

STATE OF RHODE ISLAND

DEPARTMENT OF EDUCATION

IN RE: D.F. vs WESTERLY SCHOOL DISTRICT

LL 22-12

ADMINISTRATIVE DECISION

July 7, 2023

/s/MAUREEN A. HOBSON, ESQ.

HELD: Parents who allege that District failed to provide FAPE did not establish by a preponderance of evidence that the district failed to provide FAPE. Parents' claims for relief are therefore, denied.

LEXICON

Student: D [REDACTED] F [REDACTED]

Mother: K [REDACTED] F [REDACTED]

Attorney: M [REDACTED] L [REDACTED], Esq. for the Plaintiffs

M [REDACTED] C [REDACTED], Esq. for the District

Witnesses:

K [REDACTED] F [REDACTED]

C [REDACTED] S [REDACTED] S [REDACTED], PhD

A [REDACTED] C [REDACTED], PhD

L [REDACTED] J [REDACTED], Reading Teacher

R [REDACTED] O [REDACTED], Physical Therapist

J [REDACTED] M [REDACTED], BCBA

O [REDACTED] D [REDACTED], BCBA

E [REDACTED] L [REDACTED], Occupational Therapist

S [REDACTED] S [REDACTED], School Psychologist

S [REDACTED] I [REDACTED] Special Education Teacher

C [REDACTED] M [REDACTED], Director of Pupil Personnel Services

TRAVEL

The student is a 17 year old boy who is presently enrolled in Westerly High School (WHS). The district has provided DF with an individualized education plan (IEP), and he is in a special education self-contained classroom.

Previous to being placed at WHS, the student attended school in out of district placements, first at Pathways, followed by Lighthouse. They are facilities that service students who require specialized instruction.

The parents allege that at Lighthouse, and now at WHS, the student's IEP is not being followed and/or that it is not reasonably calculated to provide access to education and their son is being denied FAPE. The parents brought the within complaint seeking the addition of outside consultants to work with DF's IEP team and Westerly staff to tailor an educational plan for DF. The parents further seek compensatory education for the provision of services that are identified in DF's IEP, but that the student did not receive at Lighthouse and WHS.

The Westerly School District (WSD) denied the parents' requests, at which point the parents filed a due process complaint with the RI Department of Education. Both parties agreed to waive the 45 day time period within which a decision should be filed in accordance with State and Federal law and regulations. The hearing was conducted over 10 days from November 14, 2022 through March 23, 2023. There were 76 exhibits entered into the record.

Upon completion of the testimony, the parties requested an opportunity to file legal memoranda for the hearing officer's consideration in reaching a decision. The hearing officer indicated that she would file a decision approximately 45 days following receipt of the memoranda. Thereupon, the hearing was closed.

REVIEW OF TESTIMONY AND EVIDENCE

The mother was the first witness. She stated that when the student was at Pathways, he had an IEP from 6/2019-6/2020 (exh 1). That IEP included direct reading instruction 3 times per week in 45 minute sessions. The reading instruction that DF was receiving at Pathways was via the Orton-Gillingham (OG) method, a specialized style of reading instruction that requires certified providers.

Despite the IEP dates indicated above, the student transitioned to Lighthouse in July 2019, with the agreement of the parents and WSD. Lighthouse did not have an OG reading instructor, so everyone agreed that Lighthouse would try a different approach to reading. The parents were under the impression that regardless of the method employed, direct reading would continue 3 times per week in 45 minute sessions. Due to the COVID pandemic, schools in RI shut down in March 2020. The mother testified that DF was unable to adequately access his instruction via virtual learning due to his maladaptive behaviors. She stated that coming out of the pandemic, she and her husband started seeing some "red flags" with respect to DF's reading, so they asked for some evaluations. She said the evaluations revealed that DF had regressed significantly. When DF left Pathways, DF was reading at an emerging third grade level. The testing completed by Lighthouse showed that he was not able to

recognize letters. (tr 17) In response to the parents' concerns, WSD agreed to provide DF with 54 reading sessions to compensate him for the loss of reading skills as a result of distance learning. The WSD suggested accomplishing this by providing an after school tutor, but that did not meet the needs of the family, and they declined after school tutoring. Therefore, the 54 reading sessions were completed during regular school hours and in DF's summer program.

The mother testified further that progress reports and draft IEPs for 2021 and 2022 indicated either regression or lack of progress with DF in attaining his prior IEP goals. In addition to reading, the parents were particularly concerned that DF was not receiving adequate physical therapy (PT), occupational therapy (OT), and instruction in vocational and independent living skills, including goals in Math and counting money. Progress reports from February 2022 and March 2022 note reduced accuracy in skills from previous IEPs (exh 11). She said that school personnel attributed his regression or lack of progress to his limited cognitive ability. The parent testified that DF only demonstrated regression following the time in which he was educated at Lighthouse. The mother said that the IEP team and the school psychologist felt that the regression in skills was due also to DF's prolonged absence from school and lack of meaningful instruction during the pandemic when DF could not access virtual learning.

The parent testified that the draft IEP dated 1/21/22 (exh 14) notes that DF requires 100% adult supervision to choose clothing appropriate for the weather and to orienting his clothing, i.e. fastening, zipping and buttoning. Prior to the time, the mother stated that previous school documents indicated that DF could perform those skills independently.

The mother testified that as of November 2021 and January 2022, the WSD also cited DF's poor vision as a contributing factor to his lack of progress or regression in life skills. (exh 14 and 21) WSD arranged for a vision screening assessment in March of 2022. The assessment indicated that he had functional visual ability. And, she said, his poor vision had existed previous to that time when he was making educational progress and was independent in daily living skills, such as dressing himself.* The mother said that despite Westerly noting poor vision as an impediment to DF's progress, they did not include any aids or accommodations to address his vision in the IEPs.

The mother also testified relative to DF's potential vocational skills. She said he likes to deconstruct electronics and is fairly good at it. The parents took a video of DF disassembling a DVD player in September or October of 2022. He also demonstrated those skills at Pathways, particularly in his summer (ESY) program in 2022. She said part of the parents' impetus for returning DF to Westerly was so that he could continue to better those skills in vocational educational classes at WHS. WSD indicated that DF would be provided with opportunities to hone his skills at the WHS, but she said, those opportunities have not been afforded to him. In fact, she stated that WHS provided DF with toy tools to use, rather than adult tools with which he could learn a skill (exh 27). Further, the mother testified that DF's IEP contained an employment goal in 2021-2023, but it was removed in the 2022-2023 IEP.

The mother testified at length (tr beginning at 344) that the educational goals for DF, particularly with respect to math and reading, were more aggressive in earlier IEPs than later ones. She contends that as a result, the current IEPs establish regression in skills.

* Recently, DF has had surgery that has greatly enhanced his vision. He no longer wears glasses.

DF's IEPs contain provisions for community outings in the 2021-2022 school year. The parent assumed those outings were taking place. She said she later found out that there had been no community outings during the school year. She did not say how she came to that conclusion. She stated that he did go out into the community, to Walmart, Price-Rite, Del's, etc., during his ESY program. She stated that the parents were recently notified that community outings would be commenced in January 2023.

In May, 2022, WSD notified the parents that OT services for DF were being reduced from 1 hour per week to ½ hour per week. The parents objected to a reduction absent an OT evaluation. She said they were told to pursue procedural due process if they were unhappy with OT services.

Again, on the subject of reading, the mother testified that in December of 2021, the IEP team agreed to put OG reading instruction specifically into DF's IEP. Thereafter, in January 2023, the IEP team determined to remove OG instruction upon the recommendation of the WHS reading specialist. Further, she said, they decided to reduce his reading sessions from 12 per month to 10.

Another complaint of the parents concerns the 2022 ESY program at Pathways. She said the reason that they had removed their son from the Pathways placement in 2019 despite the progress he was making there, was due to their inability to curb his behaviors. At the 2022 ESY program at Pathways, DF progressed educationally, but the school records indicate 17 incidences of maladaptive behaviors between 6/30/22 and 9/1/22. They had voiced their opposition to Pathways' ESY program in a meeting on May 6, 2022, but were told that was the only 40 day program available.

The parents also complained that there has been no transition planning with the involvement of the RI Office of Rehabilitation Services (ORS) or the RI Department of Behavioral Healthcare, Developmental Disabilities and Hospitals (BHDDH).*

The mother then testified on cross-examination by district's counsel. She said the child attended public school in Westerly from 2010 to 2014 when he transitioned to Pathways. He left public school at that time because his maladaptive behaviors were interfering with his education. He left Pathways in July 2019 when he transitioned to Lighthouse. He left Pathways because his behaviors were not getting any better, despite the fact that he was making educational progress. He was at Lighthouse from July 2019 to August 2021, part of which time he was taught virtually due to the COVID pandemic. While at Lighthouse, his maladaptive behaviors were minimal, but the parent said he had significant educational regression.

While at Lighthouse, DF's IEP for the period 12/2020 to 11/2021 did not specify a requirement for OG reading instruction. She agreed with counsel that, at Lighthouse, DF's reading was to be "one on one

*Those are agencies within the State of RI that assist mentally ill or disabled people in getting access to appropriate care and, if applicable, help transition them into the community and workforce. Every disabled student in RI is required to have a transition plan in place at age 16. School districts typically facilitate contact with ORS and/or BHDDH.

direct and small group instruction in order to meet academic, behavior reduction, daily living and employment goals, and it will be provided by a special education teacher, six hours a day, five days a week, four weeks per month". (tr 668) (exh A). The mother agreed that there was not specific reading instruction in either of his Lighthouse IEPs. It was to be embedded into his special education classwork. In August of 2021, when the parents met with the WSD IEP team to discuss transition from Lighthouse to WHS, the parents complained about the reading component at Lighthouse. It was at that time that the WSD agreed to provide 54 compensatory reading sessions, 40 ½ hours, that the parents had requested. The mother agreed that Westerly did provide all of the compensatory reading as agreed. She also agreed that when DF returned to the WSD in September 2021, OG reading instruction was not specified in his IEP. It was not added to his IEP until January 2022. The mother's stated position is that because DF demonstrated educational regression in the 2021-2022 school year, he was not receiving FAPE. She did admit that the special education teacher had told her that DF was experiencing difficulty accessing OG instruction.

Regarding the 2022 ESY program, the mother also admitted that DF required a 40 day program in order to maintain a continuum, and that WSD only had a 20 day program. Therefore, the out of district placement was necessary.

One of the parents' complaints is that the WSD did not schedule a timely review of the functional behavioral assessment (FBA) that they performed. However, on cross examination, she stated that the WSD FBA was reviewed within the 60 days required by regulation. Following the Westerly FBA, the parents requested an independent FBA. The district allowed the parents to obtain another FBA with a provider of their choice at WSD's expense. The parents chose Momentum to conduct the independent FBA. The review of that FBA was not conducted within 60 days because the independent agency did not get it done.

Upon further questioning by district counsel, the mother did agree that the WSD had performed transition assessments for DF in December 2022. The mother said she thought they were not sufficiently comprehensive. Also, she said they should have been started when DF was 14 years old.

The mother further admitted that DF's IEP provided for post school goals to start in 2024 and to continue through June 2027. She stated that representatives from both ORS and BHDDH were invited to two IEP meetings, but they did not appear.

The mother agreed that the district requested permission for the school psychologist to perform a psychological evaluation of DF in December of 2022 as part of his tri-annual evaluation. She said they refused permission, and that they wanted Dr. [REDACTED] in Maryland to perform the evaluation.

The mother agreed that each time the parents expressed dissatisfaction with DF's education in Westerly, they were offered an out of district placement. Despite the fact that DF has been educated in out of district placements for the majority of his schooling, the mother said that the parents now feel that he should be educated in the community school with non-disabled peers as that is where he will likely live and work.

C [REDACTED] S [REDACTED] S [REDACTED] testified on behalf of the Plaintiffs. Dr. S [REDACTED] education and experience is in the field of neurocognitive development of children with genetic disorders. She is presently the CEO and Director of Neurodevelopmental Diagnostic Center in Maryland and the Chief Science Officer of The Focus Foundation. ((CV, exh 6). She has been involved in her occupation since 1987-1990. Dr. S [REDACTED] specialty is the identification, assessment and treatment of children with rare or uncommon genetic disorders. She has a particular interest in children who have extra X and Y chromosomes., ie, sex chromosome aneuploidy. She has known DF since he was "a tot". DF has 4 X and 1 Y chromosomes. The anomaly occurs 1 in every 100,000 male births. Males with this condition are referred to as "49ers". Dr. S [REDACTED] and her team have provided assessments and treatment for DF intermittently since he was about 2 years old. Being a 49er complicates the central nervous system development and has educational implications in all domains of development. She said it is a complex disorder that requires a lot of management and oversight. She said that DF presents as a characteristic 49er, but is even more unique because he has mosaicism, i.e., cells of different types.

Dr S [REDACTED] said all 49ers struggle with language. They are deficient in the neuromotor skill for speaking and are visual learners. They have greater comprehension than is evident in their speaking. In addition, all 49ers have anxiety, to either a moderate or severe level. Their brains grow later and slower. There is no ceiling to brain growth. She said it is very unusual for 49ers to learn in the least restrictive placement (LRE), but with adaptations, they can participate in a regular school.

Dr. S [REDACTED] clinic has approximately 141-143 patients from around the world. They are pretty much the only resource, and she said there are no competitors.

49ers have particular characteristics in common with respect to learning, and DF has those characteristics. They understand more than they can say and they have high anxiety, even with the aid of medications. Anxiety is triggered in response to new situations, changes in their environment, transition and providers. They are intuitive and quick to like or dislike a person. They have "preferred providers" (tr 43). Providers should be aware that aggression is not anger, but rather anxiety. When it occurs, the best course of action is to remain calm and quiet. Do not approach the child. Rather the provider should remain at a distance saying nothing until the child recalibrates himself. Physical proximity promotes anxiety in 49ers.

Educationally, Dr. S [REDACTED] said that 49ers, including DF, learn in small, sequential steps that are repetitive and hierarchal in order to plan motor planning and memory. Without that, they retain little of what is being presented. She recommends OG reading instruction for all of her patients. It is based on a sound, repetitive, sequential approach phonemically. She viewed a 45 minute video of DF receiving OG instruction in a room with other distractions, and he did very well with the instructor.

Dr. S [REDACTED] said it is also helpful to address anxiety in other areas of education. She mentioned specifically getting on and off the bus, and that a preferred person should be with DF at those times in order to keep things predictable.

Dr. S [REDACTED] testified that in 20 years of experience with 49ers, she has never seen educational regression or loss of skills. She attributes that to the particular uniqueness of the condition.

Dr. S [REDACTED] said that DF should also receive supplemental services such as PT, OT, Speech/Language and behavioral therapy.

Dr. S [REDACTED] last evaluated DF in 2019. Subsequently, she reviewed records produced some time after her evaluation, and they showed significant regression. Most recently, she reviewed a video of DF progress in reading after participating in OG reading instruction in the summer of 2022. She recommends returning to OG instruction because DF has success with it and he enjoys reading.

Dr S [REDACTED] did also note the fact that DF had a vision impairment that added to his difficulties and anxiety. Since his vision has been surgically corrected, he has less anxiety and more self-confidence. She stated that DF's cognitive level is in the 40s overall, except for non-verbal ability where he was closer to 59.

Dr. S [REDACTED] concluded her testimony by saying that at age 17, DF should be engaged in developing life skills through vocational instruction and community participation, if his behaviors permit. Ideally, he should be in a small self-contained classroom with a 1-1 aide for cognitive learning and have opportunities for other less restrictive learning depending on his level of compliance with being managed by an adult who is with him.

A [REDACTED] C [REDACTED], PhD testified next. She is a licensed school psychologist and a board certified behavior analyst (BCBA). She is the founder and CEO of Momentum, Inc. Momentum is a business organization that provides clinical and educational supports to school aged children in RI in home based settings, at their clinic and in consultation with school districts. Prior to founding Momentum in 2014, Dr. C [REDACTED] worked at Pathways. Pathways is an adjunct of the Trudeau Center. Both Pathways and Momentum are applied behavior analysis (ABA) organizations.

In addition to operating their clinic, Momentum provides consultative and/or 1-1 support services to 12-13 school districts in RI. They have staff members who are BCBA's or registered behavioral technicians (RBTs) that go out each day providing support in public schools. Pathways has a school component for high schoolers, whereas, the Momentum clinic accepts students only till 11 years of age.

Dr C [REDACTED] is familiar with DF. She said that he has a chromosomal abnormality and he also presents with autism.

Dr. C [REDACTED] testified that the work of a BCBA or an RBT is to reduce maladaptive behaviors that interfere with learning across all aspects of a child's education; cognitive learning, PT, OT, S/L therapies and whatever other support services are in play. To accomplish this, school personnel collect specified data on a student's challenging behaviors, i.e., when they occur and what precipitates them. The BCBA or the RBT then analyze the data and draft a behavior plan to reduce the behaviors and to measure whether the strategies that have been put in place are working to enhance the student's performance. The BCBA works collaboratively with the IEP team. The behavior plan could be implemented by a 1-1 aide working with DF. The witness stated that at DF's age, it is important to focus on addressing where he needs to be in 5 years when he transitions from the school to the community. She feels that transition planning should begin at age 14, and it is required at age 16.

Dr. C [REDACTED] said she did not know the WSD BCBA, did not know how many students she services, or how many Westerly school students need BCBA support.

The next witness was L [REDACTED] J [REDACTED], DF's reading instructor in his Pathways 2022 ESY program. She is a special educator, who is also an OG certified instructor. In addition to being DF's ESY instructor, Ms. J [REDACTED] had also serviced DF when he was a full-time student at Pathway. Further, she is the person who was hired as a private practitioner by the WSD to provide the compensatory reading instruction that the mother referenced in her testimony. Ms. J [REDACTED] said that data derived from ABA is what drives her educational format and decision making. Data drives the instruction, and she works every day with BCBA's and RBT's at Pathway. She testified that OG reading instruction is diagnostic and prescriptive. She said that it is successful with students who struggle with reading because it builds upon each individual's strengths and gives him confidence. Ms. J [REDACTED] provided DF with 14 OG reading lessons over the summer of 2022, and he was an active participant in all aspects of the lessons.

On cross-examination, Ms. J [REDACTED] testified that based upon DF's observed performance levels, his reading goals were higher in his 2019-2020 IEP (exh 1) than they were in his 2022 ESY progress reports (exh 19). She also stated that DF's vision issues were not an impediment to his 2022 ESY services. Over the course of his ESY services, he made "a lot of progress" (tr. 290), "he covered a lot of material. His participation was amazing" (tr. 289). She could not speak to other areas of DF's education as she was only involved in the reading component.

Ms. J [REDACTED] said she is a preferred provider for DF, and she worked diligently to gain that status with him. As a result, she observed only minimal maladaptive behaviors during her time with him.

R [REDACTED] O [REDACTED] is a self-employed physical therapist who contracts his services to the WSD. He has provided PT services to DF since he was approximately 2 years old. Currently, Mr. O [REDACTED] provides PT to DF at WHS every Friday, in addition to once every other week through South County Health as part of DF's medical component. DF's PT at school centers around an exercise program and gaining some vocational skills. For example, he sweeps the pre-school sand lot and crushes discs with a machine in the WHS tech lab. In addition, the therapist and DF walk from one building to another, and that gives DF an opportunity to socialize with non-disabled school mates along the way. The therapist usually arranges it so the two of them are crossing the school quadrangle when other students are passing through to their classes. Mr. O [REDACTED] said social interaction was one of the reasons that DF returned to public school. Since DF's return to the WSD, Mr. O [REDACTED] has seen a "definite improvement" in his social skills, e.g., he is able to ask an adult for help, like asking the teacher for the key to the broom closet for sweeping the yard. It sets him up for seeking help and getting instructions in a job when he leaves school life.

J [REDACTED] M [REDACTED] is the Executive Director of Momentum, which she founded in conjunction with Dr. C [REDACTED]. She is a special educator and has been a BCBA since 2009. She testified much along the same lines as Dr. C [REDACTED]. Ideally, the BCBA services should be a collaboration between school and home. The BCBA should work in tandem with the classroom teacher and other school providers to modify curriculum and provide behavioral adjustments that make the student more successful. She stated that DF presents with pervasive behavioral challenges. She has not seen DF in 3-4 years. When she worked at Trudeau, she was part of the team that recommended his removal from elementary school in

Westerly and into the Pathways school program. She spoke with Dr. S [REDACTED] at that time, and she was in agreement with DF's placement at Pathways.

Ms. M [REDACTED] testified that collecting data is critically important to DF's education, as is consistency with consequences and follow-through. She acknowledged that DF has preferred persons, and, without them, his behaviors spike. If Momentum were engaged by the WSD, they would observe DF in class and meet with the IEP team approximately twice per month. Their services may or may not be written into the IEP. She said DF has the ability to learn if his behaviors can be managed.

O [REDACTED] D [REDACTED] is the BCBA on staff for the WSD. She is one person who is responsible for the entire district. She has consulted with DF's teacher and prepared "data sheets" to "capture" his behavior at school, but she has not provided any plan for modification to his behavior at school. She sat in on a meeting with Momentum personnel with regard to DF's FBA, but she did not actively participate in the meeting.

Ms D [REDACTED] has been the Westerly district BCBA since September 2022. That is about the time that she first became acquainted with DF. At the time of her testimony, Ms. D [REDACTED] said she was providing support and consultation to teachers regarding about 15 students in the district. She does not provide direct service. Her support services average about 30-45 minutes per student per week. She is not a member of any IEP team currently. Ms. D [REDACTED] reviewed DF's records for about 2 hours. She and other Westerly staff met for 2 hours with DF's team at Pathways and another 2 hours with the OG reading specialist in preparation for DF's transition to WHS. She also met with people from Momentum for about 2 hours to create data sheets. She believes that she should be part of DF's IEP team, but she has not yet been assigned to do that. She has been told that she might be called upon to provide consultation services, but she would not be part of the IEP team. She is the first BCBA that Westerly has hired, so her role is still evolving. As far as she knows, WSD does not have any RBTs, so she has not been asked to supervise anyone. She does work with para-professionals who are filling the RBT role for the 15 students in her caseload. Ms. D [REDACTED] has not evaluated DF, nor has she observed him in the classroom. If she were asked for recommendations, she would focus on transition based programming to get him ready to be a productive member of society. (tr 470).

At the request of the school psychologist, DF's teacher, a representative of Momentum and she met and participated in drafting a data sheet to be used to collect information upon which to form a behavior support plan for DF. They expected to have a collaborative effort with DF's IEP team and other school personnel. She stated that she has not worked directly with DF, as there has not been a need. His challenging behaviors are being managed without her assistance by the school psychologist, who is a preferred person for DF. The typical manner by which the BCBA would become involved is by request of the school psychologist.

Ms. D [REDACTED] has extensive earlier experience as a special education teacher. As such, she believes that DF's reading instruction should be more functional based, since, at his age, he needs that skill to work in the community.

E■■■■ L■■■■ is an Occupational Therapist (OT). She works for a private company, Community Therapeutics. She is contracted to provide OT services and OT consultation for Westerly school children from pre-school through transition. She has worked predominantly in Westerly for the past 12 years. She has been providing direct OT services to DF and OT consultation with his special education teacher since his return to Westerly in September 2021. Initially, direct OT services consisted of two ½ hour sessions per week. That has been reduced to one ½ session per week and a 15 minute consultation with the teacher. She reduced his direct OT sessions because OT is being embedded daily by his special educator and his 1-1 aide. She stated that he is in a very well supported program. She feels that OT services alone are meaningless unless they are embedded and worked on throughout the day. Staff is doing that for him. She also views her weekly consultation with DF's educational team as crucial to his success.

On cross-examination by Plaintiffs' counsel, Ms. L■■■■ said she performs OT evaluations for approximately 90 students per year, and each evaluation involves about 6-8 hours. She presently has a caseload of approximately 20 students for whom she provides direct OT services and an additional 7 for whom she provides consultation services. She also supervises two OT assistants who work with her in Westerly, as well as an OT aide. So, in all, the WSD has four individuals providing OT services.

Ms. L■■■■ said she has monthly email correspondence with DF's parents and sees them at his IEP meetings. She did not recall specifically emailing the parents to tell them about the reduction in DF's direct OT services, but she definitely brought it up at the May 6, 2022 IEP meeting. And the team agreed that it was appropriate to reduce direct service sessions from 2 to 1 per week. She said the parents were in attendance at that meeting. Ms. L■■■■ said she has attended all of DF's IEP meetings since his return to Westerly with the exception of one meeting in March 2022.

S■■■■ S■■■■ testified that he has been the school psychologist at WHS for 11-12 years. Previous to his employment in Westerly, Mr. S■■■■ worked in another district. He has 26 years of experience in the field and he has extensive education. He was qualified as an expert in school psychology.

Mr. S■■■■ began regularly seeing DF in October or November of 2021. Prior to that, he was acquainted with him as a member of the student body in his classroom. Mr. S■■■■ stated that there has been a decline in DF's cognitive scores in comparison to when he was younger. He attributes that to the fact that it is difficult to understand DF's articulation and the limited way in which he participates. Mr. S■■■■ feels that he may score better if he is evaluated by someone who understands DF's speech, is familiar with him, and with whom he has a rapport. Still, he said, DF presents with significant intellectual deficiencies. Mr. S■■■■ wanted to perform a psychological evaluation of DF as part of DF's 3 year re-evaluation. Mr. S■■■■ was "somewhat excited and optimistic" that his evaluation would achieve favorable results since DF was familiar with him, he could understand DF's spoken language and he could structure the evaluation such that DF could participate enthusiastically and more fully than he had in past evaluations. He felt that he could gain extensive information from the evaluation beyond whether a complete set of standard scores were achieved (tr 790). Subsequent to the meeting wherein Mr. S■■■■ suggested the evaluation, he learned that the parents refused to give their consent. The last evaluation performed by Dr. S■■■■ indicated significant intellectual difficulties that have a broad impact on DF's ability to comprehend and acquire new material. It may be a root cause for plateauing in certain areas and regressing in others. Mr. S■■■■ was hoping to do better.

Mr. [REDACTED] performed an FBA of DF that targeted 4 behaviors. At the request of the parents, Momentum also performed an FBA that was more limited in scope and involved less observation time. Momentum targeted only 2 behaviors. Thereafter, he, S [REDACTED] I [REDACTED], O [REDACTED] D [REDACTED] and a representative from Momentum collaborated to create a data collection sheet for DF. They had several meetings to review the data collection and determine whether the proposed interventions were working, after which Mr. S [REDACTED] drafted a report and submitted it to both the Westerly and Momentum BCBA's.

In the several weeks leading up to his testimony at this hearing, Mr. S [REDACTED] stated that DF has been coming to school more dysregulated than in the past. He has difficulty getting on and off the bus and is reluctant to take his seat in class. So, Mr. S [REDACTED] designed a plan for DF to check in and check out with him each day in his office. Each morning, they make small talk and engage in activities that relieve DF's anxiety. Mr. S [REDACTED] said that his office is a very preferred location and he is a very preferred person for DF. The strategies that he and the others have developed work to curb DF's behaviors 68-88% of the time, with the exception of spitting, where the % is less. However, the behaviors are occurring with more frequency than they did in the past.

Mr. S [REDACTED] does not see the need for the continued involvement of Momentum. Their expertise is no better than what Westerly has at its disposal. In fact, while the input provided by Momentum has been accurate, it is limited in scope to a BCBA's training, rather than being broader in scope. Mr. S [REDACTED] explained that BCBA's are not clinically trained. They have no expertise in mental health patterns. They have expertise in behavior interventions. He said the more that staff can effectively curb DF's behaviors, the more he can engage in instruction. Right now, he believes that Westerly is providing programming that is appropriate for academics and behaviors. To the extent that behaviors continue to increase in frequency, even though they are effectively corrected 68-88% of the time, the IEP team may have to consider whether WHS is an appropriate placement.

On cross-examination, Mr. S [REDACTED] testified that there are about 700 students at WHS. He services about 30 special education students and twice that number of regular education students. He was seeing DF about 3 times per week and occasionally having lunch with him. DF was more successful then. Now, as a result of escalating dysregulation, he sees DF daily, as he described in his direct testimony. In addition to morning check ins, they have a plan to meet for lunch every Monday.

Mr. S [REDACTED] stated that data collection is being done throughout the day and is discussed with DF's education team daily. If DF is brought to Mr. S [REDACTED] office, he is accompanied by the teacher or his aide with the data sheet indicating the maladaptive behavior engaged in, and what precipitated it, if that can be determined. The adult also provides an explanation of what occurred.

To this point, Mr. S [REDACTED] has not felt that BCBA involvement was necessary for DF, as he and the education team were managing his program. If the frequency of his behaviors continues to escalate, the IEP team will need to address changes. He recently discussed getting the Westerly BCBA more involved to observe DF and consider additional interventions.

The data collection sheets do not address impulsive vs. compulsive behaviors. Initially, he and the mother wanted to include those categories. The BCBA's disagreed with their inclusion, at which time the

mother also disagreed and dropped her request for their inclusion. He feels that is a function of BCBA training. There is no clinical component.

About conducting a psychological evaluation, Mr. S [REDACTED] reiterated that, although it might not produce standardized scores on some portions of the test, he would be able to gain valuable and more accurate results than in the past based upon DF's familiarity with him and upon Mr. S [REDACTED] familiarity with DF's communication skills. He said the evaluation would produce objective data.

Mr. S [REDACTED] concluded his testimony by stating that it is fairly characteristic of kids with DF's level of intellectual deficiencies to experience regression. DF has deficiencies in pragmatic language, language usage, motor skills, thinking skills and mood regulation.

S [REDACTED], DF's special education teacher testified next. She is the WHS teacher for those students who fall within the severe intellectual disability category. There are 3 students in her class, each of whom has a 1-1 aide. She described her class as addressing English language arts, reading, writing and functional activities of daily living by embedding those skills throughout their general education, as appropriate. Her areas of focus are English language arts, math, consumer affairs, financial literacy and functional life skills. She uses a tiered learning system that is tailored to each student's needs. Her students are contextual learners, so the skills are embedded throughout the day. She also meets with support services providers, (PT,OT, S/L providers) and embeds those skills as well to support transitional and vocational skills.

Ms. I [REDACTED] does not believe that OG reading instruction is appropriate for DF. She said he has not demonstrated that he can acquire decoding or encoding skills that he can carry over. She believes that he is best suited for a reading curriculum that is embedded throughout his day. She does this by engaging in a variety of different games and using task boxes to see if DF can apply and generalize the skill.

Relative to transitional activities, Ms. I [REDACTED] testified that the Southern RI Transition Program came weekly for 6-8 weeks to expose her students to a variety of vocational skills, which she then re-visited in her instructions. She also works on a real life application approach where students go out into the community to apply their academic, vocational and transitional skills.

Ms. I [REDACTED] described data collection for DF in much the same manner as did Mr. S [REDACTED]. It is her opinion that DF is receiving FAPE at WHS. His behavioral, emotional and physical needs are the top priority, and his academics are provided, evaluated and adjusted to support the provision and reinforcement of skills that prepare him for adulthood.

On cross-examination, Ms. I [REDACTED] said that she determined that OG reading instruction was not appropriate for DF based upon the data she reviewed from the results of his OG sessions with Ms. S [REDACTED] and with his online OG instructor. Ms. I [REDACTED] provides reading and other lessons through a program called Unique. Her curriculum is embedded throughout the day to support skills and concepts that were taught by the OG certified instructors. Ms. I [REDACTED] met with the OG reading instructor from DF's ESY program who provided her with methods by which she could embed DF's OG learned skills

throughout the day. From early on, Ms. [REDACTED] said that DF had been provided with OG reading instruction, and she saw only minimal progress. The parents wanted it to continue, but Westerly does not have anyone certified to do it. They have interviewed numerous people (26 according to the district's counsel), but they have not found anyone.

Ms. [REDACTED] testified that it is not unheard of for students with DF's behaviors and cognitive deficiencies to plateau and/or regress in certain areas. In other areas, they may make gains. She stated that DF has made gains in math and he has improved his handwriting following his eye surgery. She further stated that as noted in his midterm 2023 reports, DF was able to navigate the technology she provided, follow directions and write legibly in a biology lesson. She said she was not concerned with the subject content, but rather his ability to navigate which will transfer to future areas of employment.

DF's IEP contains a goal to be out in the community. Ms. [REDACTED] testified that for all of the 2021-2022 school year they made weekly forays out in the community, e.g., Walmart, Home Depot to provide purchasing experiences. In the Fall of 2022, Westerly had trouble arranging transportation for community outings, so she brought the folks from Southern RI Regional Transition Program into the classroom. Since approximately January of 2023, community outings have returned to DF's curriculum. When they are unable to access the community, Ms. [REDACTED] simulates the activity in the classroom, e.g., creating a budget to make a purchase, then going online to a store. The IEP goal is that DF be able to count money. The goal is not to access the community, though that is an activity specified in the IEP. Going out into the community is another opportunity for DF to apply his math skills. But the math goal does not state that it needs to be applied in the community. The goal is to identify Next Dollar Up strategies, i.e., to count bills.

Ms. [REDACTED] said she has seen regression and also progress in DF's levels of performance. Plaintiff's counsel quizzed her specifically about his reading comprehension goal where DF's accuracy has dropped from 83% in 2022 to 80% in 2023. She replied that there has been an increase in challenging him, so the regression is minimal. His behaviors, also significantly affect his performance. At times he refuses to engage, he throws materials, strikes materials and elopes. Other times, he is engaged and can answer all of her "wh" questions, thus demonstrating his comprehension of the material.

Ms. [REDACTED] agrees that there has been an uptick in behaviors. She prepared a report regarding DF's levels of performance as of January 31, 2023. She noted that he requires constant custodial care to maintain emotional regulation. When dysregulated, DF is aggressive and destructive as demonstrated by short intense episodes where he will hit, throw things, spit, swear, remove clothing, self-injure and/or destroy property. These episodes are temporarily extinguished by using the strategies indicated in his behavioral intervention plan (BIP). They consistently re-emerge throughout the day, only to be extinguished and re-emerge again. (tr. 919, exh 67). She said the behavior modification techniques are working. The fact that the behaviors re-emerge is DF's presentation and historically consistent with his profile.

Ms. [REDACTED] said she works collaboratively with, and regularly meets with the school psychologist and the Westerly and Momentum BCBA's. She said they have recently discussed with the parents getting the Westerly BCBA more involved with DF's care. She testified that DF has "needs" in all facets of his academic and daily life. He has a significant profound disability.

The last witness was C [REDACTED] M [REDACTED]. She has been the Director of Pupil Personnel Services since July 2022. She has known DF since he was attending middle school at Pathways in 2015. She was the Chair of his LEA team in the coordination of his education at Pathways. Ms. M [REDACTED] acknowledged that OG reading instruction is in DF's current IEP. She does not agree with putting specific programs in IEPs, as she would prefer to describe an approach that benefits the student. Despite the fact that she disagrees that OG reading instruction is appropriate for DF, it is in his IEP. So, she attempted to get a certified instructor for him. She looked within the WSD, contacted other districts and more than 25 agencies to obtain one. She was not successful. She does not believe that it is the only approach for DF. There are other multi-sensory methods that would benefit him.

Ms. M [REDACTED] said that in her position as Director, DF's mother sometimes contacts her multiple times a day. She said it has been challenging to keep up with so many contacts.

Despite the fact that DF has regressed in certain areas, she believes he is getting FAPE. He is accessing his education. He is making gains in a variety of areas and has access to vocational instructional skills. He has been most successful in his behaviors in the WHS, and he is part of the school community. She recommends that he attend Westerly's Transition Academy for the final 4 years of high school, so that he has opportunities to practice his skills out in the community. The mother has concerns about the Transition Academy. The witness testified that Westerly has a strong transition academy, and it is located in the center of town. The WSD has signed a contract with an outside vendor to provide a comprehensive vocational assessment for DF.

Ms. M [REDACTED] stated that students with IQ scores of less than 70 are usually impacted functionally as well, and they sometime show regression. DF's IQ at last evaluation was approximately 50. While the student was attending school at Pathways, he showed progress, but he exhibited the maladaptive behaviors that have been described by other witnesses. For that reason, the parents asked for placement at Lighthouse. There, his behaviors improved, but there was regression in skills. As a result, the parents sought his return to public school in Westerly. Now, the parents are unhappy with the program at WHS. The district has offered to find an out of district placement for DF, but the parents are not interested. Now that WSD has undertaken DF's tri-annual evaluations, there has been no further discussion about out of district placements.

Ms. M [REDACTED] testified that all of the para-professionals in DF's class have been trained in embedded data collection by the special education teacher and the school psychologist. They have training in safety care, CPR and other courses they elect, in addition to their basic certifications as para-professionals.

Ms. M [REDACTED] acknowledged that the 2022 ESY instructor, who is from Pathways, did contact her about DF's increasing behaviors over the course of the summer, including attempts at self-injury. That notwithstanding, he was able to make progress. The ESY teacher used the OG reading method, which is a systematic, deliberate and explicit instruction. In addition, the teacher was a preferred person for DF. Part of Ms. M [REDACTED] certification entailed the instruction of reading. She received training in how to teach students with disabilities to read with specialized instruction. She is also an adjunct college professor. In that role, she teaches graduate students how to instruct students in reading and comprehension strategies in specialized instruction for students with disabilities. DF's IEP specified OG

reading instruction. However, due to the difficulty in obtaining a certified instructor, Ms. M [REDACTED] recommended SPIRE, another structured literacy approach. The district found a tutor competent in SPIRE, and Ms. I [REDACTED] has been trained in the SPIRE reading method. The district also purchased the proprietary SPIRE materials that are necessary to deliver that instruction. OG is not the only approach. SPIRE is another multi-sensory approach to reading instruction. It was offered to the parents. They considered it and rejected it.

Plaintiff's counsel engaged in a lengthy colloquy on the record concerning the failed resolution meeting that preceded this due process hearing. Ms. M [REDACTED] and the parents were the only attendees at that meeting.

Ms. M [REDACTED] testified that she did not believe the consultations with personnel from Momentum were particularly helpful. They didn't provide anything additional beyond what the school psychologist and the Westerly BCBA could provide in regards to a behavior intervention plan. The WSD can provide exactly what Momentum offers.

FINDINGS AND CONCLUSIONS

During the course of the hearing, there was a substantial amount of information presented as to the physical disabilities affecting the student. There was a great deal of testimony describing his genetic chromosomal abnormality, i.e., he is "49er". Dr. S [REDACTED] spoke at length as to the characteristics that are common to all 49ers, including DF. It is evident that the student suffers from a rare condition, only 1 in approximately 100,000 males are born with the disorder. Dr. S [REDACTED] testified that her clinic is the leading facility in the world to address this genetic condition, and that there are no competitors to her clinic. They are pretty much the only resource. Even given that status, Dr. S [REDACTED] said that she and her team only have 140-143 patients. That being the case, it would be unimaginable to expect that the WSD would have any degree of expertise to bring to the table. Several of the witnesses from Westerly testified that they did their best to research the condition through published material and online articles in order to better address DF's education.

Dr. S [REDACTED] was one of the people who originally determined that DF was better suited to an out of district placement than he was to public school. She said it was rare for 49ers to be educated in the public school system. She did clarify that education in a public school could be possible, if DF were to be provided with a small highly structured classroom. DF is in such a setting at WHS. He is in a self-contained classroom with 2 other students who have the assistance of 4 adults who are trained to support children with disabilities. He has his own 1-1 aide.

Dr. S [REDACTED] also said that she had never encountered a 49er who regressed or lost skills. Assuming that to be true, she did not address DF's recurring maladaptive behaviors that interfere with his obtaining and

retaining knowledge and skills. The witnesses from Westerly described the numerous activities that DF engages in that deter learning. Further, the classroom teacher stated that some of the documented regression is actually due to increasing the level of instruction, so regression, if any, is minimal.

The parents are seeking a return to OG reading instruction. Dr. S [REDACTED] advocated for that also. Westerly personnel do not necessarily agree that OG instruction is appropriate or that it is the only method by which DF can be taught to read. However, Westerly did add it specifically to his IEP in 2022. The hearing officer assumes that OG reading instruction was added at the parents' behest because it was not identified in his IEP when he first returned to the Westerly public school system. However, there was no clear testimony establishing that fact. Irrespective of how it came to be in DF's IEP, it is there. The Director of Pupil Personnel Services tried mightily to obtain the services of an OG certified instructor and was unsuccessful. The Director looked within the WSD, contacted other districts and tried, by her testimony, contacting more than 25 agencies to obtain those services. The plaintiffs provided no testimony or other evidence to contradict the Director's sworn testimony. Failing in her attempt to find an available OG certified instructor, the Director then suggested another program, SPIRE. She found a tutor to deliver SPIRE based services to DF. The classroom teacher is also trained to provide SPIRE. In addition, the district purchased the proprietary material necessary for delivery of the SPIRE reading program. When proffered to the parents, they rejected Westerly's attempt to replace the OG based reading component in DF's IEP. There was no explanation given as to why the parents took that position. It seems from the record that the only place where OG reading instruction was being delivered successfully to DF was at Pathways. Ultimately, the parents removed their son from the Pathways program for other reasons.

The Plaintiffs contend that OT services for their son were reduced without notice. The OT provider recommended reducing direct services from ½ hour twice a week to ½ hour once per week. Reducing direct OT services was discussed at an IEP meeting. The IEP team determined that DF's classroom teachers were providing OT services embedded in DF's curriculum throughout the day. They, therefore, agreed that reduction in direct services provided by the OT was appropriate. The parents were present at that IEP meeting.

The Plaintiffs complained about a lack of vocational and transitional instruction and community outings. The classroom teacher testified that for a full school year, DF made routine forays into the community to experience shopping at various stores. Following that, community outings were also included in his 2022 ESY program. In the Fall of 2022, community outings were not available due to the lack of transportation. Again, this hearing officer is making an assumption that drivers and/or vehicles carrying students must be certified or licensed and insured to do so. Apparently, those people or vehicles were not available in the Fall of 2022. There was no testimony on that fact. At any rate, when community outings were not available, the classroom teacher brought in outside entities to work with the students, and she also created simulated outings for the students by working on budgets and buying items online. The teacher further explained that although community outings are set forth in DF's IEP, the goal of the activity is learning about money. Community outings became available in January 2023, and DF is accessing them. With respect to vocational and transitional instruction, it is clear that the PT provider is accomplishing some of that by engaging the student in activities such as, walking from building to

building while socializing with non-disabled peers, climbing stairs, sweeping the pre-school play yard, asking for help in getting closet keys, and destroying discs with machinery that he operates in the school tech lab. The testimony of the PT and the classroom teacher were not refuted.

The parents are also seeking the addition of Momentum BCBA's to DF's IEP. In fact, they would like to see his curriculum driven by Momentum. Here, the evidence is most clear. WSD hired Momentum to sit in and consult with the school psychologist and the Westerly BCBA. The school psychologist performed an FBA of DF, and that was followed by another FBA completed by Momentum. The Momentum FBA resulted from a ½ observation of DF. The school psychologist's FBA targeted 4 behaviors and involved several more in-depth observations. Thereafter, the school psychologist developed a data collection sheet and proposed behavior intervention strategies. Since then, he has been working with DF's special education teacher and 1-1 aide. They collect data and modify intervention strategies as necessary. The uncontradicted testimony is that the strategies are working to diffuse DF's maladaptive behaviors. Even though the behaviors are occurring with increasing frequency of late for reasons that are not explained, they are being brought under control. In addition to "supervising" the data collection and interventions, Mr. S [REDACTED] is an emotional resource for DF. He is a highly preferred person for DF, and provides DF with emotional guidance to support regulation.

Mr. S [REDACTED] has been meeting regularly with the Westerly and Momentum BCBA's. He has considered asking the Westerly BCBA for additional input to DF's behavior intervention plan. Ultimately, if they cannot reduce the frequency of DF's spurts of dysregulation, the IEP team may have to consider another placement.

From the testimony of all of the witnesses, including Dr. C [REDACTED] and Ms. M [REDACTED], it seems clear that bringing on the Momentum team to supplement services to DF would add nothing more to the supports and services already being afforded to him by the WSD.

It is evident that the Plaintiff parents care greatly for their son and are trying to do what they believe is best for him. However, the burden of proof is upon them to provide evidence of what is lacking in DF's curriculum that caused regression in skills and what services should have been added to supplement those skills. They did not produce any witnesses to establish that Westerly is failing to provide DF with an appropriate education. Instead, they rely only on their supposition that regression or lack of progress equates with a failure of FAPE. Dr. S [REDACTED] assertion that she has never encountered regression in a 49er does not establish lack of FAPE. Other than the district's inability to obtain an OG certified instructor, it seems that there are only technical violations of the state regulations with respect to timeliness and attendance of members of the IEP team. They are deemed de minimis as they did not adversely impact DF's educational planning and delivery.

Based upon the foregoing findings, the Plaintiff's complaint must be denied and dismissed.

Entered this 7th day of July 2023.

/s/MAUREEN A. HOBSON

