseo Public School
District 0279-01,

School District,

I, Mary Grace Ott, hereby declare that:

1. I am currently a behavior analyst licensed to perform services in the State of Kentucky.
2. From on or about 2013 to October 2015, I provided weekly educational services to A.J.T. in her home throughout the entire calendar year, including summers, on Tuesdays and

JA-509

Thursdays, from 4:00PM to 6:00PM
(instructional period).

3. I stopped providing services to A.J.T. when she and her family moved their residence from Boone County, KY to Maple Grove, MN.
4. During the above instructional period, I provided educational services that focused on functional communication skills and other areas of A.J.T.'s individual education plan.

* * *

/s/ MaryGrace Ott [illegible]
MARYGRACE OTT

10.04.2020
DATE

JA-510

[Logo omitted] **CINCINNATI CHILDREN'S**
Division of Developmental and
Behavior Pediatrics
3333 Burnet Ave MLC 4002 •
Cincinnati, OH 45229-3039
Phone (513)636-4611
Fax (513)636-3800

July 1, 2015

RE: Ava Tharpe
DOB: [REDACTED]

To Whom it May Concern:

Ava is a delightful young girl, with a complex combination of neurologically based difficulties, including global developmental delay, and Lennox-Gastaut Syndrome (severe, complex seizure disorder). She has been involved in very intensive and appropriate intervention privately and through her school placement, through which she has made progress.

As she moves into a new school setting, the following summary of her educational and therapeutic needs is provided:

1. Sensory support for sensory processing challenged- Ava has been assessed through the Aaron Perlman Center for children with Cerebral Palsy at Cincinnati Children's Hospital Medical Center (CCHMC), and found to have both visual and auditory sensory processing challenges that impede her ability to learn. One on one instruction, with

minimal auditory and visual distractions, is beneficial and helps mitigate her difficulties.

2. Applied Behavioral Analysis—related to the above difficulties, Ava has benefited tremendously from ASA therapy. Other instructional methods have not been successful.

3. Medical Complexity—Due to Ava’s seizures and general medical complexity, she requires a one to one aide for monitoring and safety reasons. Ava’s medical complexity also necessitates that her school schedule be modified. Specifically, due to morning seizure frequency and intensity, she does not attend school before noon, She has benefited from in home instruction in the late afternoon to accommodate her adapted schedule.

4. Classroom support for ambulation—Ave can ambulate in the classroom with appropriate modifications. Specifically, Ava should be monitored when ambulating, and she should not use a gait trainer, as previously this has resulted in gait regression.

5 Additional therapies—Ava has benefited from speech, physical and occupational therapy in the educational setting.

Thank you for supporting Ava. She is a delightful girl who will be a joy to work with.

JA-512

Sincerely,

/s/ P. Manning-Courtney, M.D.

P. Manning-Courtney, M.D.
Developmental/Behavioral Pediatrician
Director, The Kelly O'Leary Center for Autism
Spectrum Disorders
Cincinnati Children's Hospital Medical Center

* * *

JA-513

[Logo omitted] MAYO CLINIC

Clinical Document Copy

Child & Adolescent Neurology

10-507-185 19-Jan-2018

Miscellaneous

Ava Tharpe

Printed: 19-Jan-2018 15:48 by User ID: [REDACTED]

DEMOGRAPHIC INFORMATION

Clinic Number: 10-507-185

Patient Name: Ava Tharpe

Age: 12Y

Birthdate: [REDACTED] Sex: F

Address: [REDACTED]

City: [REDACTED]

Service Date/Time: 19-Jan-2018 15:48

Provider: Elaine C. Wirrell, MD Pager: [REDACTED]

Service: PDN Type/Desc: MIS Status: Fnl Revision#: 1

IMPRESSION/REPORT/PLAN

Ava has refractory epilepsy. Due to frequent morning seizures, she is unable to begin school until noon time.

DIAGNOSES

#1 Intractable epilepsy

Original: ecw Electronically Signed: 19-Jan-2018

15:48 by E.C. Wirrell, MD

JA-514

MAYO CLINIC

507-284-2511

mayoclinic.org

[Logo omitted] 200 First Street SW
Rochester, Minnesota 55905

August 23, 2019

RE: AVA THARPE

MC#: [REDACTED]

DOB: [REDACTED]

To Whom It May Concern:

Ava is a 13-year-old young lady with Lennox-Gastaut syndrome. This is a very severe seizure disorder. She has particularly problematic seizures in the morning. Thus, she is unable to attend school prior to noon. I would request that you adjust her schedule and provide accommodations for that.

Sincerely,

/s/ Elaine Wirrell

Elaine Wirrell, M.D. Epileptologist/Neurologist
Director of Pediatric and Adolescent Specialty in
Rochester, Minnesota
200 1st St SW
Rochester MN 55905-0001
Dept: [REDACTED]

JA-515

[Logo omitted] **Gillette**
Children's
Specialty Healthcare

September 4, 2019

RE: AVA THARPE

MR: [REDACTED]

DOB: [REDACTED]

Ava Tharpe is a 14 year old adolescent female with intractable epilepsy, as well as significant cognitive handicap. Ava's seizure activity is most problematic in the morning and in the evening. If Ava's sleep schedule, which involves her sleeping late in the morning, is disrupted, Ava then experiences increased seizures in daytime, creating safety concerns and interfering with her capacity to learn.

Ava should be exempted from school attendance before noon. In this regard, I join numerous other physicians and medical personnel involved in Ava's care. I would request that her schedule be adjusted to accommodate this.

Sincerely,

/s/ Galen N. Breningstall, M.D.

Galen N. Breningstall, M.D.

Pediatric Neurology

Office: [REDACTED]

Fax: [REDACTED]

JA-516

[Logo omitted] **Gillette**
Children's
Specialty Healthcare

October 31, 2020

RE: AVA THARPE

MR: 511935

DOB: [REDACTED]

Ava Tharpe is a 15-year-old adolescent female with intractable epilepsy (Lennox-Gastaut syndrome) and cognitive compromise. Long experience has established that if Ava's sleep routine, which involves her awakening relatively late, is disrupted she experiences noteworthy seizure exacerbation, which may continue to affect her for several days. There are increased seizures in daytime, creating safety concerns and interfering with her capacity to learn. At baseline, Ava has her greatest difficulty with seizures in the morning.

Accordingly, Ava's school day cannot begin until 1200.

It is also important that Ava receive a minimum of six hours of school attendance to help with her communication and interaction.

Sincerely,

/s/ Galen N. Breningstall, M.D.

Galen N. Breningstall, M.D.

Pediatric Neurology

Office: [REDACTED]

Fax: [REDACTED]

Total Special Education System Plan, 2021

This document serves as the Total Special Education System Plan for Osseo Area Schools in accordance with Minnesota Rule 3525. 1100. This plan also includes an assurance for compliance with the federal requirements pertaining to districts' special education responsibilities found in United States Code, title 201 chapter 33, and Code of Federal Regulations, title 34, part 300. This document is a companion to the Application for Special Education Funds- Statement of Assurances (ED-01350-29).

Kate Emmons, Osseo Area Schools' Special Education Director, is responsible for program development, coordination, and evaluation; in-service training; and general special education supervision and administration. Ms. Emmons may be reached at EmmonsK@district279.org or 763-391-7132.

I. Child Study Procedures

The District's identification system is developed according to the requirements of nondiscrimination as Osseo Area Schools does not discriminate in education on the basis of race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance, sexual orientation, or disability.

A. Identification

Osseo Area Schools has developed systems designed to identify pupils with disabilities beginning at birth, pupils with disabilities attending public and nonpublic schools, and pupils

with disabilities who are of school age and are not attending any school.

1) OSSEO AREA SCHOOLS BIRTH-2 YEARS

Osseo Area Schools Early Intervention services are provided for children birth through two years of age who may be experiencing delays in their development for several reasons, including special health conditions. These services are designed to meet the unique developmental needs of each child and their family.

Who Is Eligible? Young children with developmental delays or with diagnosed physical or mental conditions or disorders with a high probability of resulting in a delay, regardless of whether the child is currently demonstrating a need or delay.

Intake Process: Osseo Area Schools Early Intervention receives referrals by email, fax and phone. Referrals may be submitted through the Minnesota Help Me Grow Program or directly to the Osseo Area Schools Early Intervention Program. Referrals are received from medical clinics, hospitals, social workers, community organizations and families.

Infant and toddler intervention services under United States Code, title 20, chapter 33, section 11431 et seq., and Code of Federal Regulations, title 34, part 303, are available in Osseo Area Schools to children from birth through 2 years of age who meet the outlined criteria.

The team determines that a child from birth through the age of two years is eligible for infant and toddler intervention services if:

A. The child meets the criteria of one of the disability categories in United States Code, title 20, chapter 33, as defined in Minnesota Rules; or

B. The child meets one of the criteria for developmental delay in sub item (1), (2), or (3):

(1) The child has a diagnosed physical or mental condition or disorder that has a high probability of resulting in developmental delay regardless of whether the child has a demonstrated need or delay: or

(2) The child is experiencing a developmental delay that is demonstrated by a score of 1.5 standard deviations or more below the mean, as measured by the appropriate diagnostic measures and procedures, in one or more of the following areas:

- (a) Cognitive development;
- (b) Physical development, including vision and hearing;
- (c) Communication development;
- (d) Social or emotional development;
- and
- (e) Adaptive Development.

(3) The child's eligibility is established through the application of informed clinical opinion. Informed clinical

opinion may be used as an independent basis to establish a child's eligibility under this part even when other instruments do not establish eligibility; however, in no event may informed clinical opinion be used to negate the results of evaluation instruments to establish eligibility.

Osseo Area Schools Age 3-6

The team shall determine that a child from the age of three years through the age of six years is eligible for special education when:

- A. The child meets the criteria of one of the categorical disabilities in United States Code, title 20, chapter 33, as defined in Minnesota Rules; or
- B. The child meets one of the criteria for developmental delay in subitem (1) and the criteria in subitem (2). Osseo Area Schools has elected the option of implementing these criteria for developmental delay.

(1) The child:

- (a) Has a diagnosed physical or mental condition or disorder that has a high probability or resulting in developmental delay; or
- (b) Has a delay in each of two or more of the areas of cognitive development; physical development, including vision and hearing; communication development; social or emotional development; and adaptive development, that is verified by an evaluation using one or more technically

adequate, norm-referenced instruments. The instruments must be individually administered by appropriately trained professionals and the scores must be at least 1.5 standard deviations below the mean in each area.

(2) The child's need for special education is supported by:

(a) At least one documented, systematic observation in the child's routine setting by an appropriate professional or, if observation in the daily routine setting is not possible, the alternative setting must be justified;

(b) a developmental history; and

(c) at least one other evaluation procedure in each area of identified delay that is conducted on a different day than the medical or norm-referenced evaluation; which may include criterion references instruments, language samples, or curriculum-based measures.

Osseo Area Schools' plan for identifying a child with a specific learning disability is consistent with Minnesota Rule 3525.1341. Osseo Area Schools implements its interventions consistent with that plan. The plan details the specific scientific, research-based intervention (SRBI) approach, including timelines for progression through the model; any SRBI that is used, by content area; the parent notification and consent policies for participation in SRBI; procedures for ensuing fidelity of implementation; and a district staff training plan.

School's plan for identifying a child with a specific learning disability is included as **Appendix A**.

B. Evaluation

1) Part C-Infant and toddler intervention services birth through 2 years of age

The evaluation used to determine whether a child is eligible for infant and toddler intervention services must be conducted within the timelines established in Code of Federal Regulations, title 34, part 303. It must be based on informed clinical opinion; must be multidisciplinary in nature, involving two or more disciplines or professions; and must be conducted by personnel trained to utilize appropriate methods and procedures. The evaluation must include:

- a) A review of the child's current records related to health status and medical history;
- b) an evaluation of the child's levels of cognitive, physical, communication, social or emotional, and adaptive developmental functioning;
- c) an assessment of the unique needs of the child in terms of each of the developmental areas in item b; and
- d) at least one documented, systematic observation in the child's daily routine setting by an appropriate professional or, if observation in the child's daily setting is not possible, the alternative setting must be justified.

For infants and toddlers birth through two years of age, any screening, the initial evaluation and initial assessments of the child and family, and

initial IFSP meeting must be completed within 45 calendar days from the date Osseo Area Schools receives the referral of the child. The 45-day timeline does not apply if:

1. the child or parent is unavailable to complete the screening, the initial evaluation, the initial assessments of the child and family, or the initial IFSP meeting due to exceptional family circumstances documented in the child's early intervention records; or
2. the parent has not provided consent for the screening, the initial evaluation, or the initial assessment of the child despite documented, repeated attempts by Osseo Area Schools to obtain parental permission.

In the latter cases, the screening, initial evaluation, initial assessments of child and family and the initial IFSP meeting should be completed as soon as possible after the documented exceptional family circumstances no longer exist or parental consent to the screening, initial evaluation, and initial assessment of the child is obtained and Osseo Area Schools should develop an interim IFSP, to the extent appropriate, while the evaluation process proceeds.

2) Part B-Special education services age 3 through age 21

The team shall conduct an evaluation for special education purposes within a reasonable time not to exceed 30 school days from the date the district receives parental permission to conduct the evaluation or the expiration of the 14-calendar day parental response time in cases other than initial

evaluation, unless a conciliation conference or hearing is requested.

Osseo Area Schools conducts a comprehensive individual initial evaluation before the initial provision of special education and related services to a student. The initial evaluation consists of procedures to determine:

1. whether a child has a disability that adversely affects the child's educational performance as defined in Minnesota Statutes section 125A.02, and
2. because of that disability needs special education and related services, and
3. to determine the educational needs of the child.

To conduct an initial evaluation to determine if the child qualifies for special education and related services, Osseo Area Schools will obtain written informed consent from the child's parent or guardian before the evaluation is conducted. Parental consent for evaluation will not be constructed as consent for placement for receipt of special education and related services.

The District will not override the written refusal of a parent to consent to an initial evaluation or re-evaluation.

3) Evaluation Procedures.

Evaluations and reevaluations are conducted according to the following procedures:

- A. Osseo Area Schools shall provide notice to the parents of the pupil, according to Code of Federal Regulations, title 34, section 300.500

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to 300.505, that describes any evaluation procedures the district proposes to conduct.

B. In conducting the evaluation, Osseo Area Schools:

(1) uses a variety of evaluation tools and strategies to gather relevant functional and developmental information, including information provided by the parent, that are designed to assist in determining whether the child is a pupil with a disability and the content of the pupil's individualized education program, including information related to enabling the pupil to be involved in and progress in the general curriculum, or for the preschool pupils to participate in appropriate activities;

(2) does not use any single procedure as the sole criterion for determining whether a child is a pupil with a disability or determining an appropriate education program for the pupil; and

(3) uses technically sound instruments that are designed to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

C. Osseo Area Schools ensures that:

(1) Tests and other evaluation materials used to evaluate a child under this part are selected and administered so as not to be discriminatory on a racial or cultural basis, and are provided and administered in the pupil's native language or other mode of

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communication, unless it is clearly not feasible to do so;

(2) materials and procedures used to evaluate a child with limited English proficiency are selected and administered to ensure that they measure the extent to which the child has a disability and needs special education and related services, rather than measure the child's English language skills;

(3) any standardized tests that are given to the child have been validated for the specific purpose for which they are used, are administered by trained and knowledgeable personnel, and are administered in accordance with any instructions provided by the producer of such tests;

(4) the child is evaluated in all areas of suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general Intelligence, academic performance, communicative status, and motor abilities;

(5) evaluation tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the pupil are provided;

(6) if an evaluation is not conducted under standard conditions, a description of the extent to which it varied from standard conditions must be included in the evaluation report;

(7) tests and other evaluation materials include those tailored to evaluate specific areas of educational need and not merely those tailored to evaluate specific areas of educational need or those that are designed to provide a single general intelligence quotient;

(8) tests are selected and administered so as best to ensure that if a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills, unless those skills are the factors that the test purports to measure; and

(9) in evaluating each pupil with a disability, the evaluation is sufficiently comprehensive to identify all of the pupil's special education and related service needs, whether or not commonly linked to the disability category in which the pupil has been classified.

D. Upon completion of administration of tests and other evaluation materials, the determination of whether the child is a pupil with a disability as defined in Minnesota Statutes, section 125A.02, shall be made by a team of qualified professionals and the parent of the pupil in accordance with item E and a copy of the evaluation report and the

documentation of eligibility will be given to the parent.

E. In making a determination of eligibility under item D, a child shall not be determined to be a pupil with a disability if the determinant factor for such determination is lack of instruction in reading or math or limited English proficiency, and the child does not otherwise meet eligibility criteria under parts 3525.1325 to 3525.1351.

4) Additional requirements for evaluations and reevaluations.

A. As part of an initial evaluation, if appropriate, and as part of any reevaluation under this part, or a reinstatement under part 3525.3100, the IEP team and other qualified professionals, as appropriate, shall:

(1) Review existing evaluation data on the pupil, including evaluations and information provided by the parent of the pupil, current classroom-based assessments and observations, and teacher and related services provider observations; and

(2) On the basis of the review and input from the pupil's parents, identify what additional data, if any, are needed to determine whether the pupil has a particular category of disability, as described in Minnesota Statutes, section 125A.02, or, in case of a reevaluation of a pupil, whether the pupil continues to have such a disability; the present levels of performance and educational needs of the pupil; whether the

pupil needs special education and related services or, in the case of a reevaluation of a pupil, whether the pupil continues to need special education and related services; and whether any additions or modifications to the special education and related services are needed to enable the pupil to meet the measurable annual goals set out in the individualized education program of the pupil and to participate, as appropriate, in the general curriculum.

B. The district administers such tests and other evaluation materials as may be needed to produce the data identified by the IEP team under item A, sub item (2).

C. The district obtains informed parental consent, in accordance with subpart 1, prior to conducting any reevaluation of a pupil, except that such informed parental consent need not be obtained if the district can demonstrate that it had taken reasonable measures to obtain such consent and the pupil's parent has failed to respond.

D. If the IEP team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the pupil continues to be a pupil with a disability, the district shall notify the pupil's parent of that determination and the reasons for it, and the right of such parents to request an evaluation to determine whether the pupil continues to be a pupil with a disability, and shall not be required to conduct such an

evaluation unless requested to by the pupil's parents.

E. A district evaluates a pupil in accordance with federal regulation before determining that the pupil is no longer a pupil with a disability.

5) Procedures for determining eligibility and placement.

A. In interpreting the evaluation data for the purpose of determining if a child is a pupil with a disability under parts 3525.1325 to 3525.1351 and the educational needs of the child, the school district:

(1) draws upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, and

(2) ensures that the information obtained from all of the sources is documented and carefully considered.

B. If a determination is made that a child is a pupil with a disability who needs special education and related services, an IEP is developed for the pupil according to Minnesota Rule 3525.2810.

6) Evaluation report

An evaluation report is completed and delivered to the pupil's parents within the specified evaluation timeline. At a minimum, the evaluation report includes:

- A. A summary of all evaluation results;
- B. Documentation of whether the pupil has a particular category of disability or, in the case of a reevaluation, whether the pupil continues to have such a disability and documentation of the basis for this determination;
- C. The pupil's present levels of performance and educational needs that derive from the disability;
- D. Whether the child needs special education and related services or, in the case of a reevaluation, whether the pupil continues to need special education and related services; and
- E. Whether any additions or modifications to special education and related services are needed to enable the pupil to meet the measurable annual goals set out in the pupil's IEP and to participate, as appropriate, in the general curriculum.

C. Plan for Receiving Referrals

Osseo Area Schools' plan for receiving referrals from parents, physicians, private and public programs, and health and human services agencies is attached as **Appendix B**.

II. Method of Providing the Special Education Services for the Identified Pupils.

Osseo Area Schools provides a full range of educational services alternatives. All students with disabilities are provided the special instruction and services which are appropriate to their needs. The following is representative of Osseo Area Schools' method of providing the special education services for

the identified pupils, sites available at which service may occur, and available instruction and related services.

Appropriate program alternatives to meet the special education needs, goals, and objectives of a pupil are determined on an individual basis. Choice of specific program alternatives is based on the pupil's current levels of performance and the pupil's special education needs, goals, and objectives, and must be written in the IEP. Program alternatives are comprised of the type of services provided, the setting in which services occur, and the amount of time and frequency with which special education services occur. A pupil may receive special education services in more than one alternative based on the IEP or IFSP.

A. Method of providing the special education services for the identified pupils:

- (1) Early childhood services delivered in the home, in a center-based program, or at an Osseo Area School or community early childhood site.
- (2) Instruction by general education teachers in a general education classroom, including virtual services through Osseo Area Schools 279 Online, with modifications, accommodations, supplemental services, and indirect services by special education staff.
- (3) Pull out direct instruction services in a small group special education resource classroom.
- (4) One-on-one instruction.

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(5) Co-teaching instruction by general education and special education teacher.

(6) Services in a small structured special education classroom with high staff-to-student ratios.

(7) Homebound instructional services.

(8) Instruction and other services in a highly structured environment in a separate special education site.

(9) Transition services for grades 9-12 at Osseo Area Schools' high schools, or in a separate special education site, including community-based vocational programs.

(10) instruction and other services at Osseo Area Schools locations for students needing special education services who attend non-public schools located in the Osseo Area Schools district, including home school students.

B. Sites available at which services may occur:

(1) Each Osseo Area Schools site, including 279 Online, has Federal Setting 1, 2, and 3 special education services available.

(2) Self-contained programs for ASD, DCD, and EBD are located in many Osseo Area Schools sites.

(3) DH/H services are located at Fern brook Elementary School, Osseo Middle School and Osseo Senior High School

(4) Federal Setting IV services available through Intermediate School District 287 partnership

(5) Transition services for age 18-21 are located at Osseo Education Center

C. Available instruction and related services:

- (1) Physical Therapy
- (2) Occupational Therapy
- (3) Speech services
- (4) Deaf/Hard of Hearing (DHH) & Audiology services
- (5) Blind/Vision Impaired (BVI) services
- (6) School social work services
- (7) School psychology services
- (8) Assistive technology
- (9) Developmental Adaptive Physical Education (DAPE) services

III. Administration and Management Plan.

Osseo Area Schools utilizes the following administration and management plan to ensure effective and efficient results of child study procedures and method of providing special education services for the identified pupils:

A. The organization of administration; site responsibilities and assignments; **Appendix C.**

B. Due Process assurances available to parents: Osseo Area Schools has appropriate and proper due process procedures in place to assure effective and efficient results of child procedures and method of providing special education services of the identified pupils, including alternative dispute resolution and due process hearings. A description of these processes are as follows:

(1) Prior written notice to a) inform the parent that except for the initial placement of a child in special education, the school district will proceed with its proposal for the child's placement or for providing special education services unless the child's parent notifies the district of an objection with 14 days of when the district sends the prior written notice to the parent; and b) state that a parent who objects to a proposal or refusal in the prior written notice may request a conciliation conference or another alternative dispute resolution procedure.

(2) Osseo Area Schools will not proceed with the initial evaluation of a child, the initial placement of a child in a special education program, or the initial provision of special education services for a child without the prior written consent of the child's parent. A district may not override the written refusal of a parent to consent to an initial evaluation or reevaluation.

(3) A parent, after consulting with health care, education, or other professional providers, may agree or disagree to provide the parent's child with sympathomimetic medications unless medical, dental, mental and other health services are necessary, in the professional's judgment, that the risk to the minor's life or health is of such a nature that treatment should be given without delay and the requirement of consent would result in delay or denial of treatment.

(4) Parties are encouraged to resolve disputes over the identification, evaluation, educational placement, manifestation determination, interim alternative educational placement, or the provision of a free appropriate public education to a child with a disability through conciliation, mediation, facilitated team meetings, or other alternative process. All dispute resolution options are voluntary on the part of the parent and must not be used to deny or delay the right to a due process hearing. All dispute resolution processes are provided at no cost to the parent.

(5) Conciliation Conference: a parent has the opportunity to meet with appropriate district staff in at least one conciliation conference if the parent objects to any proposal of which the parent receives prior written notice. Osseo Area Schools holds conciliation conferences within ten calendar days from the date the district receives a parent's objection to a proposal or refusal in the prior written notice. All discussions held during a conciliation conference are confidential and are not admissible in a due process hearing. Within five school days after the final conciliation conference, the district must prepare and provide to the parent a conciliation conference memorandum that describes the District's final proposed offer of service. This memorandum is admissible in evidence in any subsequent proceeding.

(6) In addition to offering at least one conciliation conference, Osseo Area Schools

informs parents of other dispute resolution processes, including at least mediation and facilitated team meetings. The fact that an alternative dispute resolution process was used is admissible in evidence at any subsequent proceeding. State-provided mediators and team meeting facilitators shall not be subpoenaed to testify at a due process hearing or civil action under special education law nor are any records of mediators or state-provided team meeting facilitators accessible to the parties.

(7) Descriptions of the mediation process, facilitated team meetings, state complaint, and impartial due process hearings may be found In Osseo Area Schools' Procedure Safeguard Notices; **Appendix D** (Special Education Part B) and **Appendix E** (Special Education Parts C).

IV. Interagency Agreements into which the District has Entered.

Osseo Area Schools has entered in the following interagency agreements or joint powers board agreements for eligible children, ages 3 to 21, to establish agency responsibility that assures that interagency services are coordinated, provided, and paid for, and that payment is facilitated from public and private sources:

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Name of Agency	Terms of Agreement	Agreement Termination/ Renewal Date	Comments
Help Me Grow	Annual	Annual	To provide information that will equip those who interact with young children (birth to kindergarten) to better monitor each child's development.
St. David's	Annual	Annual	Provides mental health support and consultation to schools
Lee Carlson	Annual	Annual	To support mental health and wellness in our community through collaboration and integration of care.
Intermediate School	Joint Powers	Annual	The mission of intermediate District 287 is to

<p>District 287</p>	<p>Agree- ment</p>		<p>be the premier provider of innovative specialized services to ensure that each member district can meet the unique learning needs of its students.</p>
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V. Special Education Advisory Council.

In order to increase the involvement of parents of children with disabilities in district policy making and decision making, Osseo Area Schools has a Special Education Advisory Council.

- A. Osseo Area Schools’ Special Education Advisory Council is individually established.
- B. Osseo Area Schools’ Special Education Advisory Council is not a subgroup of an existing board/council/committee.
- C. At least half of Osseo Area Schools’ parent advisory council’s members are parents of students with a disability.
 - (1) The district does not have a nonpublic school located in its boundaries.
 - (2) The district has a nonpublic school located in its boundaries and the parent advisory council includes at least one member who is a parent of a nonpublic school student with a disability, or an employee of a nonpublic school

if no parent of a nonpublic school student with a disability is available to serve.

Each local council meets no less than once each year.

D. Osseo Area Schools' Special Education Advisory Council meets monthly with the exception of the month of December. More information can be found here.

E. The operational procedures of Osseo Area Schools' Special Education Advisory Council; Appendix F.

VI. Assurances.

Code of Federal Regulations, section 300.201: Consistency with State policies. Osseo Area Schools, in providing for the education of children with disabilities within its jurisdiction, has in effect policies, procedures, and programs that are consistent with the State policies and procedures established under sections 300.101 through 300.163, and sections 300.165 through 300.174. (Authority: 20 U.S.C. § 1413(a) (1)).

Yes: Assurance given.

VII. Appendices.

a. Process for Literacy and Behavior Interventions; Appendix A.

b. Osseo Area Schools' plan for receiving referrals from parents, physicians, private and public programs, and health and human services agencies; Appendix B.

c. Organization of administration; site responsibilities and assignments; Appendix C.

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- d. Osseo Area Schools' Procedure Safeguard Notice, SPED Part B; Appendix D.
- e. Osseo Area Schools' Procedure Safeguard Notice, SPED Part C; Appendix E.
- f. The operational procedures of Osseo Area Schools' Special Education Advisory Council; Appendix F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

OSSEO AREA
SCHOOLS,
INDEPENDENT
SCHOOL DISTRICT
NO. 279,

**MEMORANDUM AND
ORDER**

Plaintiff,

Civil File No. 21-1453
(MJD/DTS)

A.J.T., by and through
her parents, A.T. and
G.T.,

Defendant.

Christian R. Shafer, Elizabeth M. Meske, and Laura
Tubbs Booth, Ratwik, Roszak & Maloney, PA,
Counsel for Osseo Area Schools, Independent School
District No. 279.

Amy J. Goetz, School Law Center, LLC, Counsel for
A.J.T.

I. INTRODUCTION

Defendant AJT is a teenage girl with a severe form
of epilepsy called Lennox-Gastaut Syndrome. As a

result of her disability, AJT has the intellectual capacity of an 18-month-old child and has seizures continually throughout the day. Her seizures are so severe early in the day that she is unable to attend school in the morning. Since moving to Plaintiff Osseo School District in 2015, AJT and the District have agreed that she is unable to begin school until noon due to her medical condition but have been unable to reach consensus regarding when her school day should end.

In 2021, an administrative law judge ruled in favor of AJT and ordered the District to provide AJT with “instruction at home that includes discrete trial training interventions between 4:30 p.m. and 6:00 p.m. each school day,” among other things. The District appealed that decision to this Court. Both parties have now filed motions for Judgment on the Record. (Doc. 43 (Defendant AJT’s Motion for Judgment on the Record)); (Doc. 46 (Plaintiff Osseo Area School’s Motion for Judgment on the Administrative Record).) The Court heard oral argument via Zoom on July 13, 2022.

As discussed in detail below, the evidence in the record supports the ALJ’s conclusion that “whenever there was a conflict between the need to maintain the regular hours of the school’s faculty, and [AJT’s] need for instruction, the regular hours of the faculty was always the prevailing and paramount consideration.” The correct standard is whether AJT’s IEP established an educational program that was “appropriately ambitious in light of her circumstances.” Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 1000-01(2017). Without more than 4.25 hours of schooling a day, the IEP did not establish such a program.

AJT's de minimis educational progress since moving to the District does not change that fact, especially in light of her regression in certain areas and the fact that certain historical goals had to be cut from her IEP due to the shortened school day. In addition, the District's shifting reasons for denying the in-home instruction AJT seeks to make up for the morning hours she is not in school were never based on AJT's needs. Accordingly, AJT's Motion for Judgment on the Record is granted and the District's Motion is denied.

II. BACKGROUND

A. Factual Background

1. The District

Defendant AJT lives with her parents, AT and GT, within the boundaries of Plaintiff Osseo Area Public Schools, Independent School District No. 279 ("the District"). AJT has attended public schools in the District since fall 2015 when her family moved from Boone County, Kentucky to Minnesota. (Doc. 15 at 973 (ALJ Order, Facts ¶ 24).) AJT was in fourth grade at the time she entered the District. (Doc. 14-15 at 36 (Sept. 21, 2015 IEP).)

2. AJT

At the time of the administrative hearing in February 2021, Defendant AJT was a 15-year-old girl with Lennox-Gastaut Syndrome ("LGS"), a severe form of epilepsy that causes AJT to have seizures continually throughout the day. (Doc. 14-11 at 53 (Breningstall Hr'g Test. at 255); Doc. 15 at 200 (Wills Hr'g Test. at 534), 970 (ALJ Order, Facts ¶ 1).) Her seizure activity is especially severe throughout the night and in the morning. (Doc. 14-15 at 392

(Kohlhepp Aff. ¶ 10), 463.) Due to LGS, AJT has significant cognitive disability and functions in the range of an 18-month-old child. (Doc. 15 at 785 (Shams H'rg Test. at 954).) She does not speak verbally and uses adapted signs somewhat inconsistently. (Doc. 14-15 at 248-79 (Ex. 133).) She requires assistance for walking, balance, and toileting. (Id.)

Dr. Galen Breningstall, AJT's treating neurologist, testified at the administrative hearing that AJT had a significant cognitive disability caused by LGS. (Doc. 14-11 at 59 (Breningstall H'rg Test. at 279); Doc. 15 at 784-85 (Shams H'rg Test. at 947-54).) Individuals with LGS often plateau in their functional and intellectual gains by middle school. (Doc. 15 at 239 (West H'rg Test. at 689); 785 (Shams H'rg Test. at 953).) AJT's constant seizure activity has impacted her cognitive ability and development. (See, e.g., id. at 200 (Wills H'rg Test. at 534); (West H'rg Test. at 688); 785 (Shams H'rg Test. at 952-53).)

Dr. Karen Wills, the District's expert and a pediatric neuropsychologist who has evaluated over 500 children with profound intellectual disabilities, at least two hundred of whom have seizure disorders, and who has participated in developing educational programming for more than 7000 students, testified:

Well, [AJT] is actively having seizures all day every day. And it is clear from the description of [AJT] herself as an individual that that ongoing seizure activity interferes greatly with memory, with attention and with new learning and also her mood, and for most people, just overall alertness.

(Id. at 200 (Wills H'rg Test. at 534); see also Doc. 14-15 at 386 (Wills Aff. ¶ 6).)

At school, AJT is

working to pick up objects and release her grasp on command (putting things into containers), to use a crayon to mark a single stroke on paper, to comply with single word commands about physical actions (e.g., to sit or stand), to demonstrate intention and a sense of purpose (e.g., protesting or demanding an activity), and to anticipate events based on the social context (e.g., raising her arms to be dressed).

(Doc. 14-15 at 386 (Wills Aff. ¶ 9).)

She is just beginning to learn how to imitate others, to take turns in reciprocal interaction (such as tossing a ball back and forth), to share joint attention (looking at or listening to something when another person calls attention to it), and to initiate social contact or purposeful object-manipulation (exploring things on her own, rather than following the commands and prompts of adults).

(Id.)

3. Services Provided in Kentucky

According to AJT's father, while a student in Kentucky, AJT received instruction from the public school from noon until 6:00 p.m. each day. (Doc. 14-5 at 103 (AT H'rg Test. at 32-33).) The Kentucky IEP in the record, however, provided that AJT received 125

minutes of special education in school daily and 90 minutes of special education in the home daily, for a total of 215 minutes (3 hours and 35 minutes) of special education instruction per day. (Doc. 14-15 at 27 (Mar. 12, 2015, Boone County, KY, IEP).) AJT's father asserts that this Kentucky IEP in the record was inaccurate. (Doc. 14-6 at 10-12 (AT H'rg Test. at 80-82).) AJT alleges that the inaccuracy was not discovered until the administrative hearing and she was unable to obtain the corrected documents from Kentucky. (Id.; (Doc. 14-7 at 37-38 (AT H'rg Test. at 206-07).)

Kentucky behavior therapist Marygrace Ott, MA, BCBA¹, LBA², and independent evaluator and AJT's expert, Dr. Joe Reichle, Ph.D., testified that between 4:00 and 6:00 p.m., AJT had good stamina, was alert and engaged, was on task, was responsive, worked easily without breaks for an hour, and was easily reinforced. (Doc. 14-11 at 69-70 (Ott H'rg Test. at 319-21, 325-26); Doc. 14- 12 at 17, 21 (Reichle H'rg Test. at 440-41, 456); see also (Docs. 14-5 at 140-41 & 14-6 at 1-2 (AT H'rg Test. at 69-72) (AJT's father's testimony opining that AJT did well during Dr. Reichle's three-week trials in the late afternoon).) Dr. Breningstall testified that AJT would benefit from instruction between 4:15 p.m. and 6:00 p.m. "[b]ecause that is the time of day that is her best time for functioning," and it would provide "more opportunities for the instruction that was delivered at that time to be beneficial to her." (Doc. 14-11 at 61 (Breningstall H'rg Test. at 288-89).)

¹ Board Certified Behavior Analyst

² Licensed Behavior Analyst

4. AJT's Unavailability for Instruction Before Noon

AJT is “unavailable for school before noon each day.” (Doc. 15 at 970 (ALJ Order, Facts ¶ 1).) Since AJT moved to the District in 2015, the District has excused AJT’s absence from school before noon. (Id. ¶ 2.)

AJT’s seizure activity is highest before noon. (Id. at 971 (ALJ Order, Facts ¶ 10); Doc. 14-15 at 97-102 (AT H’rg Test. 26-31).) During heavy seizure activity, she cries, is afraid, needs to be comforted, and may be in pain. (Doc. 14-6 at 38- 39 (AT H’rg Test. at 108-09).) Dr. Breningstall testified that starting AJT’s school day before noon would lead to an “inevitable worsening of her problem. And I can’t see on an experimental basis or otherwise exposing her to an inevitable worsening of her problems.” (Doc. 14-11 at 57 (Breningstall H’rg Test. at 273-74).) No medical provider has ever recommended changing AJT’s schedule or experimenting with an earlier school start time. (Doc. 14-6 at 39 (AT H’rg Test. at 109).)

5. Scheduled School Day in the District

Dr. Karen Wills, a pediatric neuropsychologist and the District’s expert on assessment and interventions, testified that a typical school day for any child is “anything but back-to-back instructional programming. Part of the school day includes things like lunch time, break time, recess and all of that kind of stuff [T]o sort of think about the entire day as involving direct instructional programming just isn’t accurate.” (Doc. 15 at 197-98 (Wills H’rg Test. at 523-24).) AJT is at school for 4 hours and 15 minutes each day receiving intensive special education services and always has one or two adults working solely with her

providing services and working on AJT's goals. (Doc. 15 at 389, 404 (H'rg Test. of Joy Frederickson, former District special education site administrator, at 777-78, 793); 976 (ALJ Order, Facts ¶¶ 55-56); 802 (Elliott H'rg Test. at 1019-20).)

The District provided extended school year ("ESY") services to AJT in the amount of 16 3-hours sessions in AJT's home by a licensed special education teacher between the hours of 12:00 p.m. and 3:00 p.m. during the summers she was enrolled in elementary school. (Doc. 15 at 558, 568-69 (Fredrickson H'rg Test. at 727, 770-71).) The District typically provides ESY services for students with special needs at school in the morning and ends services at noon. (*Id.* at 569 (Frederickson H'rg Test. at 771).) The District offered to provide additional ESY services beyond the typical ESY in June and August; however, AJT's parents rejected this offer because June and August were times that AJT might try new medications and treatments and receive outside therapies. (*Id.* at 559 (Frederickson H'rg Test. at 731).)

6. Negotiations Between AJT's Parents and the District

AJT's father asserts that before the family moved from Kentucky to Minnesota, he received assurances from the District that the District would continue her modified schedule as it was in Kentucky. (Doc. 14-5 at 92 (AT H'rg Test. at 21).) AJT's father claims that his request was based on undisputed medical and educational opinions that AJT is best able to be alert and active and seizure-free between noon and 6:00 or 7:00 p.m. (Doc. 14-6 at 31-33 (AT H'rg Test. at 101-03).)

When AJT entered the District in October 2015, her parents requested that AJT not attend school until noon due to her morning seizure activity. (Doc. 14-15 at 392 (Kohlhepp Aff. ¶ 10).) The IEP team, including AJT's parents, agreed that starting the school day at noon was appropriate given AJT's individual needs. (Id. at 464 (Oct. 16, 2015 Prior Written Notice ("PWN") stating that AJT "can not [sic] come to school in the morning due to her seizure activity through the night and in the morning".))

AJT's IEP team first met on September 21, 2015. (Id. at 46 (Sept. 21, 2015, IEP Meeting Summary).) The District proposed an IEP that generally accepted the goals and objectives on AJT's most recent IEP from Kentucky. (Id. at 20 (Mar. 12, 2015, Boone County, Kentucky, IEP); 36 (Sept. 21, 2015, IEP); Doc. 15 at 553 (Frederickson H'rg Test. at 708).) AJT's parents requested two more IEP meetings, which were held on October 14 and October 20, 2015. (Doc. 14-18 at 8-12.) Following those meetings, the District proposed an IEP that accepted the goals and objectives on AJT's Kentucky IEP and included minutes of special education service that were commensurate with those on the Kentucky IEP. (Doc. 15 at 553-54 (Frederickson H'rg Test. at 708, 712).) The Kentucky IEP called for 125 minutes of special education in school daily and 90 minutes of special education in the home daily, for a total of 215 minutes of special education instruction per day. (Doc. 14-15 at 27.) The District's IEP included 240 minutes of direct special education daily and 20 minutes weekly of direct speech services. (Id. at 56.)

AJT's parents also requested that AJT receive paraprofessional support in her home from 4:00 p.m. to 6:00 p.m. (Id. at 464 (Oct. 16, 2015 PWC).) AJT's

parents told the District staff that in Kentucky, AJT received paraprofessional support from her school district three days per week for 90 minutes at home. (Doc. 15 at 553 (Frederickson H'rg Test. at 708).) In addition, AJT's parents told the District that AJT also received services two days a week after school at home in the evenings all year long, including summers, from the State of Kentucky via a Medicaid waiver program. (Doc. 14-11 at 68-69 (Ott H'rg Test. at 316-20) (testifying that she worked with AJT from 4:00 p.m. to 6:00 p.m. two days a week and that while her report indicated that AJT attended school from 1:00 p.m. to 3:30 p.m., that was incorrect).)

At the October 14, 2015, IEP team meeting, AJT's father asked if the District would, "Provide support in the evening," and the District's special education coordinator stated, "We don't provide both homebound and school support (modified)." (Doc. 14-13 at 15 (Oct. 14, 2015, IEP Team Meeting Notes).) Two days later, on October 16, 2015, based upon that same meeting, the District issued a Prior Written Notice ("PWN") that stated:

The team discussed a modified schedule to [AJT's] school day. [AJT] can not come to school in the morning due to her seizure activity through the night and in the morning. Mom and Dad have requested a modified schedule to further her education into the evening when her physical health is appropriate for learning. The district has denied this request saying state law does not mandate this support from the school district.

(Doc. 14-15 at 464.)

AJT's parents did not sign the PWN consenting to or objecting to the IEP within 14 days; thus, as stated in the PWN, the District went forward with the IEP as proposed. (*Id.* at 468.) On October 20, 2015, AJT's parents provided a letter to the District stating that "the District has not scheduled sufficient IEP team meetings to discuss appropriate accommodations from an education and safety perspective and/or engage[d] in the interactive process" to meet her needs. (Doc. 14-13 at 16.) Also in the letter, AJT's parents consented to the proposed IEP. (*Id.*) AJT began attending Cedar Island Elementary School ("Cedar Island") under that agreement. The typical school day at Cedar Island was from 9:30 a.m. to 4:00 p.m. (Doc. 15 at 552 (Frederickson H'rg Test. at 705).) AJT was scheduled to attend from noon to 4:00 p.m.; however, her mother initially picked her up from school at 3:30 p.m. due to concerns about AJT's safety being dismissed at the same time as other students. (*Id.* at 552-53 (Frederickson H'rg Test. at 705-06).)

On March 18, 2016, the District sent AJT's parents a PWN addressing AJT's school day schedule. (Doc. 14-15 at 476; Doc. 14-16 at 1-2 (Continuation of Mar. 18, 2016, PWN).) In that PWN, the District refused AJT's parents' request for weekly instruction in their home beyond the end of the typical school day; however, it proposed elongating AJT's modified school day from an end time of 4:00 p.m. to 4:15 p.m. (Doc. 14-15 at 476.) This offer was made in part to address AJT's parents' concerns about AJT navigating the hallways at the end of the school day. (*Id.*; Doc. 15 at 552-53 (Frederickson H'rg Test. at 705-06).) Under this proposal, AJT would continue to receive services from her teacher in a one-to-one setting. (Doc. 14-15

at 476; Doc. 14-16 at 1-2.) This offer was rejected by AJT's parents. AJT's parents and the District attended conciliation conference meetings in late May and early June 2016 to discuss, in part, AJT's school day. (Doc. 14-13 at 42-43.) Following the conciliation conferences, the District again proposed trialing an extension of AJT's school day beyond the end of the regular school day to 4:15 p.m. (Id. at 44-45 (June 7, 2016, Summary of Conciliation Conference).)

On June 6, 2016, the District issued a PWN that stated:

The district discussed an extended school day and decided against it due to the precedent it would start. For [sic] Osseo School District and other districts across the area.

(Doc. 14-16 at 3.) The District and AJT's parents continued to meet and discuss AJT's IEP. (See, e.g., id. at 6.)

On April 24, 2017, the District proposed an PWN reflecting a 4.25-hour school day. (Doc. 14-16 at 7-8.) AJT's parents did not return the PWN within 14 calendar days to object to the proposed IEP so the IEP went into effect with the implied consent of AJT's parents. (Id. (mark in checkbox for "implied consent—14 days elapsed"); Doc. 15 at 554 (Frederickson H'rg Test. at 713).) The April 24, 2017 IEP became the last agreed-upon IEP between the District and AJT's parents. This is known as the "stay put" IEP, meaning that during the pendency of any dispute between a parent and school district, the student remains in the then-current educational placement as outlined in that IEP. See 20 U.S.C. § 1415(j).

AJT was retained at Cedar Island for an extra year at the request of her parents before matriculating to Maple Grove Middle School (“MGMS”). (Doc. 14-7 at 16-17 (AT H’rg Test. at 185-86).)

On April 2, 2018, in preparation for AJT’s transition from Cedar Island to MGMS, the parties discussed AJT’s school day in middle school. MGMS’s typical school day ends at 2:40 p.m., and the District suggested extending AJT’s day to 3:00 p.m. (Doc. 14-16 at 9-11 (Apr. 2, 2018 PWN).) AJT’s parents rejected the District’s proposal. (*Id.* at 11.) In response to the District’s proposal, AJT’s parents proposed “hours of instruction similar to those currently provided [at Cedar Island] (12:00 – 4:15PM).” (Doc. 14-13 at 86.) The District continued to provide instruction to AJT from noon to 4:15 p.m. under her stay-put IEP.

Each year, AJT’s parents have provided the District with a brief letter from AJT’s treating neurologist requesting that she be “exempted from school attendance before noon” in order to manage her seizure activity. (*See, e.g., id.* at 153.) The District made repeated offers to serve AJT whenever she is available during the regular school day, including before 12:00 p.m. on any days when AJT might be available to be in school earlier in the day. (*See, e.g., Doc. 14-16 at 16.*)

7. AJT’s Progress in the District

AJT’s father testified that AJT had regressed since she lived in Kentucky because she had lost the ability to use a handful of modified hand signs to communicate and had regressed from 50% proficiency using the toilet after her parents agreed to have the goal of “toileting” removed from her IEP as it was

taking up too much instructional time. (See, e.g., Doc. 14-5 at 106-09 (AT H'rg Test. at 35-38).)

Dr. Wills testified that in her review of AJT's education record, AJT had plateaued with regard to her "expressive communication," but she had "not seen any skill where [AJT] regressed." (Doc. 15 at 206 (Wills H'rg Test. at 557).) Dr. Wills testified that she looked for evidence in the record that AJT's communication skills had regressed over the five years she had been attending school in the District and that she "did not see any evidence of any regression at all." (Id. (Wills H'rg Test. at 518).) Dr. Wills noted that this lack of regression of skills "is really encouraging" and that "given the severity and frequency of [AJT's] seizure disorder, she very well could have, might have regressed." (Id.)

a) Progress at Cedar Island

Pam Kohlhepp, AJT's special education teacher at Cedar Island, testified that AJT made progress in her communication ability in the three years that she attended Cedar Island. (Doc. 15 at 583-84 (Kohlhepp H'rg Test. at 829-30).) Kohlhepp specifically testified that "[AJT] made a lot of gains in terms of her desire to communicate" and her intent to communicate. (Id. (Kohlhepp H'rg Test. at 830).) AJT also made progress in using eye gaze as a way to answer questions or select choices. (Id. at 596 (West H'rg Test. at 882).) Kohlhepp noted that AJT "made a good deal of progress" with respect to making choices and answering questions using eye gaze. (Id. at 583 (Kohlhepp H'rg Test. at 830).)

Kohlhepp also testified that AJT made progress on her functional skills while she was a student at Cedar Island. (Id.) According to Kohlhepp, AJT's "ability to

feed herself increased a great deal.” (Id.) Kohlhepp also testified that AJT experienced periods of progression and periods of waning in her ability to use modified signs as a means of communication and that AJT continued to use the main signs that she consistently used when she started at Cedar Island, which were “eat” and “treat.” (Id. at 584 (Kohlhepp H’rg Test. at 831).)

Former District Special Education Site Administrator Joy Fredrickson testified that data on AJT’s progress was shared at each of AJT’s IEP team meetings while she was at Cedar Island. (Id. at 556 (Frederickson H’rg Test. at 720).) She testified that AJT’s parents “were complimentary of the staff and personnel working with [AJT]” while she attended Cedar Island. (Id. at 555 (Frederickson H’rg Test. at 718).)

b) Progress at Maple Grove Middle School

Dr. Wills stated that recent reports from MGMS did not show regression but rather showed “a distinct improvement.” (Doc. 15 at 196 (Wills H’rg Test. at 519).) In particular, AJT is improving in the following areas:

Visual tracking of objects and people in the room, the looking at people’s faces, smiling and laughing in response to what’s going on around her, initiating and sustaining some turn taking play, like throwing a ball back and forth, really sometimes aiming, which is pitching a ball into, like, a basket or bucket, the eye gaze selection attending and looking at pictures that are pointed

out to her, being able to respond relatively quickly to commands like sit down, stand up, just very basic instructions, using the signs that she has consistently and with diminished prompting with less of a need for kind of the hand-over-hand reminders for the eat and drink and treat that she uses pretty predictably.

(Id. at 196-97 (Wills H'rg Test. at 519-20).)

District expert and special educator and consultant Deb West testified that based on her review of AJT's records, AJT made progress with regard to numerous short-term objectives as reported in AJT's IEP Progress Report dated March 9, 2020. (Id. at 608-09 (West H'rg Test. at 930-32).) She opined that, while the data collection in elementary school may have included more anecdotal information, the information collected by MGMS was "rich in data" from which to calculate progress. (Id. at 609 (West H'rg Test. at 932).)

Teresa Elliot, AJT's case manager at MGMS, testified that AJT "absolutely" made progress during the 2019-2020 school year with respect to her IEP goal of increasing her ability to use direct selection for communication. (Id. at 797 (Elliot H'rg Test. at 1000-02).) Elliot testified that AJT made progress with regard to choosing with whom she wanted to do an activity or work. (Id.) AJT also made progress communicating choices such as whether she wanted a bite of avocado or a bite of something else. (Id. (Elliot H'rg Test. at 999-1000).) AJT made progress gaining adult attention. (Id. at 797-98 (Elliot H'rg Test. at 1002-03).) Elliot also testified that AJT made

progress on objectives related to her IEP goal of improving her skills in activities of daily living. (Id. at 798 (Elliot H'rg Test. at Tr. 1004-05).) Elliot testified that, among other things, AJT made progress with regard to handwashing. (Id. (Elliot H'rg Test. at 1005-06).) Elliot also testified that AJT made progress on her literacy and math goals. (Id. at 799 (Elliot H'rg Test. at 1007-1010).) She did not, however, make any progress with regard to using the toilet. (Id. at 798 (Elliot H'rg Test. at 1004-06).)

c) Dr. Joe Reichle's Trial Tests

In 2019, the parties agreed that Dr. Joe Reichle would conduct an independent educational evaluation ("IEE") of AJT. (Doc. 15 (ALJ Order) at 970- 71).) Dr. Reichle conducted his evaluation sometime that year. Among Dr. Reichle's recommendations in his May 28, 2019 IEE Report were access to "voice output devices" and as much instruction time as possible "during [AJT's] alert hours," which optimally are "between approximately noon and 6:00 p.m." (Doc. 14-15 at 201, 246, 278.)

In autumn 2020, AJT's parents hired Dr. Reichle to conduct a "series of discrete trial tests and to assess how interventions in the mid and late afternoons might impact [AJT's] learning." (Doc. 15 at 979 (ALJ Order, Facts ¶ 73).) Dr. Reichel's evaluation consisted of performing ten discrete trials of late afternoon instruction from 4:15 to 5:30 p.m. in AJT's home, which he compared to instruction that had been conducted in AJT's home from noon to 1:15 p.m. v(Doc.14-12 at 20 (Reichel Hr'g Test. at 453-54).) Coaching was provided via telehealth and the paraprofessional implementing the strategies with AJT was the paraprofessional who usually works with

AJT and her family. (Id. (Reichel Hr'g Test. at 454).) Trials were performed twice-to-three-times-per-week for approximately three and one-half weeks. (Id. at 20-21 (Reichel Hr'g Test. at 453- 54, 458).)

AJT made gains on skills she was learning in school during the trials. (Id. at 21 (Reichel Hr'g Test. at 458 (“[I]t was fairly impressive how quickly she gained skill in a reasonably short period of time.”); 25 (Reichel H'rg Test. at 472 (“My data suggests that not only can she be available and that she can participate, but she can also learn during a period of time in our trial up through 5:30 p.m., because that’s as long as we ran the trial in any given day.”).) He testified that there was nothing in his two evaluations of AJT that would support a conclusion that she needs less than a full day of school and that he thought she could benefit from a full day of school. (Id. at 24 (Reichel Hr'g Test. at 468).) However, he admitted that he found it “difficult” to opine on her progress because “of the quality of the data” available to him; in particular, the Cedar Island data consisted of more “anecdotal reports that are somewhat spotty.” (Id. at 25 (Reichel H'rg Test. at 473).) Dr. Wills testified that the behavioral observations collected at Cedar Island are data and that there is a very extensive description of AJT’s functioning over the years and “quite good data . . . over time to indicate there’s learning and teaching going on.” (Doc. 15 at 204 (Wills H'rg Test. at 550).)

On October 31, 2020, Dr. Breningstall sent a letter to the District stating that AJT’s school day could not begin before noon due to her morning seizure activity. (Doc. 14-13 at 154.) The letter also stated that “[i]t is also important that [AJT] receive a minimum of six hours of school attendance to help with her communication and interaction.” (Id.)

8. Administrative Hearing

On September 14, 2020, AJT's parents filed a special education complaint and request for a due process hearing against the District with the State of Minnesota Office of Administrative Hearings, alleging that the District had violated the Individuals with Disabilities Education Act ("IDEA") because AJT did not receive six-and-a-half hours of education per day like her non-disabled peers and asserting that the District should provide education to AJT from noon until 6:30 p.m. each day. (Doc. 14 at 5-10.) Administrative Law Judge Eric L. Lipman ("the ALJ") presided over the case. (Id. at 19, 28.)

A five-day hearing occurred before the ALJ in February 2021. (Doc. 15 at 969 (ALJ Order at 1).) On April 21, 2021, the ALJ issued his decision ("ALJ Order"). The ALJ ruled:

The Student established that an educational program which did not include supplemental instruction [at] home in the afternoon, did not afford her a free appropriate public education (FAPE). The Student likewise established that 495 hours of such instruction would fairly remediate the School District's denial of a FAPE.

(Id.)

The ALJ ordered the District to revise AJT's IEP to include the following additions:

- (a) instruction at home that includes discrete trial training interventions between 4:30 p.m. and 6:00 p.m. each school day;

- (b) compilation and review of the discreet trial training intervention data;
- (c) direct and indirect services of a Speech and Language Pathologist to design, deliver and monitor the implementation of a communication intervention program; and
- (d) the provision of eye gaze technology with a speech generating device to effectively augment her communication capacities.

(Id. at 987 (ALJ Order, Conclusions ¶ 15).)

Other facts will be discussed as necessary.

B. Procedural History

1. Appeal Case

On June 21, 2021, the District filed the instant case against AJT in this Court asserting an appeal of the ALJ's decision under 20 U.S.C. § 1415(i)(2). Civil File No. 21-1453 (MJD/DTS).

2. Related Discrimination Case

On August 3, 2021, AJT, through her parents, filed a Complaint against the District and the Osseo School Board. Civil File No. 21-1760 (MJD/DTS). On November 8, 2021, AJT filed an Amended Complaint against the District and the Osseo School Board alleging: Count 1: Violations of the IDEA; Count 2: Violations of § 504 of the Rehabilitation Act of 1973; and Count 3: Violations of the Americans with Disabilities Act. (Doc. 15.) All three claims are based on the District's failure to provide AJT a six-and-a-half-hour school day starting at noon. That case was transferred to Judge Davis as a related case. On July 29, 2022, the District filed a motion for summary

judgment in the discrimination case. On August 18, 2022, AJT filed her opposition to the District’s motion.

C. Current Motions

The parties have now filed cross motions for judgment on the record in the appeal case.

III. DISCUSSION

A. Standard of Review Under the IDEA

The Individuals with Disabilities Education Act (IDEA or Act) offers States federal funds to assist in educating children with disabilities. In exchange for the funds, a State pledges to comply with a number of statutory conditions. Among them, the State must provide a free appropriate public education—a FAPE, for short—to all eligible children.

Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 993 (2017) (citations omitted).

“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. at 994 (cleaned up and citation omitted). When evaluating an IEP, “[t]he IDEA looks for improvement, not mastery.” Minnetonka Pub. Schs., Indep. Sch. Dist. No. 276 v. M.L.K. ex rel. S.K., --F.4th--, No. 21-1707, 2022 WL 3009138, at *4 (8th Cir. July 29, 2022). “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” Endrew F., 137 S. Ct. at 999.

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. 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 in original) (citations omitted). However, that child’s “educational program must be appropriately ambitious in light of [her] circumstances. A student making ‘merely more than de minimis’ progress from year to year can hardly be said to have been offered an education at all.” J.P. ex rel. Ogden v. Belton Sch. Dist. No. 124, 40 F.4th 887, 890 (8th Cir. 2022) (quoting Endrew F., 137 S. Ct. at 1000-01) (cleaned up).

When parents and a school district disagree regarding the contents of a child’s IEP,

parents may turn to dispute resolution procedures established by the IDEA. The parties may resolve their differences informally, through a “preliminary meeting,” or, somewhat more formally, through mediation. If these measures fail to produce accord, the parties may proceed to what the Act calls a “due process hearing” before a state or local educational agency. And at the

conclusion of the administrative process, the losing party may seek redress in state or federal court.

Andrew F., 137 S. Ct. at 994 (cleaned up).

In lawsuits filed under section 1415(i)(2), the district court is required to receive the records of the administrative proceedings, hear additional evidence at the request of a party, and independently determine the appropriate relief based on a preponderance of the evidence.

Hansen ex rel. J.H. v. Republic R-III Sch. Dist., 632 F.3d 1024, 1026 (8th Cir. 2011) (citations omitted).

In deciding whether the IDEA has been violated, the district court must independently determine whether the child in question has received a FAPE. In doing so, the court must also give due weight to agency decision-making. This somewhat unusual standard of review is less deferential than the substantial-evidence standard commonly applied in federal administrative law. But we have recognized that this limited grant of deference—due weight—is appropriate in IDEA cases because the ALJ had an opportunity to observe the demeanor of the witnesses and because a district court should not substitute its own notions of sound educational policy for those of the school authorities that it reviews.

K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 803 (8th Cir. 2011) (cleaned up and citations omitted).

Although the Court “must give due weight to the factual findings of the administrative panel,” the Court “consider[s] the panel’s legal conclusions de novo.” Hansen, 632 F.3d at 1026.

“While the district court must accord due weight to the administrative panel’s decision, the burden of persuasion remains with . . . the party challenging the IEP,” in this case, AJT. Lathrop R-II Sch. Dist. v. Gray ex rel. D.G., 611 F.3d 419, 423 (8th Cir. 2010); see also Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 62 (2005) (“The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief,” that is the party who “seek[s] to challenge an IEP”).

Here, the District asserts that the ALJ made no credibility determinations and relied on the testimony of each of the witnesses for some part of his decision. Therefore, there is no basis to defer to the ALJ.

B. Whether the ALJ Applied the Correct Legal Standard

The District asserts that the ALJ applied the incorrect legal standard when deciding whether the District had provided AJT with a FAPE, because he based his decision on whether AJT might make more progress with more instructional time at home, rather than on the appropriateness of AJT’s stay-put IEP.

The District notes that the ALJ made factual findings that AJT made progress during her time at Cedar Island and MGMS in (1) using eye gaze methods to make choices and answer questions; (2) handwashing; (3) using modified signs as a means of

communication; (4) using direct selection for communication; (5) choosing with whom she wanted to work or do an activity; (6) communicating choices; and (7) self-initiating handwashing. (Doc. 15 at 977 (ALJ Order, Facts ¶¶ 58, 61).) The District asserts that the ALJ failed to assess whether this progress was appropriate in light of AJT's unique circumstances including a severe seizure disorder and cognitive impairment. Instead, the ALJ merely relied on Dr. Reichle's opinion that AJT would likely make more gains with more instruction. (See *id.* at 980-81 (Facts ¶¶ 74, 86).)

The District argues that the correct standard to determine whether the District provided a FAPE is whether the IEP was "reasonably calculated to enable [AJT] to make progress appropriate in light of the child's circumstances." Endrew F., 137 S. Ct. at 1001. The District asserts that applying that standard, AJT did receive a FAPE.

The Court finds that the ALJ applied the correct legal standard to AJT's claim. First, the ALJ acknowledged that the burden of proof was on AJT to demonstrate by a preponderance of the evidence that she did not receive a FAPE. (Doc. 15 at 986 (ALJ Order, Conclusions ¶ 3).) Second, the ALJ noted that the test was whether AJT's IEP was "reasonably calculated to enable the child to make progress appropriate in light of [her] circumstances." (*Id.* at 986-87 (ALJ Order, Conclusions ¶ 9).) Third, the ALJ held that AJT had established that her educational program was not "appropriately ambitious in light of [her] circumstances," that she did not have "the chance to meet challenging objectives," and that "the opportunity to access hours of afternoon instruction at home—particularly discrete trial opportunities—

would be beneficial, meaningful and appropriately challenging to [AJT].” (Id. at 987 (ALJ Order, Conclusions ¶¶ 10, 12).)

Thus, although the ALJ did find that more instruction would provide more progress, he also found that the current IEP, without the supplemental instruction at home, was not providing an educational program reasonably calculated to enable AJT to make progress appropriate in light of her circumstances. (Id. at 986 (ALJ Order, Conclusions ¶¶ 6-7).) Specifically, the ALJ found that whenever there was a conflict between the need to maintain the regular hours and AJT’s need for instruction, regular hours was always “the prevailing and paramount consideration” and that AJT’s educational programming was “thus constrained by limitations imposed upon, and outside of, the IEP Team.” (Id.) This was the wrong priority for the District. See Ind. Sch. Dist. No. 623, No. 317-2, 31 IDELR ¶ 17, 53 (holding that a Minnesota school district’s categorical refusal to consider provision of extended day services as way to meet goals of IEP was procedural violation of IDEA because “[s]uch services are appropriate in certain circumstances and their location is not confined to the school day or a school setting”); see also U.S. Dept. of Education Dec. 22, 2014 Letter to Arcadia Unified School District (“Arcadia”) (explaining that the school violated disabled students’ civil rights when it dismissed disabled students earlier than other students, which denied them the same number of educational minutes of schooling as non-disabled students without making individual assessments that early dismissal was “necessary for the needs of specific students”), available at <https://www2.ed.gov/about/offices/list/ocr/docs/>

investigations/more/09141322-a.pdf (last visited Aug. 21, 2022); U.S. Dept. of Education New York Office for Civil Rights May 29, 2015 Letter to Rye City School District (“Rye City”) (explaining that dismissing certain disabled students earlier than all other disabled and non-disabled students denied the students a FAPE when the early dismissal was to avoid congestion during parent and bus pick-up time and that “[a]dministrative convenience is never an excuse for impermissibly shortening the instructional time that students with disabilities receive”), available at https://www2.ed.gov/about/offices/list/ocr/docs/59_investigations/more/02151099-a.pdf (last visited Aug. 21, 2022).

This is the conflict point between the parties. For the most part, the District argues that AJT’s FAPE should be judged by her progress. AJT, on the other hand, asserts that the District cannot provide her a FAPE as long as it does not provide her a school day that is 6.5 hours-long and that those hours coincide with the hours when she is medically-able to learn (i.e., when she is less prone to severe seizure activity and is alert and receptive to learning).

C. Whether the IDEA Requires the Presumption of a Full School Day

The District argues that while it has a legal obligation to individualize AJT’s educational programming to meet her needs, it does not have an obligation to provide the same length school day to her as to non-disabled students. It asserts that Minnesota law allows the standard school day to be adapted for students with disabilities because Minn. Stat. § 120A.22, subd. 12 states that a child may be “excused from attendance for the whole or any part of

the time school is in session during any school year” based on a “note from a physician or licensed mental health professional stating that the child cannot attend school.” The District notes that AJT’s parents and medical providers opine that she cannot attend school before noon; therefore, it concludes that AJT’s needs dictate her school day. Moreover, the ALJ did not order a 6.5-hour “full” school day from noon until 6:30 p.m. Instead, the ALJ ordered a 5.75-hour day that ran from noon until 4:15 p.m. at school and then included home instruction from 4:30 p.m. until 6:00 p.m.

Relying on Andrew F., AJT responds that before a school can provide a shortened school day, the IEP team must determine that a shortened school day is “pecially designed to meet a child’s unique needs.” 137 S. Ct. at 999 (cleaned up) (emphasis in original). She asserts that there is no evidence that a shortened school day is required in order to meet her individual needs. Instead, a preponderance of the evidence shows that a full school day is necessary for AJT to learn appropriately.

AJT argues that under 20 U.S.C. § 1401(9)(B), a FAPE is a program of “special education and related services that . . . meets the standards of the State educational agency.” Minnesota education standards require every school district to provide minimum hours of instruction to all students: 935 hours per year for grades 1-6 and 1020 hours per year for grades 7-12 per Minn. Stat. § 120A.41, subdivision a. Yet the District has only allocated AJT 765 hours per year of instruction while other middle school students in the District receive 1170 hours of instruction per year.

AJT asserts that every eligible student with a disability is presumed to be entitled to a full school

day unless their needs dictate otherwise. See 34 C.F.R. § 300.11(c) (“School day means any day, including a partial day that children are in attendance at school for instructional purposes. School day has the same meaning for all children in school, including children with and without disabilities.”).

AJT concludes that only a student’s IEP team’s determination that the individual student requires a shorter school day in order to receive a FAPE can justify a shorter school day. (Doc. 54 at 24 n.91 (citing, inter alia, Spring Branch Ind. Sch. Dist. v. O.W., 938 F.3d 695, 712 (5th Cir. 2019) (holding that shortening a school day by almost half “was a substantial and significant deviation from the IEP which indisputably resulted in a loss of academic benefits” and when accomplished outside of the required IEP Team process violated the IDEA) opinion withdrawn and superseded on other grounds on reh’g sub nom. by Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W., 961 F.3d 781 (5th Cir. 2020); Teague Ind. Sch. Dist. v. Todd L., 999 F.2d 127, 129 (5th Cir. 1993) (holding that shortening student’s school day from seven hours to two hours did not violate the IDEA when reduction was included in the IEP due to the student’s “inability to tolerate a longer school day without becoming unduly frustrated and discouraged, leading to regression rather than academic progress” and not for the convenience of school staff)). AJT concludes that, here, the District shortened her school day without first employing full-time instruction to determine the benefits from full-time instruction and without considering AJT’s needs. Because the District refused to provide instruction after 4:15 p.m., the only data regarding

the benefit to AJT of instruction between 4:00 p.m. and 6:00 p.m. comes from the testimony of her father, her former educator in Kentucky, and Dr. Reichle, who performed test trials with AJT between 4:15 p.m. and 5:30 p.m.

The Court declines to reach the issue of whether the IDEA requires the presumption that every student is entitled to a full instruction day regardless of the start time. Deciding this issue is not required to decide the motions before the Court. Importantly, the ALJ found that AJT had been denied a FAPE without relying on such a presumption. Moreover, the Supreme Court's caselaw regarding FAPE provides a flexible standard of whether the IEP is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Endrew F., 137 S. Ct. at 999. The Supreme Court has purposely avoided applying bright-line rules such as a "de minimis" progress standard or a standard that the IEP provides "an opportunity to understand and participate in the classroom that was substantially equal to that given her non-handicapped classmates." See id. at 1001 (citation omitted). Additionally, the Supreme Court and Eighth Circuit caselaw is clear that the burden is on the party challenging the IEP – here, AJT – so applying a presumption that the District's IEP is illegal because it provides fewer instructional hours than a typical school day and requiring the District to show that fewer hours are required for AJT flips that burden.

Additionally, given the evidence that AJT cannot safely start the school day until noon and the lack of evidence that it would be safe for her to receive instruction after 6:00 p.m., the record amply supports

the ALJ's decision that AJT's FAPE did not require a full 6.5-hour school day. Finally, although federal statute defines a FAPE as a program of special education that "meets the standards of the State educational agency," Minnesota law allows a student to be excluded from attendance based on a note from a physician, and AJT had an annual letter from her physician stating that she was unable to attend school before noon. Therefore, like the ALJ, the Court need not rely on this presumption to determine whether the District provided AJT a FAPE.

D. Sufficiency of the Evidence to Support the ALJ'S Decision

1. Whether the District Prioritized Regular Faculty Hours Over AJT's Needs

The District argues that the ALJ clearly erred by determining that

whenever there was a conflict between the need to maintain the regular hours of the school's faculty, and the student's need for instruction, the regular hours of the faculty was always the prevailing and paramount consideration.

(Doc. 15 at 986 (ALJ Order, Concl. ¶ 6).)

The District argues that the evidence in the record supports only one conclusion: the District shortened AJT's school day because the IEP team, including AJT's parents, determined that AJT's needs required a noon start time for school. The doctors' letters that AJT's parents provided to the IEP team stated that AJT needed a noon start time, the letters never stated that she should be educated 6.5 hours per day until

Dr. Breningstall's October 31, 2020 letter, which stated that she should receive a minimum of six hours of school attendance to help with her communication and interaction. And, the District asserts, Dr. Breningstall's opinion is simply based on information from AJT's parents.

The District also argues that the uncontroverted evidence showed that AJT received a shortened school day in Kentucky; the IEP team considered the Kentucky IEP and adopted most of it and the IEP team agreed to more minutes of special education services than AJT had received in Kentucky, although she received them in school rather than at home. (Doc. 55 at 6-7 (citing Sterling A. ex rel. Andrews v. Washoe County Sch. Dist., 307-CV-00245-LRH-RJJ, 2008 WL 4865570, at *7 (D. Nev. Nov. 10, 2008) (holding that services offered in the interim IEP in Nevada were "similar or equivalent" to the home-based services provided for in the California IEP because "[t]he evidence indicates that while the exact location of the services was different, the substance and goals of the [] services was the same").)

The District further argues that AJT's IEP called for a school day of 4.25 hours during almost the entire time she was enrolled in the District; and, apart from the brief interim IEP, the District's IEP always called for services after the end of the regular school day—15 minutes more in elementary school and 95 minutes after the end of the middle school day. Finally, the District notes that in April 2017, AJT's parents agreed to an IEP that required a 4.25-hour school day for middle school and did not object.

The District also argues that AJT only needed a shortened school day because AJT's education consisted of 4 hours and 15 minutes of intensive 1:1

or 2:1 instruction, which provided education comparable to 6.5 hours of a usual school day. It asserts that AJT's school day schedule does not include down times for recess, elective courses, or eating lunch with peers. AJT received an intensive program designed based on her unique needs with the sole attention of one adult or, from 2:40 p.m. to 4:15 p.m., two adults delivering instruction to her alone. (Doc. 15 at 389, 404 (Fredrickson H'rg Test. at 777-78, 793); 802 (Elliott H'rg Test. at 1019-21).)

Thus, AJT's educators designed her program for the time that she was available when school was in session and for additional time that the full IEP team agreed was necessary beyond the school day.

The District emphasizes that it consistently considered AJT's parents' request for additional hours of instruction beyond the end of the regular school day. The IDEA's procedural requirements require the District to "consider" AJT's parents' requests for more educational services by discussing those requests at an IEP team meeting. See K.E., 647 F.3d at 805-06. The District asserts that it met this obligation, and the fact that AJT's IEP team disagreed with her parents' requests does not demonstrate a violation of the IDEA.

The Court finds that the ALJ did not err in finding that when there was a conflict between AJT's need for instruction and the school's regular hours, the regular hours of the faculty were always the prevailing consideration. AJT's parents consistently maintained that AJT needed instruction in the late afternoon and early evening, she received such instruction under her Kentucky IEP, and there was no evidence ever submitted to the school that instruction during that time would be harmful to AJT. The District

steadfastly refused to extend the instruction hours past 4:15 with a series of shifting reasons: at one point merely stating, “We don’t provide both homebound and school support,” then stating state law did not mandate this type of support, and finally stating that it would not provide an extended school day “due to the precedent it would start [for the District] and other districts across the area.” None of these reasons is based on an individual assessment of AJT’s needs as required by the IDEA, under which extended days “are appropriate in certain circumstances and their location is not confined to the school day or a school setting.” Ind. Sch. Dist. No. 623, 31 IDELR ¶ 17; Andrew F., 137 S. Ct. at 999 (“A focus on the particular child is at the core of the IDEA.”). Administrative convenience is not an excuse for impermissibly shortening the instructional time a disabled child receives. Rye City, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02151099-a.pdf>; see also Todd L., 999 F.2d at 129 (finding that shortened school day was in response to child’s needs not for the convenience of school staff).

There is no evidence that six hours of instruction per day would be harmful to AJT. In fact, there is evidence that six hours of daily instruction is important to AJT’s communication and interaction development.

As the ALJ acknowledged, the District provides AJT “intensive services” with one-on-one or two-on-one instruction at all times. (Doc. 15 at 976 (ALJ Order, Facts ¶ 55).) However, there is no evidence that the intensity of the services means that a six-hour school day would not be appropriate and beneficial or that this student-to-teacher ratio is

somehow a substitute for hours of instruction. As AJT's father testified, the IEP needed to omit toileting goals because there simply was not time in the 4.25-hour school day to work on that goal along with the other goals in AJT's IEP. Dr. Reichle testified that all of the interventions that he recommended for AJT in the 2019 independent evaluation could not be implemented in her shortened school day. (Doc. 14-12 at 18 (Reichle H'rg Test. at 444-45).) Nor is there any evidence that the intensity of AJT's instruction makes her fatigued or unable to learn for six hours. Finally, contrary to the District's assertion, like any child's typical school day, AJT's 4.25-hour day includes time for lunch, bathroom use, and breaks, although her aides do work on some learning goals during those times. (Doc. 14-15 at 323.) Moreover, the District admits that AJT receives 1:1 and 2:1 support because she requires it, not because the District is doing something extraordinary for AJT. (Doc. 15 at 570 (Fredrickson H'rg Test. at 778).)

Although both parties agree that AJT is unable to start school before noon, that is not the same as agreeing that AJT has to stop school after 4.25 hours. The evidence supports the ALJ's decision that while AJT's medical needs dictated the start of AJT's school day, the District's preferred schedule dictated the end of AJT's school day. No member of AJT's medical team ever suggested that a full school day would be harmful to AJT or would fail to produce any benefit to her. (Doc. 14-6 at 37 (AT H'rg Test. at 107).) The most recent letter from Dr. Breningstall stated, "It is also important that [AJT] receive a minimum of six hours of school attendance to help with her communication and interaction." (Doc. 14-13 at 154.) In addition, Dr. Reichle testified, "My opinion is it's likely she

would make more gains with additional instruction” and that AJT should have as much instruction as possible during her alert hours from approximately 12:00 to 6:00 p.m. (Doc. 14-12 at 25 (Reichle H’rg Test. at 474); see also Doc. 14-15 at 201, 246, 278.) AJT’s parents never agreed that a shortened school day beginning at noon would be appropriate given her individual needs.

As the ALJ found, the services in AJT’s IEPs were limited by the shortened school day rather than by her needs. This conclusion is supported by the testimony of independent educational evaluator Dr. Reichle, that her teacher and case manager, Teresa Elliot, conceded that to him in discussions. (Doc. 14-12 at 22 (Reichle H’rg Test. at 461); Doc. 15 at 979 (ALJ Order, Facts ¶ 71)); see also Ind. Sch. Dist. No. 623, No. 317-2, 31 IDELR ¶ 17, 53 (holding that extended days “are appropriate in certain circumstances and their location is not confined to the school day or a school setting”); Arcadia (denial of same number of educational minutes to disabled students without individual assessments that fewer minutes or early dismissal was “necessary for the needs of specific students” was denial of FAPE), available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141322-a.pdf>; Rye City (“Administrative convenience is never an excuse for impermissibly shortening the instructional time that students with disabilities receive”), available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02151099-a.pdf>.

2. Instruction in the Late Afternoon and Evening

The District asserts that the ALJ's remedy that AJT receive services until 6:00 p.m. is contrary to the evidence presented by the District about AJT's needs and also contrary to the evidence introduced by AJT's experts. Because the ALJ's Order is based on something other than the record created at the hearing, the District argues it must be overturned.

The District points out that the ALJ determined that education after 6:00 p.m. would be risky for AJT. (Doc. 15 at 985 (ALJ Order, Facts ¶ 111).) Yet no witness opined services between 6:00 p.m. and 6:30 p.m. would be dangerous for AJT. Dr. Reichle testified that nothing in his evaluations supported a conclusion that AJT could not attend schooling until 6:30 p.m. (Docket No. 14-12 at 25 (Reichle H'rg Test. at 472-474).)

The District emphasizes that “[t]he fact that the IDEA is a federal statute does not mean that every state must administer the act in the same way.” J.B. ex rel. B.B. v. Lake Washington Sch. Dist., No. C12-0574RSL, 2013 WL 195375, at *2 (W.D. Wash. Jan. 17, 2013). Thus, according to the District, the services provided by Kentucky are not the standard for measuring whether AJT received a FAPE in the District. See id.

AJT responds that although Dr. Reichle did no trials between 5:30 and 6:00 p.m., evidence from Kentucky and AJT's parents shows that effective educational results can be achieved after 5:30 p.m.

a) Instruction Between 5:30 and 6:00 p.m.

The ALJ's decision that instruction between 5:30 and 6:00 p.m. would be beneficial to AJT is well supported. Although Dr. Reichle's trial experiments

only lasted until 5:30 p.m., Behavior Specialist Ott testified that AJT was able to learn until 6:00 p.m. when she received instruction in Kentucky, and AJT's father testified that she was alert and available to learn at that time. Dr. Breningstall also testified that AJT would benefit from instruction between 4:15 and 6:00 p.m. There is no evidence to contradict that testimony. Additionally, the ALJ's determination that the District was not required to provide instruction after 6:00 p.m. was reasonable and well-supported because there is no evidence that instruction after 6:00 p.m. would be beneficial or safe. No instruction or test trials ever occurred at that time and no medical provider testified that instruction at that time would be beneficial or safe.

b) Whether AJT Would Have Made More Progress with Additional Instruction until 6:00 p.m.

The record supports the finding that AJT would have made more progress with additional instruction from 4:15 to 6:00 p.m. and there is no evidence that she would not have made additional progress with those extended hours. Dr. Reichle testified that AJT was not as efficient a learner as a typical learner, needed additional time, was a hard and motivated worker who was easy to motivate to pay attention and learn during those times, and "would have made additional gains" with additional instruction. (Doc. 15 at 979 (ALJ Order, Facts ¶¶ 72, 74 (citing Doc. No. 14-12 at 18, 25 (H'rg Tr. at 443, 474 (Reichle Test.)).)

Every witness to testify on the subject testified that AJT does not learn as efficiently as a typical learner. Dr. Reichle testified that three hours of instruction for AJT is not the same as three hours of

instruction for a typical learner, and that “she could definitely benefit from more instruction than she has received.” (Doc. 14-12 at 25 (Reichle H’rg Test. at 473).) He opined:

[AJT] can use all the time she can get to learn. She is clearly – and I don’t think anybody can dispute she is clearly way behind in terms of learning communication skills and she’s falling further behind every day in terms of rate of acquisition. So she can use all the available hours that she can get where she’s motivated to learn. That’s in terms of what would be best for her.

(Id. at 18 (Reichle H’rg Test. at 444).) Dr. Reichle explained that all of the interventions that he recommended for AJT in 2019 had not been implemented and full implementation would require more time than a regular school day. (Id. (Reichle H’rg Test. at 445).) He opined that literature in the field regarding the effects of intensity of instruction for learners with intellectual disabilities generally suggests “that higher dosages result in quicker acquisition.” (Id. at 23 (Reichle H’rg Test. at 464).) In 2019, Dr. Reichle recommended that AJT receive a full day of school.

In conducting this IEE, it quickly became clear that optimal times to work with [AJT] were between approximately noon and 6 p.m. [AJT] frequently experiences seizures during the evenings which requires that she recovers during the following mornings. Consequently, her school hours are not

traditional hours. Given her seizure history [AJT] is likely to experience relatively fewer productive educational hours than most learners. As a result, it is very important that she receives as much time as possible for instruction during her alert hours.

(Doc. 14-15 at 246.) Dr. Reichle testified that AJT's learning "trajectory is falling further and further behind her peers." (Doc. 15 at 229 (Reichle H'rg Test. at 651).) He testified that additional instruction would result in additional progress. (Doc. 14-12 at 25 (Reichle H'rg Test. at 474).) "[A] full school day in my experience tops a half school day every time." (*Id.* at 24 (Reichle H'rg Test. at 468).)

3. Whether AJT Made Progress in the Shortened School Day

The District argues that the preponderance of the record evidence shows that AJT made progress on her IEP goals with the shortened school day. (*See* Doc. 15 at 573 (Frederickson H'rg Test. at 789 ("[AJT] was benefiting from the school day that she had, she was continuing to make progress within the hours she was provided.")); 599 (Kohlhepp H'rg Test. at 892 (testifying that AJT has made progress on communication skills but that she did not "see a lot of progress in her functional skills")).) Even Dr. Reichle admitted that AJT had made progress on some skills in school. (Doc. 14-12 at 25 (Reichle H'rg Test. at 473 ("There are skills at school where she has made gains.")).)

The District asserts that evidence of progress is significant given that it is not uncommon for individuals with LGS to regress and lose previously-

acquired skills. (See Doc. 15 at 196 (Wills H'rg Test. at 518 (testifying that "given the severity and frequency of [AJT's] seizure disorder [] she very well could have, might have regressed" and "many children do [regress]")); 239 (West H'rg Test. at 689 (testifying that her experience with two individuals with LGS is that they plateaued, but did not regress, by the time of middle school)); 785 (Shams H'rg Test. at 952-53 (testifying that most LGS patients plateau after age 8 or 9 and through the mid-teenage years)).) Both Dr. Wills and West testified that AJT has not regressed in a single skill area since enrolling in the District. (See, e.g., id. at 196 (Wills Hr'g Test. at 518, 556); 599 (West H'rg Test. at 892-93).)

The District notes that evidence of progress is probative of the adequacy of the IEP, citing Andrew F., 137 S. Ct. at 1001 (holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"). The District also reminds the Court that the IDEA requires neither specific results nor that the District maximize AJT's potential or "provide the best possible education at public expense." (Doc. 60 at 1 (quoting M.L.K., 2022 WL 3009138, at *4).)

The Court finds that AJT made progress during the 4.25-hour day. However, this fact does not require reversal of the ALJ's Order. First, the Supreme Court has made clear that the fact that a student makes some progress in an IEP does not alone establish that the IEP provides a FAPE. See Andrew F., 137 S. Ct. at 1000-01 (holding that FAPE "standard is markedly more demanding than the merely more than de minimis [progress] test" and "requires an educational program reasonably calculated to enable a child to

make progress appropriate in light of the child's circumstances") (cleaned up). Second, while it is undisputed that AJT did make progress in some areas under the IEP, it is also undisputed that she regressed in the areas of toilet training, signing, and initiating greetings with assistive technology. She lost the capacity to use a variety of signs that she had used in Kentucky, lost the capacity to void on the toilet 50% of the time, and lost the capacity to successfully interact with peers by using assistive technology to initiate or return a greeting. (Doc. 14-5 at 106-07; 14-6 at 71-72 (AT H'rg Test. at 35-37, 141-42); Doc. 14-15 at 22 (Mar. 12, 2015, Kentucky IEP ("[AJT] can independently initiate a greeting to a peer or adult or return a greeting from a peer or adult by activating a prerecorded button switch . . .").))

Dr. Reichle testified that AJT lost skills previously acquired and that regression suggests that AJT needs more instruction. (See, e.g., Doc. 14-12 at 10- 11, 24 (Reichle H'rg Test. at 413-15, 470).) He noted in his IEE that on the day he observed AJT at school, she did not return the greeting of one of her school peers. (Doc. 14-15 at 181 ("One female classmate said 'Hi' to [AJT] to which she did not react. The peer 'hung around' [AJT] for a minute or so telling others that '[AJT] here' while acting excited.")) Importantly, Dr. Wills testified that while LGS can cause a regression in skills, LGS had not yet caused AJT's regressions because she was still progressing. (Doc. 15 at 206 (Wills H'rg Test. at 556-57).)

While witnesses testified that LGS can cause plateauing or regression (Doc. 15 at 239 (West H'rg Test. at 689); 785 (Shams H'rg Test. at 952-53)), there is no definitive evidence that AJT's LGS caused the plateauing and regressing that she has experienced.

Furthermore, special education teacher Pam Kohlhepp testified that she could not opine for sure if AJT's learning progress could improve with more time, that she had no basis to conclude that AJT would be harmed by instruction between 4:00 and 6:00 p.m., and that she had no reason to believe AJT could not benefit from a full day of school. (*Id.* at 590 (Kohlhepp H'rg Test. at 855).) Likewise, Dr. Breningstall testified that "it would be beneficial for [AJT] to have the same number of schooling hours as her peers" and there is no reason to believe she would be harmed by instruction from noon to 6:00 or 6:30 p.m. (Doc. 14-11 at 58 (Breningstall H'rg Test. at 275).) Dr. Wills also testified that "it's kind of a no-brainer that, of course, instruction is a benefit," particularly for an individual "with greater needs," although she noted that it is "a different thing than to say that this is necessary." (Doc. 15 at 197 (Wills H'rg Test. at 520-21).)

4. Reliability of Dr. Reichle's Opinion

The District argues that Dr. Reichle's opinion that "more is better" and that AJT would likely make more gains with more instruction is not supported. First, the District notes that his recommendation is based on a short-term intervention over the internet in which he coached a paraprofessional in AJT's home to facilitate discrete trial training sessions that were limited in scope and duration. (Doc. 14-12 at 20 (Reichle H'rg Test. at 454).) Dr. Reichle wanted to gauge AJT's seizures and alertness, but he could not do either via the computer, testifying only that he could "say there were no large seizures but beyond that I can't say too much." (*Id.*) Likewise, he had only an anecdotal gauge of AJT's alertness based on the

fact that “she learned relatively quickly and we had relatively few no responses.” (Id. at 20-21 (Reichle H’rg Test. at 454-55).)

Dr. Reichle also testified that literature regarding the success of more intensive interventions for learners with intellectual disabilities is “a little mixed.” (Id. at 279 (Reichle H’rg Test. at 463-65).) He admitted that one recent study indicates that less intensity of service may actually be more successful because the learner’s attention span wanes in longer sessions. (Id.) When asked what the literature indicates with regard to more intensity affecting a child’s ability to maintain skills and generalize their use in different environments, he answered “[t]he honest answer is we don’t know.” (Id. (Reichle H’rg Test. at 466).) Finally, the District notes that Dr. Reichle opined that while he thought more was better with respect to AJT’s education programming because she is highly motivated and an easy learner to motivate, he did not pick “dosage levels” that were sufficiently different to actually demonstrate that. (Id. (Reichle H’rg Test. at 465).)

The District notes that Dr. Reichle’s intervention and virtual observations took place over ten sessions, held two to three times per week over the course of a three-and-a-half-week period during the COVID-19 pandemic when AJT was not in school. (Id. at 20 (Reichle H’rg Test. at 453-54).) Dr. Wills opined that she did not know if AJT would make more progress with more hours of instruction. (Doc. 15 at 201 (Wills H’rg Test. at 537).) She reviewed Dr. Reichle’s data from his telehealth observations and testified that it was debatable how much progress AJT made in the timeframe of 4:15 p.m. to 5:30 p.m.—the report showed that AJT was available to learn at that time

when she had not been in school all day beforehand (Id. at 206 (Wills H'rg Test. at 559).) She opined that Dr. Reichle's data did not demonstrate that a 6.5-hour school day would produce more gains for AJT. (Id. at 200-201 (Wills H'rg Test. at 535-36).)

The District asserts that the ALJ relied on Dr. Reichle's opinion to order the District to provide an additional one-and-a-half hours of in-home instruction to AJT after school until 6:00 p.m., even though Dr. Reichle testified that no trial lasted beyond 5:30 p.m., so he was not able to gauge AJT's ability to learn after 5:30 p.m. The District asserts that the ALJ erred in relying on Dr. Reichle's testimony without making any credibility determinations as to the divergent testimony of the District's witnesses.

The Court rejects the District's claim that the ALJ's decision is wrong because Dr. Reichle's testimony is unreliable. Although Dr. Reichle only conducted ten trials via the internet that consisted of far fewer than 6 hours per day, there is no evidence to contradict his findings that AJT successfully learned from 4:15 to 5:30 p.m. There is no indication that the paraprofessional at AJT's home did not correctly participate in the trials or that, in other circumstances, AJT was not alert and able to learn at that time. Although the literature on the efficacy of the intensity and amount of instruction may be "mixed" with regard to students in general, Dr. Reichle had a clear opinion on AJT's ability to learn with intense and longer instruction based on his interactions with her and her personal characteristics. Dr. Reichle's testimony was the best evidence available to the ALJ regarding AJT's ability to learn at that time and was corroborated by Ott's

testimony regarding AJT's successful learning at that time after a school day in Kentucky and by AJT's father's testimony. Moreover, although this trial took place during the pandemic, the trial consisted of two-sessions-per-day beginning at noon, which mirrored school conditions as closely as possible, given the circumstances, which were dictated by a global pandemic.

5. Whether the ALJ's Decision Relies on Factual Errors

The District argues that the ALJ's decision relies on findings inconsistent with the evidence. For example, the ALJ found that while reaching agreement as to the start time of AJT's school day, AJT's parents and the District have never agreed as to when AJT's day should conclude. (Doc. 15 at 970 (ALJ Order, Facts ¶ 3).) The District asserts that, in fact, AJT's parents agreed to the stay-put IEP that includes a 4:15 p.m. end time by way of implied consent in April 2017. And, at one point, AJT's parents themselves suggested a 4:15 p.m. end time to AJT's school day.

The ALJ also includes a finding that the "District has struggled in making progress on [AJT's] IEP goals and objectives with a four-hour and fifteen minute school day." (*Id.* at 979 (ALJ Order, Facts ¶ 71).) In support of this finding, the ALJ states as fact that "[a]s Dr. Reichle was preparing the IEE, [AJT's] current special education teacher and case manager, Teresa Elliot, confided that some of the instructional objectives in [AJT's] IEP could not be implemented in the time available during her shortened school day." (*Id.* & n.71 (citing (Doc. 14-12 at 22 (Hr'g Tr. at 461 (Reichle Test.))).) The District argues that

Dr. Reichle's testimony, however, is directly refuted by Elliot's hearing testimony. Elliot testified that she took part in writing AJT's IEP, "[s]o if I didn't feel that we would be able to implement that IEP, I wouldn't write it that way." (Doc. 15 at 800 (Elliot H'rg Test. at 1013).) She testified that she wrote AJT's IEP knowing that AJT attended school from 12:00 to 4:15 p.m. and she wrote the IEP knowing AJT only had 4.25 hours. Thus, she did not tell Dr. Reichle that there was too much on the IEP to accomplish in a 4.25-hour day. (*Id.* at 804 (Elliot H'rg Test. at 1029-30).)

According to the District, the ALJ provided no credibility assessment that would suggest Dr. Reichle's testimony was more credible or deserved more weight than Elliot's testimony. Indeed, the ALJ includes no reference to Elliot's testimony with respect to this factual finding. Additionally, AJT's father agreed that the statement was similar to his experience with "Kohlhepp when we made the very difficult decision to remove potty training from [AJT's] goals and objections because there wasn't enough time." (Doc. No. 14-6 at 3-4 (AT H'rg Test. at 73-74).) When asked whether Dr. Reichle's recommendations could be implemented during a 4-hour-and-15-minute school day, AJT's treating neurologist testified, "Then that would be to the – that would be at the expense of something else occurring during that period of time." (Doc. 14-11 at 61 (Breningstall H'rg Test. at 289).)

The District also notes that the ALJ made a finding that "[f]or its part, the District agrees that the amount of instruction should be based upon the number of hours that [AJT] can remain engaged, active and alert." (Doc. 15 at 980 (ALJ Order, Facts ¶

76.) The ALJ cites to Dr. Wills' testimony to support this notion; however, Dr. Wills was not testifying about the hours of instruction generally, but rather, was answering the question regarding "the method of determining how much of that ABA instruction [AJT] should have." (*Id.* at 201-02 (Wills H'rg Test. at 539-40).) Dr. Wills also testified, "[i]t's not the [number of] hours, but what you do with them." (*Id.* at 200-01 (Wills H'rg Test. at 535-36).) The District asserts that it has taken the timeframe during which AJT is available for learning and offered her an educational program that is highly individualized and designed to provide a FAPE within that timeframe. AJT begins her day at 12:00 p.m. because that is when she is first available to learn. Her day is extended beyond the end of the typical school day because that is part of what allows her to make progress appropriate in light of her circumstances. The District asserts it is under no obligation to provide instruction to its students at all hours of the day during which they are engaged, active, and alert.

The District next takes issue with the ALJ's conclusion that Dr. Shams' suggestion that "one or two hours of instruction was 'good,' 'fine' and sufficient" for a student like [AJT], is not well taken." (Doc. 15 at 986 (ALJ Order, Conclusions ¶ 8).) Dr. Shams is the District's expert neurologist. The District asserts that this is a gross misstatement of Dr. Shams's testimony.

During the hearing, the ALJ asked Dr. Shams if a student with LGS, be it AJT or another LGS patient, was not available for instruction until 3:00 p.m., "would it be your view that an hour from 3:00 to 4:00 would be suitably challenging and beneficial because they have access to peers?" (*Id.* at 793 (H'rg Tr. at 984

(Shams Test).) Dr. Shams answered, “I think many of these patients grow up at—spend significant time at home without peer interaction. So I think any peer interaction globally is good. If it’s one hour 3:00 to 4:00, great. So be it. If the baseline is nothing, then one to two hours is fine.” (*Id.*) The District argues that the ALJ’s decision suggests that Dr. Shams believed AJT is so disabled that she only requires an hour or two of instruction; however, this is not an accurate representation of Dr. Shams’s testimony at hearing.

The ALJ also concluded that the District showed “no flexibility in the instruction schedule for [AJT] beyond 4:15 p.m.” (*Id.* at 983 (ALJ Order, Facts ¶ 99).) Similarly, the ALJ also found that “[t]he hearing record reflects that the School District’s aggressive press for an earlier start time for [AJT] did not follow an individualized assessment of [her] needs, but rather the need to safeguard the ordinary end-of-the-workday departure times for its faculty and staff.” (*Id.* at 983-84 (ALJ Order, Facts ¶ 101).) The District argues that these findings are erroneous; it engaged in lengthy and ongoing communications with AJT’s family in order to find a way to best understand and serve her needs.

The District argues that it has always remained ready to provide instruction to AJT any time that she is available during the regular school day as it would be for any other District student. And it has never proposed an IEP with a start time earlier than 12:00 p.m. It merely offered a flexible start time option as one of many various suggestions to provide AJT with the opportunity to access her education program to the same extent as her peers in light of the District’s obligation to include AJT to the maximum extent

possible with her nondisabled peers as required by 34 C.F.R. § 300.114 (setting forth the least restrictive environment requirement under the IDEA). The District asserts that, in response to AJT's parents' request for instruction time for AJT, the District offered to place trained staff in AJT's home to collect more information regarding her seizure activity and needs during the morning. AJT's parents rejected this offer and the District accepted their decision.

The District argues that it has shown its commitment to flexible scheduling for AJT by extending her school day beyond the end of the regular school day by 15 minutes when she attended Cedar Island and by 1 hour and 35 minutes when she attended MGMS. The District also provided AJT with ESY services that took place in her home from 12:00 to 3:00 p.m. as opposed to the typical 9:00 a.m. to 12:00 p.m. ESY service provided on school premises. And the District even offered to provide the Student with additional hours of ESY services, which the family declined.

The Court finds that while the ALJ did appear to make a few errors, collectively, the errors do not support reversing the ALJ's decision.

The ALJ erred by finding as a fact that Elliot told Dr. Reichle that "some of the instructional objectives in [AJT's] IEP could not be implemented in the time available during her shortened school day" without making a credibility determination between Elliot and Dr. Reichle because Elliot testified that she did not make that statement and Dr. Reichle testified that she did. (Doc. 15 at 979 (Doc. 15 at 979 (ALJ Order, Facts ¶ 71).) However, this error does not alter the Court's overall analysis.

Even accepting Elliot's testimony as true, she stated that she crafted the IEP goals to fit into the limitations of 4.25 hours and so would not have included any goal that could not be accomplished during that time, which does not show that a 4.25-hour-day was appropriate. Elliot's testimony supports a finding that AJT's IEP goals were limited by the 4.25-hour day. In addition, Dr. Breningstall testified that implementing Dr. Reichle's recommendations within the 4.25-hour school day would require eliminating other goals for AJT. AJT's father testified that the District indicated that it was not possible to pursue toilet training due to the length of the day and, thus, AJT's parents agreed to eliminate that goal from her IEP. And Dr. Reichle testified that his IEE recommendations could not be implemented when constrained to a 4.25-hour day. (Doc. 14-12 at 18 (Reichle H'rg Test. at 444-45).) Therefore, the record still supports the ALJ's decision.

Similarly, the ALJ's statement that Dr. Shams opined that one-or-two hours of instruction for a student like AJT was "good,' 'fine' and 'sufficient'" appears to be a mischaracterization of his opinion. In context, Dr. Shams was stating that one or two hours of peer interaction is better than no peer interaction and that this amount of peer interaction for a student like AJT would be "fine" if the baseline was zero. He was not opining that instruction time of one or two hours was sufficient for AJT. However, this mischaracterization does not form the basis for the decision that AJT should receive six hours of instruction per day, so it is not material. See Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580, 259 F. Supp. 2d 880, 885-86 (D. Minn. 2003) (finding disputed issue immaterial to determination of

whether child was denied a FAPE and granting judgment for school based on this and other grounds).

On the other hand, the ALJ did not err in stating that AJT's parents and the District have never agreed as to when AJT's day should conclude. AJT's parents have consistently requested instruction until at least 6:00 p.m. and merely "agreed" to the 2017 IEP by not responding to it. At one point, they suggested a 4:15 p.m. end time in the school building, but that was a negotiating point in the context of their knowledge that the District consistently refused anything later and also refused in-home support after school hours.

Likewise, the ALJ's statement that the District showed "no flexibility in the instruction schedule for [AJT] beyond 4:15 p.m." is accurate. Although the District engaged in ongoing communications with AJT's family to seek a solution that met her needs and provided multiple alternatives, it never offered an alternative with instruction beyond 4:15 p.m.

The ALJ's interpretation of Dr. Wills' testimony is reasonable—Dr. Wills was answering a question about the amount of ABA instruction AJT should have. AJT's parents maintain that AJT should receive ABA instruction, so it was a reasonable interpretation that Dr. Wills thinks that AJT's instruction overall should be based on how long she "can remain engaged, active and alert."

The ALJ's interpretation that the District's request to observe AJT in the mornings to see if morning instruction would be feasible and its offer of a flexible start time to allow AJT to attend any time before noon on any day when she is able were made solely to provide a standard departure time for its staff is a factual interpretation that is entitled to due

weight. A reasonable interpretation of the evidence is that the District was trying to accommodate AJT with a flexible start time by allowing her extra instructional time when she was available. And, since there was no data on how AJT fared during instruction before noon, it was reasonable for the District to offer to have a professional observe her at that time to determine if there was a possibility of some manner of morning instruction. At one point, the District was told by one of AJT's neurologists, Dr. Jason Doescher, that he thought education earlier in the day would be a possibility and that attempting to trial that would be "reasonable." (Doc. 14-16 at 42 (Jan. 28, 2021, Transcript of Recorded Phone Call with District personnel; AT, AJT's father; and Doescher at 12-13); see also Doc. 14-11 at 56 (Breningstall H'rg Test. at 267) ("Dr. Doescher was apparently somewhat amenable to attempts to modify [AJT's] schedule to try to start her educational process earlier in the day.").)

However, the ALJ's attribution of a different motivation to the District's actions is entitled to due deference under the standard of review the Court must apply in this case. See K.E., 647 F.3d at 803. Evidence supporting the ALJ's interpretation includes AJT's father's clear testimony regarding the adverse effects AJT has endured from waking up earlier for medical treatments, (see, e.g., Doc. 14-6 at 19-23 (AT H'rg Test. at Tr. 89-93)), and Dr. Breningstall's testimony that starting AJT's school day before noon would lead to an "inevitable worsening of her problem" and that Dr. Breningstall "can't see on an experimental basis or otherwise exposing [AJT] to an inevitable worsening of her

problems” (Doc. 14-11 at 57 (Brenningstall H’rg Test. at 273-74)).

Therefore, while the ALJ made some factual errors, the errors do not require that the Court reverse the ALJ’s decision.

IV. CONCLUSION

Based on the above discussion, the Court concludes that the District has not provided AJT a FAPE. AJT requires more than 4.25 hours of schooling a day to have an educational program that is sufficiently ambitious in light of her circumstances and that will allow her to meet challenging objectives. Extending her instructional day until 6:00 p.m. and including compensatory hours of instruction as found by the ALJ is the appropriate remedy. The ALJ’s decision is **AFFIRMED**.

Based on the files, records, and proceedings herein,

IT IS HEREBY ORDERED:

1. Defendant’s Motion for Judgment on the Record (Doc. 43) is **GRANTED**; and
2. Plaintiff’s Motion for Judgment on the Administrative Record (Doc. 46) is **DENIED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: September 13, 2022

s/Michael J. Davis
Michael J. Davis
United States District Court