

**DUE PROCESS HEARING PANEL
MISSOURI STATE BOARD OF EDUCATION
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

,)
by his parent,)
,)
)
Petitioners,)
)
vs.)
)
LATHROP R-II SCHOOL DISTRICT,)
)
Respondent.)

DECISION COVER SHEETS

This is the final decision of the hearing panel in an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415(f) (1997), and Missouri law, §162.961.3 RSMo.

THE PARTIES

Student:

Petitioner: Father,

Respondent: LATHROP R-II SCHOOL DISTRICT.

The petitioner was represented by:

 Stephen Walker
 Attorney at Law
 23245 Fairmount Blvd.
 Beachwood, OH 44122

The school district was represented by:

 Teri B. Goldman
 Attorney at Law
 36 Four Seasons Center, #136
 Chesterfield, MO 63017.

HEARING OFFICERS:

Kenneth M. Chackes	Hearing Chair
Marilyn McClure	Panel Member selected by parents
Terry Allee	Panel Member selected by school district

RELEVANT DATES

Request for due process hearing: January 5, 2004.
 Dates of hearing: September, October, and December 2004; March, April, and June 2005
 Date of Decision: August 18, 2005.

Explanation of deviation from 45 day time-line:

The parent submitted a request for a due process hearing which was received by the Missouri Department of Elementary and Secondary Education (DESE) on January 5, 2004. The original deadline for hearing the case and completing and mailing a written decision, therefore, was February 19, 2004, 45 days from the date DESE received the request.

In a letter dated February 2, 2004, the school district requested that the hearing be scheduled in April 2004 and requested an extension of the time to complete the decision to 30 days after the final date of the hearing. The parent agreed to an extension, and indicated that he would prefer that the hearing be held in May. On February 4, 2004, I extended the deadline for completion of the decision to April 30, 2004, but indicated that the deadline could be extended again if the parties sought a hearing in May. Based upon subsequent communications with hearing officers and the parties, the dates of May 17-19, 2004, emerged as the best dates for the hearing. In an email from the school district dated March 10, 2004, the district requested that the deadline for the decision be extended through June 21, 2004. Based on the above considerations I granted the parties' request for an extension of the time line and scheduled the hearing for May 17-19, 2004, and extended the deadline for the decision to June 21, 2004.

On May 12, 2004, however, petitioners requested a continuance of the hearing, based upon the unavailability of an individual who they wanted to have with them at the hearing as a person with special knowledge and expertise of the issues to be presented, pursuant to their right under 20 U.S.C. §1415(h)(1). On May 13, 2004, over the objection of the school district, I granted that request and issued a written Order explaining that decision. Since that time the parties and hearing officers have endeavored to find dates when all would be available for the hearing, and agreed upon September 13-15, 2004, and October 25-29, 2004. The petitioners requested that the deadline for decision be extended to November 19, 2004. Based on the above considerations I granted the petitioners' request for an extension of the time line and scheduled the hearing for September 13-15 and October 25-29, 2004, and extended the decision deadline to November 19, 2004.

Following eight days of hearing, on September 13-15, 2004, and October 25-29, 2004, and the determination that additional time for hearing was necessary, and based on the agreement and schedules of the parties and hearing officers, I scheduled the hearing to resume on

December 15-17, 2004, and, if necessary, December 20, 21 and 22, 2004. Upon joint motion of the parties I extended the deadline for completion and mailing the decision to March 1, 2005.

Three additional days of hearing were conducted, on December 15-17, 2004. At that time, based on the agreement and schedules of the parties and hearing officers, the hearing was scheduled to continue March 21-23, and, if necessary, April 20-22, 2005. Upon the motion of the parents, the deadline for completion and mailing the decision was extended to June 3, 2005.

At the hearing on April 20, 2005, the parents objected to the district's calling Lisa Robbins as an expert witness. The parties argued that objection on April 20 and 21. On April 21, 2005, the panel ruled that it would allow Ms. Robbins to testify, the parents moved for a continuance to prepare its cross examination and possible rebuttal evidence. Tr. 3427. The district did not object to the continuance and it was granted by the panel. Tr. 3427-34. The parties and the panel agreed that the hearing would resume the week of June 27th and that the deadline for the decision would be extended to August 8, 2005. Tr. 3437.

The hearing resumed and was completed on June 28 and 29, 2005, except for some possible further rebuttal and/or surrebuttal testimony that the parties might seek to offer. At the close of the hearing on June 29, 2005, the parties agreed and requested, and the panel agreed, that the parties would have until July 29, 2005 to submit briefs and that the deadline for the decision would be extended to August 18, 2005.

DECISION

This is the final decision of the hearing panel in an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415(f) (1997), and Missouri law, §162.961.3 RSMo.

STATEMENT OF ISSUES

When the parents submitted their request for a due process hearing in this case they were not represented by an attorney. The parents filed an original and then an amended request for hearing. Ex. R-42 at 548; Ex. R-43 at 570. The parents later retained an attorney who, on April 29, 2004, filed Petitioners' Clarification of Issues. Ex. R-44. In that document the parents stated following issues:

- (1) The District **failed to craft appropriately drafted IEPs** for the 2002-03 and 2003-04 school years and, **thus, denied the student a free appropriate public education (FAPE)**, in that the IEPs lacked:
 - (a) sufficiently measurable annual goals and objectives;
 - (b) functional and meaningful objective or evaluative criteria; and
 - (c) adequate related and support services, including an adequate behavior plan.
- (2) The District failed to provide the parents adequate **prior written notice** for the 2002-03 and 2003-04 school years in violation of 20 U.S.C. § 1415(b) and 34 C.F.R. § 300.503.
- (3) The District failed to provide **necessary services** for the 2002-03 and 2003-04 school years, and thus failed to provide a FAPE requiring the parents to obtain such services privately and at their own expense.
- (4) The District failed to **address all the student's educational and social emotional needs**, and thus denied him a FAPE for the 2002-03 and 2003-04 school years.
- (5) The District failed to **provide special education and related services designed to meet the individual educational, social and emotional needs** of the student for the 2002-03 and 2003-04 school years, and thus denied the student a FAPE.

The parents' attorney stated at the beginning of the hearing that the Clarification of Issues was intended to be a supplement to the original and amended requests for due process submitted by the parents. Tr. 19. In their original request the parents complained that the District **failed to provide needed OT and SLP services**. Their attorney stated they intended to pursue those issues and that they were part of issues 1 and 3 in their Clarification of Issues, pertaining to the 2002-03 and 2003-04 school years. Tr. 19-21. The parents also indicated at the start of the hearing that the previously alleged issue that the District **failed to provide the parent with all records** was part of the overall issue of whether the student was provided a FAPE. Tr. 22.

The parents' attorney also stated at the beginning of the hearing that the parents intended to pursue additional issues that were not specifically mentioned in the written submissions. Those issues included **lack of staff training**, as part of the issue of the District's failure to provide necessary services; **failure to keep the parents informed** and **violation of the parents' right to participate**, as part of the issues relating to the failure to appropriately draft IEPs and the failure to provide all records; and **failure to conduct an appropriate evaluation**, as part of the issue of failure to appropriately draft IEPs. Tr. 25. The district sought a ruling, on

constitutional due process grounds, limiting the issues to those specifically raised by the parents in writing prior to the hearing. Tr. 11, 28-30, 33. The parents' attorney offered to agree to a continuance if the district sought one in order to be prepared to respond to all the issues. Tr. 32-33. The Chair pointed out that the IDEA regulations that deal with the parents' obligation to provide a notice of issues indicate that the State may not deny or delay a parent's right to a due process hearing for failure to provide proper notice. Tr. 34; 34 C.F.R. §300.507 (1999). The Chair also stated his view,

that in order to balance the parent's right to a due process hearing and the school district's general constitutional right to fair notice and due process," that the proper procedure is to go forward with the hearing unless the school district wants more time to prepare and yet allow the school district more time to prepare a response so that the school district has a full opportunity to respond to the issues that come up during a hearing.

Tr. 34. The district's attorney responded that she was not seeking additional time, but that she believed that general constitutional due process limits the parents to the issues raised in advance of the hearing, and that case law supports that view. Tr. 35. After hearing argument from the attorneys and following a private conference among the panel members, the Chair announced: "We have decided we are not dismissing any specific issues, but we'll limit the testimony and decision to the issues that were raised in the [parents'] written notices." Tr. 36. The Chair explained that the issues that were not specified in writing "would not result in specific findings of violation by themselves," but could be considered as they relate to the issues that were raised in writing. Tr. 36-37.

In the **parents' post-hearing brief**, they seek rulings on the following issues:

I. The District denied FAPE by excluding and limiting parent participation in the development of goals and objectives and in making placement decisions.

That issue was not specifically mentioned in the parents' written submissions prior to the hearing, but was raised in the parents' opening statement and asserted by their attorney to be related to the issue of the district's failure to craft appropriately drafted IEPs resulting in a denial of FAPE. The panel will consider the issue in that context, whether the district excluded and limited parent participation and thereby led to inappropriately drafted IEPs. The district could not have suffered any prejudice from the panel's consideration of that issue as it had ample time to prepare its case, even after the beginning of the hearing, and as evidenced by the fact that the district wrote a detailed response to that issue in its post-hearing submission. Dist. Brief at 95-98.

II. The IEPs were deficient, because they failed to:

- A. Include a statement of present levels of educational performance or baseline data;
- B. Include measurable goals and objectives;
- C. Include appropriate objective criteria and evaluation procedures for determining progress;
- D. Address the student's particular needs arising from his disability (in the area of behaviors);
- E. Include sufficient information to make a placement decision.

All of those issues, except part E, were clearly raised in writing prior to the hearing.

III. Parents are entitled to reimbursement.

That issue was raised in writing prior to the hearing.

IV.A. The District failed to provide proper prior written notice.

That issue was raised in writing prior to the hearing.

IV.B. The District made decisions without including key people with knowledge, including the parents.

That issue relates to the first issue above, parent participation.

In their Clarification of Issues, the parents sought the following relief:

- (1) A finding of a denial of FAPE for the 2002-03 and 2003-04 school years.
- (2) Reimbursement for expenses, including independent evaluations, services the parents' provided, and education related costs for the 2002-03 and 2003-04 school years.
- (3) A finding that petitioners are prevailing parties and are entitled to attorneys' fees.
- (4) Compensatory education and services.
- (5) Additional equitable relief required by the evidence.

FINDINGS OF FACT

1. The student in this case is a student with a disability for purposes of the IDEA and the Missouri State Plan for Part B of the IDEA. At all relevant times he was educationally diagnosed as autistic.

2. At the time of hearing, the student was a middle-schooled age male (DOB: ,) who resided in and attended the district from October 2000 through May 2004.

3. Prior to the parents' move to Lathrop, Missouri, the student attended the Putnam County School District.

4. On or about November 15, 1999, the Putnam County School District reevaluated the student when he was in the third grade. Ex. P-4. The report noted that he had attended Putnam County for his entire school career and was placed on an IEP in 1994. Ex. P-4. On the Test of Non-Verbal Intelligence (TONI), the student achieved a below average IQ score of 84. Ex. P-4. On an adaptive behavior scale, he received a quotient of 56, nearly three standard deviations below the mean. Ex. P-4 at 18. On the Brigance Diagnostic Inventory of Basic Skills, the student obtained the following scores: Readiness – 1.6 grade level; reading – 4th grade level; language arts – 2.8 grade level; and math – 3rd grade level. Ex. P-4. The narrative section of the Brigance explained that, although the student knew his sight word vocabulary to the fourth grade level and read words comfortably at the third grade level, his comprehension was at only a pre-first grade level. Ex. P-4 at 19. Moreover, the report indicated that the student did not understand some directional terms, did not know all the body parts, did not button, zip or tie his shoes, did not know his ordinal numbers, could not count by two's or add or subtract with renaming, and did not know the value of coins or comprehend measurement.¹ *Id.* at 19. Putnam

¹ At hearing, however, the parent testified that, at the time the family moved to Lathrop, the student could tell time, could add, subtract and perform multiplication problems in his head, could read fourth and fifth grade level books, and could read his father's college text books. Tr.

County's speech-language evaluation showed that the student's speech was robotic in nature and his language skills were at only the 1% or three-year-old level. Ex. P-4 at 21. His speech also was echolalic and, at that time, the student did not relate appropriately to people, did not acknowledge his peers, and displayed inappropriate behaviors. *Id.* at 21-22. Putnam County educationally diagnosed the student as autistic. *Id.* at 23.

5. On or about October 18, 2000, the Putnam County District developed an IEP for the student.² Ex. P-6. The present level noted that the student could perform simple math functions using a calculator and could spell any word if he first saw it written. Ex. P-6. The present level also stated that the student could call words at the fourth grade level, but could not comprehend at that level. *Id.* The IEP noted the student engaged in disruptive behaviors. *Id.* In particular, Putnam County's IEP said the student "is very noisy and disruptive;" he does not want to do any work; he "needs a very structured one on one intensive program; "[h]e should not be in a regular classroom until behaviors are under control;" "he is destructive;" when an item is taken away "he disrupts the classroom by screaming and making noises;" he "controls much of his environment by noise;" and he will not participate in art. Ex. P-6 at 29. The front page of the IEP stated that the student will be placed 100% of the time in special education, but in another place, the IEP indicated that he had always been placed in regular education with an aide. Ex. P-6.

6. On or about October 20, 2000, the student transferred and enrolled in the Lathrop School District. Ex. R-1 at 1, 2. Prior to that time, the student's father spoke to Special Education Director, Dr. Ken Quick, regarding the family's anticipated move to Lathrop. As a result and before the student enrolled, Quick and other staff members enrolled in Project Access training in autism to prepare for the student. Tr. 561, 577-78, 594, 1632, 2024-26. Staff received additional training in autism after the student's enrollment. Tr. 562, 1632, 2026-36.

7. The Lathrop District initially placed the student in an interim regular education fourth grade placement until a new IEP could be developed. Tr. 96, 1223, 1636-38. In that interim setting, the student demonstrated behaviors similar to those described by Putnam County. Tr. 96. His special education teacher, Cindy Nance, testified that when the student spent time in the regular classroom he exhibited many disruptive behaviors, including loud outbursts, finger biting, echolalia, talking and reciting. She stated the student's behaviors were severe and very much impeded his learning.

8. Cindy Nance remained the student's special education teacher through May 2004. Tr. 1631, 1679-80. Nance has a bachelor's degree in elementary and special education and a master's degree in special education and has 25 years of experience in special education. Tr.

1294.

² The parents misstated the record when they claimed they attended that IEP meeting. Parents' Brief at 9.

1630. Prior to becoming the student's teacher, Nance had very limited experience with children with autism, but received training in autism in preparation for the student's transfer and received additional training after that. Tr. 1825-26.

9. Katie Alexander was the student's occupational therapist. Tr. 1674, 2989. Alexander was employed as an occupational therapist at the Sherwood Center from 2000 to 2003 where she provided occupational therapy services to children with autism. Tr. 3017. During that time, she also contracted with three rural school districts, including Lathrop, to provide occupational therapy to students. Tr. 3017-18. Alexander contracted with the Lathrop District from August of 2000 through the fall of 2002. Tr. 3018. At the time, she had a bachelor's degree in occupational therapy and had begun a master's program. Tr. 3018-19. Alexander was licensed by the state of Missouri to provide occupational therapy and was board certified. Tr. 3020.

10. On November 13, 2000, the student's IEP team convened to prepare an IEP. Ex. R-1. The present level of educational performance section of that IEP stated that the student was able to read words on a third grade level, but his academic functioning was at a readiness to first grade level. Ex. R-1 at 9. He could not tell time to the half-hour, give the value of coins or understand ordinal numbers. He was unable to add or subtract with carrying or borrowing. *Id.* He used spoken language and gestures with some signs as his primary mode of communication. *Id.* The present level also indicated that the student had some sensory and attentional issues. *Id.* at 10. Lathrop's IEP for November 2000 noted that the student's behaviors impede his learning and that they will be "addressed in IEP objectives." *Id.* at 8. The IEP then addressed the student's behavior in one goal, to "reduce noise making when he becomes frustrated to 35% each day for four out of five days, six out of eight weeks." *Id.* at 14. The district reported he met that goal. *Id.*

11. During the spring and fall of 2001, the student began to display incidents of behavior that were perceived as sexual. On October 11, 2001, district staff discussed with the student's mother the behaviors observed (that included a "humping" motion, the singing of a Spice Girls song, and the grabbing of his penis). Ex. R-2 at 114. Alexander testified that, during the 2001-02 school year, the behavior changed in that the student began to engage other people in the behavior. Tr. 3046-47. The student later displayed additional behaviors, that included talk about toes and saying "mmm" that staff believed were precursors to the more sexually overt behaviors. Tr. 1684-85. Alexander ultimately concluded that the behavior was an automatically reinforcing behavior and then began initiating strategies that would assist the student in replacing that behavior with appropriate behaviors. Tr. 3048, 3056. To do that, she used a cost response behavior modification procedure where the student would be given a set of potato chips and, when he engaged in the behavior, he would lose a chip. Tr. 1685, 3048. Based on her observations, that strategy did decrease the frequency of the student's sexual behaviors. Tr. 3049; *see also* Tr. 1686. Staff concluded that the sexual behaviors were observed mostly when the student was in the presence of younger women, with light-colored, long hair. Tr. 1686-88; *see also* Tr. 2743. The district's language therapist testified that these behaviors impeded the student's learning to some extent but he was able to learn. Tr. 2746.

12. On November 7, 2001, the student's IEP team convened to conduct the annual review of his IEP. Ex. R-2. The present level of the IEP noted the progress the student had made since the prior IEP was implemented. Ex. R-2 at 30-31. With respect to behaviors, the

present level noted that the student had decreased noise making and was able to follow a request to stop. *Id.* The sexual behaviors were not mentioned. The present level also stated that the team was going to begin a functional behavioral assessment. Ex. R-2 at 32. The November 2001 IEP contained goals and objectives with respect to telling time, money, math, measurement, reading comprehension, task completion, following directions in games with peers, language, self-help skills, and written expression. Ex. R-2 at 32-37.

13. Although the district reported that the student met the goal of reducing his noise making when frustrated to 35% of the time on four of five days and six out of eight weeks, (Ex. R-1 at 14), for the November 2001 IEP his placement remained the same, in the special education classroom for more than 60% of his time. Ex. R-1 at 19; Ex. R-2 at 38. While the IEP for November 2001 again indicated the student had behavior issues that impeded his learning, and he was still making noise when he became frustrated, that IEP contained no goals or objectives to further reduce that or any other behavior. Ex. R-2.

14. Less than one month after the November 2001 IEP meeting, on December 4, 2001, Alexander, Nance and the student's paraprofessional prepared a memorandum to document his sexual behaviors because of their stated concern that the behaviors might be the result of sexual abuse. Ex. P-15. In addition, staff made a hotline report with the Division of Family Services. Ex. P-15. DFS conducted an investigation that included an observation of the student at school and consultation with individuals knowledgeable about autism to see if the behaviors were typical of children with autism. Ex. P-16. Because of the conflicting opinions about whether the behavior was typical of autism, the investigator found no firm evidence of sexual abuse. Ex. P-16 at 130; *see also* Ex. P-19.

15. On January 28, 2002, the student's father wrote to the district's special education director, Dr. Ken Quick, indicating that he had been seeking an IEP meeting for the student since before Christmas and was now demanding a meeting to discuss, among other things, a new behavior plan.³ Ex. R-2 at 44. In that letter, the father asserted that the parents were very disappointed in the services their sons were receiving and alleged that school staff was physically abusing them and denying them a FAPE. *Id.*

16. On or about April 5, 2002, Quick wrote to the parents regarding an IEP meeting. Ex. R-2 at 55. In that letter, Quick expressed the District's desire to bring in a behavioral/autism specialist to consult with the IEP team. *Id.* Prior to that time, Alexander consulted informally with Marilyn Stubbs about the student's behaviors. Tr. 734, 847. The district contracted with Stubbs to consult with respect to the student's sexual behaviors and to assist in determining whether the behaviors were part of the student's autism or the result of possible sexual abuse.

³ The district asserted in its brief, citing the testimony of Nance: "Between November 2001 and May 2002, when [the student's] IEP team convened to address ESY, [the father] did not request an IEP meeting to address the behaviors that had been communicated to the [parents]. Tr. 1718." Dist. Brief at 14, n. 19. That is obviously not true. When it did discuss the father's January 28, 2002, letter, the district also mischaracterized the contents by stating it "demanded an IEP meeting to discuss a behavior plan **that would** put restrictions on 'how the boys will be punished.'" *Id.* at 17, ¶44. The letter actually demanded an IEP meeting to discuss "a new behavior plan **and to** put restrictions on how the boys will be punished." Ex. R-2 at 44.

Tr. 398-99, 839, 841-3, 847. Stubbs was the Associate Director of and has been employed for twenty-five years at the Sherwood Center, an agency that specializes in persons with disabilities and autism in particular. Tr. 398-99, 732-33. She specialized in behavior intervention and worked primarily with families in their homes. Tr. 733. Stubbs has testified in two prior due process hearings on behalf of parents and as an expert in behavior and autism. Stephen Walker, the parents' attorney in this case, represented the parents in one of those hearings and presented her as an expert witness. Tr. 839-40. Rand Hodgson, the advocate who worked for the parents in this case, recommends Stubbs as a consultant. Tr. 839, 1297.

17. Stubbs testified that children with autism can display behaviors that are not easily understood and an observer must look at the environment and context in which those behaviors are displayed. Tr. 734. To do so, Stubbs conducts a functional behavior assessment ("FBA"). Tr. 737. Stubbs was hired by the district to conduct an FBA of the student's sexual behaviors and to recommend strategies for staff to use in addressing those behaviors. Tr. 743-44, 775, 832. Stubbs has attended workshops and other training opportunities in the areas of autism, behavior management and functional behavioral assessment and also has provided training to others in those areas. Tr. 733, 836-37.

18. Stubbs began a functional assessment of the student's sexual behaviors in April 2002. Tr. 267-303, 1874-75. She first had the school staff describe the student's behaviors and provide other information regarding those behaviors. Tr. 737, 848-49, 862, 3055-56. She then observed the student to check the accuracy of the staff reports and to see if there was other information that staff had missed. Tr. 737, 742, 848-49, 862. Stubbs also spoke to the student's father at IEP meetings and asked him about the student's behaviors. Tr. 747. She was able to observe the sexual behaviors that had been described. Tr. 742, 851, 1691. She then requested the staff to take data to see when the behaviors were occurring and with whom. Tr. 862.

19. The data collection process was designed to acquire information about the antecedents of the behavior as well as the function. Tr. 738-39, 3054-55. The form listed the various sexual behaviors that had been observed, but contained a place to note any other behaviors that might be observed. Tr. 865. The form also listed the various people with whom the student came into contact at school, the perceived functions of the behaviors, and the frequency and consequences of the behaviors. Tr. 865-66, 1875-76, 1882-83. The individual working with the student took and completed the form. Tr. 1874-75. If no behaviors were observed on a given day, the form remained blank. Tr. 866-68. After the data were collected, Stubbs reviewed the data sheets as part of her FBA. Tr. 869. Stubbs generally wants to view at least a week's worth of data, but reviewed approximately 8 weeks of data for the student's FBA. Tr. 737, 869, 873. Stubbs testified there was sufficient data on which to prepare an appropriate behavior plan. Tr. 874. Stubbs testified that her FBA was valid. Tr. 1010.

20. In preparing the behavior intervention plan that followed the FBA, Stubbs relied on the data. Tr. 874. In developing a behavior plan, Stubbs generally follows the typical scientific process by defining the problem, gathering information, creating a hypothesis regarding the function of the behavior if possible, and creating interventions. Tr. 875. Those interventions are designed to decrease the inappropriate behaviors and increase socially appropriate interactions. Tr. 875. She followed this process in this case. *Id.*

21. On or about April 9, 2002, the district provided the parents with an IEP conference notification for a meeting to be held on April 23, 2002 to consider extended school

year (ESY) services and a behavior plan. Ex. R-2 at 56. The notice indicated that Stubbs, an autism and behavioral specialist, was invited. *Id.* The parents requested that the meeting be rescheduled and requested a diagnostic staffing meeting. Ex. R-2 at 57. On or about April 20, 2002, the parents took the student to Premier Therapy Services for a private speech-language evaluation. Ex. P-28; Tr. 2362-63. Based on the availability of the necessary participants, including the parents, the district rescheduled the IEP meeting for May 14, 2002, to consider ESY, a behavior plan, and – at the parents’ request – to hold a diagnostic staffing. Ex. R-2 at 58, 64, 65, 67-69.

22. On May 14, 2002, the IEP team convened and the following individuals were among those who participated: the student’s father, Quick, Nance, Alexander, Stubbs and Hodgson. Ex. R-2 at 70. The team agreed that the student was eligible for ESY. Ex. R-2 at 33, 39, 70-76. The team discussed the components for the student’s three-year reevaluation, to be conducted in the fall of 2002. Ex. R-2 at 74-75, 79, 82; Tr. 377, 1721, 1725. The team discussed the sexual behaviors of concern that the student had exhibited, but the hotline call was not discussed. Tr. 1722-23. The parents said they were aware of the behaviors that were discussed and had seen some of the behaviors at home. Tr. 876. Hodgson testified that the district staff were forthright about the student’s behaviors and reported that a lot of his behaviors were greatly interfering with his progress. Tr. 1351-52. They described off task behaviors, perseverative talking, difficulty focusing and following directions, self stimulating behaviors such as hand flapping, and sexual behaviors. Tr. 1368-69. Hodgson testified that he assumed Stubbs, an autism expert, was brought in to help understand and deal with all the student’s behaviors. Tr. 1369-70. Hodgson and the parents did not learn until the hearing, in 2004, that she was retained to help only with the student’s behaviors that appeared to be sexual in nature, not the preexisting behaviors that also impeded his education. Tr. 1370-71.

23. During the 2002-03 school year, the student attended the Lathrop District as a sixth grade student. Ex. R-9 at 214. Nance continued as his special education teacher, Tr. 1733, Christi Foreman was his speech-language therapist, Tr. 1851, 2474, and Holly Bozarth became his occupational therapist. Tr. 1879-80. Alexander did not provide direct therapy services during the 2002-03 school year, but did participate in the student’s reevaluation. Tr. 3067.

24. During the student’s sixth and seventh grade years, Foreman provided him with 30 minutes per day of speech-language therapy. Tr. 2478-79. The therapy was always provided in a 1:1 setting. Tr. 2484. Once a week, Foreman would take the student out into the school building to practice the skills that had been worked on 1:1. Tr. 2485, 2493-95. Foreman testified that the student made progress on and mastered many of his goals and benchmarks. Tr. 2494-98. She stated that when she first began working with the student, he displayed varying eye contact and avoided a lot of communication. Tr. 2479. He also had lots of sexual behaviors. Tr. 2481. Foreman implemented strategies to reduce those behaviors. When she began using the strategy of “head down” that was suggested by Stubbs, Forman testified that intervention helped to reduce those behaviors and that by January 2003, those behaviors had significantly diminished. Tr. 2482-83. When the student displayed behaviors during his therapy sessions, Foreman testified those behaviors only momentarily interfered with his ability to work on his goals and objectives. Tr. 2483. Foreman stated that when she first began working with the student, he was nonverbal most of the time and was exhibiting sexual behaviors and did not interact. Tr. 2562. After the two years that she worked with him, he still required cues, but was

more interactive and enjoyed those interactions. Tr. 2562. Foreman testified she observed “lots of gains” in those two years. Tr. 2562-64.

25. For approximately the first seven weeks of the 2002-03 school year, the district was unable to find an occupational therapist to work with the student and did not provide the occupational therapy services called for in the student’s IEP. Ex. P-34; Tr. 100-01, 341-42. Dr. Quick offered and by the time of the hearing provided compensatory occupational therapy services. Ex. P-34; Ex. P-39. There is no evidence to support the parents’ broad statement that the student failed to receive OT services “during the years in question.” Parents’ Brief at 4.

26. The student’s IEP team convened on August 29, 2002 and prepared a reevaluation plan. Ex. R-3 at 130, 132-33; Tr. 1440, 1729-30. The following were among those who participated: the student’s father, Nance, Hodgson, Foreman, Stubbs, Alexander and Quick. Ex. R-3 at 132. The parent presented the district with a copy of the Premier Therapy Services evaluation from April 2002. Ex. R-3 at 182; Tr. 1730, 2362. On that date, the district presented and the parent provide his written consent to a notice of action proposing to conduct the district’s reevaluation. Ex. R-3 at 133, Tr. 1732, 2502-03.

27. On September 10, 2002, Dr. William Breckenridge, an outside licensed psychologist, completed the cognitive and adaptive behavioral components of the student’s reevaluation. Ex. R-3. On the Leiter-R, the student obtained an IQ of 30. Ex. R-3 at 141, Tr. 3446. The Leiter is a standardized and validated IQ test that does not require verbal responses or an understanding of questions. Tr. 3446, 3450. Breckenridge’s report stated, however, due to the student’s distractibility, the IQ score might not be valid. Ex. R-3 at 141; Tr. 116, 120, 3447, 3457-59.

28. On October 16, 2002, the student’s team convened to review the reevaluation results. Ex. R-8; P-36; Tr. 388, 1732-34, 1429-30. Among the participants were the student’s father, Hodgson, Breckenridge, Stubbs, Nance, Foreman and Quick. Ex. R-8 at 201; Tr. 385, 388, 1372, 2499-00. The report that was prepared incorporated the results of testing by Alexander, Breckenridge, Krause, and school staff, and also included the conclusions from Stubbs’ functional behavioral assessment. Ex. R-8; Ex. R-8 at 198-99; Tr. 788-89, 2110, 2348, 2414-15, 2500-02, 2505. The Vineland scales completed by Nance and the parents showed that the student was rated as significantly impaired by both. Ex. R-8; Tr. 1735-37, 2355-56.⁴ The report also notes the IQ of 30 on the Leiter. Ex. R-8; Tr. 1737. The team did not diagnose the student as mentally retarded in spite of the IQ of 30 and the low adaptive behavior scores. Ex. R-8; Tr. 382.

29. The functional behavioral assessment showed that one of the antecedents to the sexual behaviors appeared to be younger women with light colored hair because he demonstrated higher rates of the targeted sexual behaviors with such individuals. Ex. R-8 at 198-99; Tr. 1877-78, 2349, 2360-61. After review of all information collected, the team concluded that the student continued to need special education and related services based on a diagnosis of educational

⁴ Hodgson testified, however, that he did not observe the student to function as low as rated by Nance and the parents. Tr. 1616.

autism. Ex. R-8 at 200-01; Tr. 1734. All team members signed in agreement with that conclusion. Ex. R-8 at 201; Tr. 388-89, 1738, 2505-06.

30. The student's IEP team convened on November 6 and 14, 2002, to prepare his annual IEP for the remainder of his sixth grade year. Ex. R-9 at 205; P-37. The following were among those who participated: the father, Hodgson, Stubbs, Quick, Nance, Alexander and Foreman. Ex. R-9 at 206. The present level described how the student's disability impacts his ability to access the general sixth grade curriculum. Ex. R-9 at 214. The present level also documented the progress he made on his prior IEP goals and incorporated information from the reevaluation. Ex. R-9 at 214-25. The present level further reflected the team's discussion of the student's Leiter IQ score of 30 and notes that the team did not believe that the score was representative of his daily performance or his capacity for learning. Ex. R-9 at 219; Tr. 122, 1737-38, 1748. The present level also noted the student's areas of strength but also described the behaviors that he was exhibiting. Ex. R-9 at 221-22, 225; Tr. 1749-50. The district for the first time included extensive descriptions of his behaviors in the section of the IEP containing his present levels of educational performance. Ex. R-9 at 221-22, 224-25. The IEP stated the student has "significant difficulties" with social conventions; difficulty starting and stopping activities when told to do so; "significant difficulty observing rules" regarding allowed versus restricted areas and objects, bathroom use, talking, and respecting others' property. He "demonstrates great difficulty with skills required for task behavior and completion," including listening, attending, remaining in his seat, staying on task. The student has difficulties with interactions with peers and adults, including sharing, waiting his turn, and modulating his voice. He engages in "self-stimulating behaviors, such as hand flapping, jumping up and down, biting his left index finger . . . and reciting movies." "He may begin laughing at inappropriate times for no identifiable reason." The student "has trouble . . . avoiding provoking others, . . . using nonaggressive actions, using words rather than physical actions to respond when provoked or angry." He also presents a safety risk as he has difficulty keeping unsafe objects out of his mouth, . . . recognizing dangerous areas, . . . and checking for safety before crossing a traffic area." Ex. R-9 at 221-22. In addition, the IEP stated that the student's teacher, Nance, rated the student "as having very significant concerns in the areas of excessive withdrawal . . . and poor attention . . . [and] significant concerns in the area of . . . poor impulse control." *Id.* at 224-25. The IEP also described the student's inappropriate sexual behaviors and reported that district staff conducted a functional behavioral assessment only with respect to those types of behaviors, which included, using certain words that the staff believed were sexually suggestive, "touching his genitals, and caressing others' shoulders." *Id.* at 225. Stubbs testified that she did not do any detailed work to analyze or control the student's non-sexual behaviors because his classroom teacher said she thought they were being controlled in the classroom. Stubbs did not form her own opinion about whether those other behaviors interfered with the student's education.

31. The IEP contained goals and objectives or benchmarks in telling time, money skills, measuring, math calculation, reading, writing, language, work completion, peer interaction, sensory, motor and adaptive behavior. Ex. R-9 at 227-40. While the November 2002 IEP contained 27 annual goals, each with several short-term objectives, none of them related to decreasing the student's behaviors that are described in the present levels section of his IEP. *Id.*

32. The IEP also contained a list of accommodations and modifications including a modified spelling curriculum, social stories, visual cues, the use of PECS for language, frequent breaks, immediate and concrete reinforcements, the use of a private bathroom and modified assignments. Ex. R-9 at 226, Tr. 2515-16. Many of those accommodations and modifications constituted positive behavioral strategies. Tr. 2518-19.

33. The IEP also included a behavior management plan that was developed based on Stubbs' FBA, and a sensory diet that was developed by Alexander. Ex. R-9 at 208-13; Tr. 884, 887, 1766, 1771, 2508, 3080-81. The behavior plan was intended primarily to address the sexual behaviors that the student had exhibited, but the team believed it appropriate to include all the behaviors the student had exhibited. Tr. 794-95, 883-87. Although the team was attempting to extinguish the sexual behaviors, the team was not intending to extinguish the off-task and finger biting behaviors that also were addressed. Tr. 1834-35.

34. The November 2002 IEP provided for a placement of 1375 minutes per week in special education with occupational and speech-language therapy. Ex. R-9 at 241; Tr. 3084. The student's placement did not change from his prior IEP and no notice of action was prepared. Tr. 1850. The student's time in regular education for art, music, P.E., lunch and recess also remained the same. Tr. 1851.

35. During the 2002-03 school year and based on the data collected, the student made progress on his IEP goals and objectives. Ex. R-9 at 227-240; Ex. R-10, 15. In November 2002, the district began providing the parents with daily behavior sheets that informed them about the student's behaviors and schedule. Ex. R-15; R-15A. These sheets were used to collect data with respect to the student's behavior and were sent home daily and signed by the parents. Reviewing the IEP for the following year, November 2003, Stubbs testified she was unable to discern any indication that the behavior plan was working. *See* Ex. R-29. Stubbs testified that one of the purposes for reducing behaviors is to increase the child's time in regular education. Tr. 784-85. Yet between the November 2002 and the November 2003 IEP the student was actually spending less time in regular education. R-29 at 467; Tr. 786-87. The district asserted that the data showed that the student was exhibiting behaviors less frequently (District's Brief at 51), but both Stubbs and Nance testified that there was no improvement. Stubbs stated she was aware of no data showing success of the behavior plan. Tr. 787-88, 796-801. The November 2003 IEP present levels contain no behavior data. Tr. 804-07. And the student made no progress accessing the general education curriculum. Tr. 778-80. Stubbs agreed with the parents' attorney that the present levels section of the November 2003 showed no improvement in the student's behaviors and that she was unaware of any data that showed behavioral progress. Tr. 787-807. Stubbs also admitted that since the November 2003 IEP contained essentially the same behavior intervention plan after a year of no progress, that it was no longer appropriate to continue using it. Stubbs testified that she believed that Nance and Alexander had data regarding the frequency of the student's behaviors and that typically that kind of data would be included in an IEP or other reports, and the lack of that data makes the IEPs inappropriate. On examination by the school district's attorney, Stubbs stated that at one time the district was keeping data on the student's behaviors, but "at some point they quit using the charts and were making notations, just some general notations on notebook paper." Tr. 906. Stubbs also testified that in her opinion, the behavior plan was working and the student was improving. Tr. 907. There are no data or data summaries or reports that substantiate that opinion and the opinions of other staff that the

student's behaviors were improving. The district's documentation included behavior charts from November 2002 through May 2003, but no charts from May 2003 through the November 2003 IEP meeting. Ex. R-15 and R-15A at 304-397. Nance also testified that during the first year that the behavior plan was in place, from November 2002 to November 2003, there was no change in the student's behaviors, she was still seeing them and at the same rate. Tr. 1765-66. The district prepared no analysis of the data reflected in the behavior charts that it kept from November 2002 through May 2003. The charts indicate a lot of inconsistency, some days indicating good focus and many days indicating very little on task behavior, such as 30 seconds or one to two minutes on task during a one-hour instructional period. Ex. R-15 and R-15A.

36. The district's brief is misleading in several respects with regard to the student's behavior. For example, the district stated: "The data that was collected showed that [the student's] behaviors of concern were decreasing. Tr. 857." Dist. Brief at 37 ¶97. The transcript at page 857, however, only contains Stubbs' testimony that she was told by other staff that his **sexual** behaviors were decreasing. The district also claimed that Nance did not observe progress with "sexual behaviors" during sixth grade. Dist. Brief at 38 ¶98. The transcript pages cited, however, contained Nance's clear testimony that she did not observe any progress with respect to **all of the student's behaviors**. Tr. 1733, 1765-66. Nance testified that over the four years she taught the student at Lathrop, through May 2004, some of his behaviors decreased, including his biting, hand flapping, and sexual behaviors, but his echolalia remained. The district did not point to any data that supported that testimony.

37. The district also relied on the testimony of its expert witness, Lisa Robbins, and claimed that she "testified that research shows that, for every year that a behavior has been in place, it takes three months of consistent implementation of a plan to see a significant decrease in that behavior. Tr. 3602-03." Dist. Brief at 38 ¶98. The district failed to point out that Robbins testified that she was not aware of such research regarding children with autism, and, perhaps more importantly, Robbins' testimony was not that it takes that long to make a "significant decrease" in behavior, but a "long-term" or "permanent" change in behavior. Tr. 3602-03. Robbins even clarified: "Now, that is not to say that you don't make some changes." *Id.*

38. During the 2002-03 and 2003-04 school years the relationship between the district and the parents became very strained. District staff complained about the father's behavior and he complained about their behavior. Staff filed police reports about the father and the parents filed formal complaints about the staff. There were disputes about access to records and whether the father was allowed to come on school property and the father asserted that due to medical conditions he was advised not to do so. The parents did not attend IEP meetings for the student, in the spring and fall of 2003. When the district later agreed to conduct IEP meetings at a neutral location, the father again attended. The panel will not attempt to sort out and decide all of those disputes or even provide detailed facts about them in this decision. The panel will note that the parties were able to conduct themselves appropriately during 18 days of hearing, which was held at a neutral location.

39. During the 2003-04 school year, the student attended the Lathrop District as a seventh grader. Nance continued as his special education teacher, Foreman continued as his speech-language therapist. On or about November 11, 2003, the student's IEP team convened at school to prepare an IEP for the remainder of the 2003-04 school year. Ex. R-29. The following

were among the individuals who were present and participated: Quick, Nance, PE teacher Joyce Slayden, Bozarth, Foreman, and Stubbs. Ex. R-29 at 460. The parents did not attend, but the team met without them, according to the district, because at least two attempts had been made to have them present. The present level of the IEP noted the progress that the student had made over the previous year. Ex. R-29 at 461-66. The district noted in its brief that the present level also indicates a decrease in the student's finger biting behavior, but it failed to point out that the next sentence states: "He has increased hand flapping and loud vocalizations when he becomes anxious." Ex. R-29 at 466. In the same paragraph, the IEP stated that the student "may run across the room and begin jumping when excited" and "[h]e frequently recites movies throughout his school day." *Id.* The IEP contained goals and objectives in the following areas: telling time, money skills, reading, measuring, writing, staying on task, language, adaptive skills, motor, and sensory integration. Ex. R-29 at 475-89. It contained no goals regarding decreasing inappropriate behaviors. The IEP also contained numerous accommodations and modifications, many of which constitute positive behavioral strategies to address the student's targeted behaviors. Ex. R-29 at 467; Tr. 1910, 2532-35. The IEP also contained a slightly revised behavior intervention plan as well as a sensory diet. Ex. R-29 at 469-74. The IEP did not propose a change in placement, but a continued placement of 1375 minutes per week in special education, 60 minutes per week of occupational therapy, 150 minutes per week of language therapy. Ex. R-29 at 491.

40. One of the places where the district attempted to integrate the student was in PE. The PE teacher, Slayden, testified that he was able to participate in only about five percent or less of the PE curriculum. Slayden was excused early from the November 2003 IEP meeting, and could not recall whether she was present for discussion of the student's behaviors. She testified that she did not bring up at the IEP meetings the fact that the student was able to spend so little time in her class. Knowing that the student was not attending the full PE class, the district's response was to modify his attendance in PE, meaning he would only stay part of the time. Ex. R-29 at 467. As stated above, the behavior plan was not meeting the goal of allowing the student to spend more time in the regular education environment, but between the November 2002 and the November 2003 IEPs, the first year the behavior plan was in place, the student ended up spending less time in regular education.

41. During the 2003-04 school year, the student met and/or made some progress with respect to many of the IEP goals and objectives contained in November 2003 IEP. Ex. R-35 at 509-14; R-38 at 521-36; R-50 at 633-47. Although some of the district's witnesses testified that the student made some progress with respect to his behaviors during that year, the only data kept by the district on those behaviors was for April and May 2004. Tr. 1888; Ex. R-50 at 648-74.

42. On or about November 13, 2003, Quick corresponded with the parents regarding speech therapy services for the student, and acknowledged that there may have been some days during the prior three years when such services were not provided. Ex. R-31 at 497. Quick indicated the district would provide all necessary compensatory services. *Id.*; *see also* Ex. R-30 at 496. The district determined that the student was owed a total of 32 hours of compensatory speech services. Ex. R-36 at 518; R-41. The district's review of records indicated the student missed 32 hours of speech services during the 2000-01 school year, over 11 hours during the 2001-02 school year, and five and one-half hours during the 2002-03 school year. Ex. R-41.

43. On or about March 19, 2004, the parents corresponded with Quick to inform him that a representative of Partners in Behavior Milestones (PBM) would be coming to the district on April 1 to observe the student. Ex. P-134. Quick initially replied that the observation was not necessary (Ex. R-37 at 519) but ultimately allowed the observation. On or about April 1, 2004, Dan Matthews from PBM observed the student at the Lathrop School District and prepared a report of his observation. Ex. P-139 at 511. The report was not presented to the District or to the student's IEP team. Tr. 1951-52, 3268, 3304. The report noted that Matthews observed for approximately 5 ½ hours which, as noted in the report, is a "relatively short amount of time to assess the conduct of any child." Ex. P-139 at 511. The report further noted that Matthews was present to assess only the behavioral component of the student's school day. *Id.* Matthews observed the student with Nance, but other children were removed from the setting because of the school's alleged privacy concerns. Ex. P-139 at 511; Tr. 1950-51. Matthews also observed the student in Foreman's therapy session, but that is not reflected in the report. Tr. 2549-50; *see* Ex. P-139. Matthews noted that the function of most of the student's behavior appeared to be for avoidance of non-preferred tasks, but further noted that the behaviors that he observed might serve different functions under different conditions. Ex. P-139 at 512. Matthews' report stated that Nance consistently refused to permit the student to escape and she provided a structured academic routine for him. *Id.* He recommended changes in the program that he observed. *Id.* at 513.

44. Matthews did not testify at hearing, but Corey Royer, the owner of Partners in Behavioral Milestones, testified. Tr. 1029, 1031. Rand Hodgson, the student's advocate, contacted Royer about testifying. Tr. 1089. Hodgson and the student's father met with Royer one time at Royer's office about his involvement. Tr. 1144, 2920. Royer has a bachelor's and a master's degree in human development and dropped out of a doctorate program before he could complete that degree. Tr. 1030. Although Royer has a private practice as a behavioral analyst, Tr. 1030, he is not nationally certified in that area. Tr. 1030, 1091. Royer holds no licensures from any state in any area. Tr. 1092. Since 1997, since he founded PBM, Royer's primary job has been to help school districts manage behavioral issues with children with autism for whom most people are not able to succeed. Tr. 1031-32, 1034-35. He has worked with 1100 to 1200 different children and consulted with over 100 different school districts. Tr. 1031. PBM trains parents, teachers and other staff to manage noncompliance and decrease inappropriate behaviors. Tr. 1035. Many PBM employees have master's degrees and in the past others have had Ph.D.'s. Tr. 1032.

45. Royer testified that he had never met or observed the student, but that Matthews observed the student at Lathrop at his direction. Tr. 1036-38, 1066, 1109. In Royer's opinion, a behavior plan should never remain the same over an entire school year and an effective behavior plan should have a dual economy of reinforcement, one to reinforce the absence of inappropriate behaviors and the other for the production of work. The district's behavior plans were not appropriate without those dual economies. Tr. 1074. If the behavior plans were effective, they would not still exist after two years. Tr. 1080. Royer testified that PBM has dealt successfully with the types of behaviors exhibited by the student in this case and has decreased such behaviors swiftly. Tr. 1081. In May 2004, PBM began the Milestones school for older children, aged 7-17. Four children began attending in May. Tr. 1093, 1100-01. Milestones was not in existence at the time that Matthews prepared his report. Tr. 1149. The school is approximately

40 minutes from Lathrop. Tr. 1093. The school for older children is a state approved private agency. Tr. 1033, 1094, 1102, 1189-90. PBM employs contracted occupational and speech-language therapists for those children who need those services. Tr. 1119. Royer testified that Milestones enrolls two types of children. The first are children with behavioral issues who are taken on a short-term basis and then reintegrated quickly into their public schools. Tr. 1102. In describing these children, Royer indicated that most have physically aggressive behaviors and he characterized them as the “toughest of the tough.” Tr. 1097, 1102-03, 1197. Royer described the second group of students as those with autism. Tr. 1102. He testified that those students would be expected to stay at Milestones for a longer period of time because of the intricacies involved in teaching children with autism. Tr. 1102. Mr. Royer testified that, because of the short time that Milestones had been in existence, it was premature to discuss the average length of a student’s stay. Tr. 1105. Royer also testified that Milestones has an application process and that the parents did not initiate that process with respect to the student. Tr. 1105, 1108-09. However, Mr. Matthews testified that he believed that PBM was an appropriate placement for the student. Tr. 1079. He acknowledged that the school was “pretty restrictive” and stated that PBM “imports” non-disabled peers for one or two hours every 2-3 weeks to interact with PBM students. Tr. 1130.

46. On or about May 13, 2004, the parents requested an IEP meeting to discuss placement. Ex. R-47. The request did not indicate that they were going to request PBM/Milestones as a placement and the district maintained it was unaware that that was the placement the parents were seeking prior to the meeting. Tr. 2331, 2962-63, 2975, 3270. On May 18, the IEP team convened at a neutral location to discuss placement and the meeting was civil. Ex. R-48 at 623-28; Ex. R-46; Tr. 1984-85, 1988, 2560, 2784-86, 3270. The student’s father requested that the district place the student at PBM for the 2004-05 school year. No one from PBM attended the meeting and the parents did not share the Dan Matthews’ report or request that any of Matthews’ recommendations be implemented. Tr. 1121, 1964-65, 2560, 2949-50, 2961. At the meeting, the parent stated that PBM would not have occupational, physical or speech therapy services available. Ex. R-48; Tr. 3329-30. The team had no information about PBM other than what the parent provided. Tr. 2783, 3271. Moreover, at that time, the Milestones program was not in existence and limited information was, therefore, available. Tr. 3300. The parties disputed whether someone from the district, in particular its attorney, stated that PBM was too expensive. The district witnesses testified they analyzed the request by looking at least restrictive environment requirements and the continuum of placements. Ex. R-48 at 624-25; Tr. 3008-10. The team, excluding the parent, concluded that PBM was not the LRE for the student and rejected the parents’ request. Ex. R-48 at 625-26; Tr. 2561, 3012, 3272, 3331-32.

47. On May 18, 2004, the district provided the parents with a written notice of action refusing the request to change the student’s placement to PBM because PBM was too restrictive and the student would have no opportunity for integration and was making progress at Lathrop. Ex. R-48 at 629. The notice also indicated that, per the parent’s information, the student would have no opportunity for related services and the team further noted concerns regarding the length of time for transportation. Ex. R-48 at 629.

48. Over the strenuous objections of the parents, the hearing panel allowed Lisa Robbins to testify as an expert witness for the District. Robbins has a bachelor’s degree in

psychology and special education and a master's degree in special education with an emphasis in autism and Asperger's Syndrome. Tr. 3530. She also has taken courses towards a doctorate degree and has taken courses in autism and behavior beyond her degree programs. Tr. 3530, 3541-42. Robbins is certified by the State of Missouri to teach elementary education, special education, early childhood education and early childhood special education. Tr. 3530. Robbins is a full-time assistant professor at Missouri Western State College in St. Joseph, Missouri. Tr. 3529. In that position, Robbins teaches courses in early childhood education and early childhood special education, IDEA requirements and supervises student teachers in special education. Tr. 3529-30, 3551-52. She was employed as a special education teacher in a public school setting for approximately 16 years. Tr. 3530-32; *see also* Ex. R-53.

49. Robbins also has a private practice, Autism Supports Connection, Inc., in which she consults regarding autism, primarily with parents of children with autism but also with school districts. Tr. 3533-37. Robbins also is designated as a Missouri Autism Consultant by Project Access and received training from Penn State University in applied behavior analysis. Tr. 3537-41. Robbins also has received federal grants to write modules to train others on behavior, sensory integration and other areas related to autism. Tr. 3542. She also has published in the field of autism. Tr. 3544. She is the author of a book on Asperger syndrome and sensory integration and has another book in the publication process. Tr. 3544-45. Robbins has consulted on autism issues on an international scale. Tr. 3545-46.

50. During the 2004-05 school year, the Lathrop District contracted with Robbins to be the district's autism consultant and she met and observed the student through that consultation. Tr. 3555-58. In preparation for her testimony, Robbins reviewed all of the district's evidence. Tr. 3558. Based on that review, Robbins testified that the student's autism affected him behaviorally, academically, socially, cognitively, and in communication in the school environment. Tr. 3566-70. Robbins described his IEPs at Lathrop as being a "Cadillac" model and representative of best practice. Tr. 3610-11. The present levels of those IEPs were excellent and were thorough, detailed and provided a clear picture of all areas of the student's functioning, his strengths and his areas of concern. Tr. 3596-97, 3610-11. Robbins testified that the present level met and exceeded IDEA requirements. Tr. 3596-97, 3610-11. In addition, she stated the goals and objectives in the IEPs were directly derived from the present levels and were age, developmentally and functionally appropriate, addressed all areas of concern and complied with IDEA requirements. Tr. 3597. She testified that the progress reports included within the district's evidence demonstrated that the student was making significant progress on his IEP goals and objectives. Tr. 3574-75, 3611. Robbins also testified that, due to his autism, it was not appropriate to expect the student to perform at grade level and she does not put much weight in an IQ score in developing an IEP program. Tr. 3578, 3585-87.

51. Robbins also testified about the student's behaviors and behavior plan. She testified that the sexual behaviors that he displayed were not typical of children with autism. Tr. 3579-81. She testified, however, that it is difficult to separate a behavior from autism. Tr. 3600. She testified the behavior plans were excellent and addressed the behaviors that were most significantly impairing his ability to function at school. Tr. 3601-02. Those plans looked specifically at what the behaviors were that were of concern and attempt to interpret why that behavior was occurring and provide responses to that. Tr. 3602. In addition, the behavior plans put preventative strategies in place to prevent a reoccurrence of the behaviors. Tr. 3602. She

testified that the behavior plans and strategies included in the IEPs were appropriate and the sensory diets were exemplary. Tr. 3609.

52. Robbins also testified that, based on her knowledge of the student and PBM, PBM would not have been the least restrictive environment, but would have been a step backwards. Tr. 3613-14.

53. The parents presented several witnesses to testify that Robbins was not truthful in her dealings with other parents and about whether she had used the word “torture” in relation to behavioral therapy for children with autism in workshops she conducted at the Carl Junction School District. Robbins testified that she had described an intensive, at-home discrete trial program for young children with autism as “abusive” but denied she used the word “torture” in conjunction with the ABA methodology.

CONCLUSIONS OF LAW

The burden of proving compliance with the IDEA is on the school district. According to the United States Court of Appeals for the Eighth Circuit, which governs the federal courts in Missouri: “At the administrative level, the District clearly had the burden of proving that it had complied with the IDEA.” *E.S. v. Independent Sch. Dist. No. 196*, 135 F.3d 566, 569 (8th Cir. 1998). The burden of proof is on the district for procedural as well as substantive issues. *Seattle School District No. 1 v. B.S.*, 82 F.3d 1493, 1498 (9th Cir. 1996) (appropriateness of evaluation and placement).

The United States Supreme Court described the determination of whether a public entity has complied with the IDEA as involving a two-part analysis:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Board of Education v. Rowley, 458 U.S. 176, 206-07 (1982) (footnotes omitted). The Supreme Court emphasized the importance of procedural compliance:

It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.

Rowley, 458 U.S. at 205-06.

The case law under the IDEA requires that an educational program be set aside on procedural grounds in any one of three circumstances: (1) when the procedural inadequacies have “compromised the pupil’s right to an appropriate education,” (2) when the district’s conduct has “seriously hampered the parent’s opportunity to participate in the formulation process,” or (3) when the procedural failure has resulted in “a deprivation of educational benefits.” *Independent School District No. 283 v. S.D. by J.D.*, 88 F.3d 556, 562 (8th Cir. 1996).

Each of those three factors is stated by the courts to grounds for finding a procedural violation significant enough to require setting aside the educational program developed by the district. *Id.*

As recently summarized by the Ninth Circuit, “‘procedural inadequacies that result in the loss of educational opportunity,’ **or** seriously infringe the parents’ opportunity to participate in the IEP formulation process, **or** that ‘caused a deprivation of educational benefits,’ clearly result in the

denial of a FAPE.” *Amanda J. v. Clark County Schl Dist.*, 267 F.3d 877, 892 (9th Cir. 2001) (citations omitted; emphasis added). Where a school district has “failed to develop the IEP according to the procedures required by the Act,” the hearing panel “need not address the question of whether” the resulting IEP “was reasonably calculated to enable [the student] to receive educational benefits.” *W.B. v. Target Range School District*, 960 F.2d 1479, 1485 (9th Cir. 1991). A school district’s failure to develop an IEP “in accordance with the procedures mandated by the IDEA” may, “in and of itself” deny the student a free appropriate public education. *Amanda J.*, *supra*, 267 F.3d at 895.

The panel will address the issues as they were presented in the parents’ post-hearing brief. In considering the issues, the panel will apply the statute of limitations of two years prior to the request for due process.

I. Did the district deny FAPE by excluding and limiting parent participation in the development of goals and objectives and in making placement decisions?

As stated above, that issue was not specifically mentioned in the parents’ written submissions prior to the hearing, but was first raised in the parents’ opening statement. At that time, the attorney for the parents stated this issue was related to the issue of the district’s failure to craft appropriately drafted IEPs resulting in a denial of FAPE. As discussed above, the panel will consider the issue in that context, whether the district excluded and limited parent participation and thereby led to inappropriately drafted IEPs.

Where a school district “blatantly violated one of the Act’s procedural requirements, preventing full and effective parental participation,” courts have condemned the district’s violations as “driving a stake into the very heart of the Act,” *Burlington v. Dept of Ed.*, 736 F.2d 773, 783 (1st Cir. 1984), *aff’d on other grounds*, 471 U.S. 359 (1985), and “undermin[ing] the very essence of the IDEA.” *Amanda J.*, *supra*, 267 F.3d at 892.

The 1997 amendments to the IDEA were intended to strengthen the participation of parents in the education of their children with disabilities. In the Congressional findings of the 1997 amendments, the IDEA states:

(5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by -

(B) strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

20 U.S.C. §1400(c)(5). The United States Department of Education reinforced Congress’s emphasis on parental participation in the regulations it adopted in 1999 to enforce the IDEA. The ability to participate in meetings is an absolute parental right. 34 C.F.R. §300.501 states:

(a) *General.* The parents of a child with a disability must be afforded, in accordance with the procedures of §§300.562-300.569, an opportunity to-

* * *

(2) Participate in meetings with respect to-

(i) The identification, evaluation, and educational placement of the child; and

(ii) The provision of FAPE to the child.

According to the parents in this case, the district violated their right of participation in several ways that the panel believes might be pertinent to this issue:

- rejecting the parents' request for placement at PBM without gathering additional information about the program;
- not accepting the father's statement that he could not attend meetings on school grounds;
- failing to schedule IEP meetings at a mutually convenient location;
- not believing the district had an obligation to disclose or share teachers' data with the parents or place it in the student's educational records.

This case is in an unusual posture because the parents did not allege a general denial of their right to participate prior to the hearing. The panel ruled that the issue would only be considered as it related to the issue regarding drafting of IEPs. The parents were allowed to and did participate in IEP meetings, except for the period during which the father was being treated for emotional issues and informed the district he could not go on the school grounds. When the father did attend IEP meetings, including with his advocate Rand Hodgson, they did not challenge the districts' development or drafting of IEP goals and objectives. There might have been a technical violation of the district's obligation to conduct IEP meetings at a mutually convenient place, but a panel majority does not believe that any limitation of the parents' right of participation, led to inappropriately drafted IEPs.

II. Were the IEPs for the school years 2002-03 and 2003-04 deficient?

In their post-hearing brief the parents contended the IEPs were deficient in that they failed to include information required by the IDEA and failed to address the student's particular needs arising from his disability, and that the district thereby failed to provide the student a free appropriate public education. Parents' Brief at 33-39. The parents rely on *Rowley* and its twofold inquiry quoted above, regarding procedural compliance and whether the IEP is reasonably calculated to provide educational benefit. *Rowley* also stated FAPE is tailored to the unique needs of the child by means of an IEP. The Court stated the IEP must contain a statement of present levels of educational performance, goals, objectives, and "appropriate objective criteria and evaluation procedures" to determine whether objectives are being met, citing 1401(18) and (19). *Rowley* at 181-82.

Did the IEPs include an adequate statement of present levels of educational performance and baseline data, measurable goals and objectives, and appropriate objective criteria and evaluation procedures for determining progress?

The IDEA, 20 U.S.C. §1414(d)(1)(A)(I), requires that present levels of educational performance must include "how the child's disability affects the child's involvement and progress in the general curriculum." The parents argue "these critical pieces of information are missing from the IEPs challenged," and only with this information can measurable annual goals and short term objectives be developed to meet the child's unique needs. The parents rely on *Cleveland Heights-University Heights Sch. Dist. v. Boss*, 144 F.3d 391 (6th Cir. 1998), and *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 317 F.3d 1072 (9th Cir. 2003), for the proposition that the IEP requirements contained in the IDEA are not minor technical matters but minimum requirements for IEPs.

In *Cleveland Heights* the district argued that any deficiencies in the IEP "implicated only a few minor technical matters on a 'laundry list' of requirements that were insufficient in number and significance to constitute violations of the IDEA." 144 F.3d at 398. The court disagreed:

“The items in section 1401(19) are requirements by which the adequacy of an IEP is to be judged, although minor technical violations may be excused.” 144 F.3d at 398. The court affirmed that the IEP “did not provide appropriate objective criteria for measuring [the student’s] progress,” as required by the IDEA. 144 F.3d at 398. The court held: “In this case the violation was far from technical, and its absence was not harmless. The omission went to the heart of the substance of the plan.” 144 F.3d at 399.

In *Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 317 F.3d 1072 (9th Cir. 2003), the court stated that the school district violated the IDEA’s substantive requirements by failing to include in its IEP a statement of the student’s “present educational levels and procedures for determining whether the instructional objectives had been achieved,” citing 20 U.S.C. §1401(a)(20)(F) (requiring that an IEP contain “appropriate objective criteria and evaluation procedures and schedules for determining . . . whether instructional objectives are being achieved”). 317 F.3d at 1078 n6.

The parents argued the IEPs in this case were similar to those in *Cleveland Heights and Shapiro*. In *Cleveland Heights* the court described the offending IEP: “The IEP stated that Sommer’s progress would be measured in terms of her ability to do things such as ‘identify’ a ‘list of sight words . . . with 80% accuracy’ and ‘improve her reading fluency when reading a passage aloud 8/10 times.’ Beyond such vague and general statements, the IEP offered no basis for measuring Sommer’s progress.” In *Shapiro*, however, the court did not specify the IEP deficiencies.

The district argued its position on this issue in its brief at 82-84. The district asserted that the IDEA and its regulations provide no further detailed requirements beyond the mandate that the IEP contain a “statement of measurable annual goals, including benchmarks or short-term objectives.” Dist. Brief at 82-83. The district cited two district court decisions in which the courts rejected a similar argument, also made by Mr. Walker, the attorney who represents the parents in this case. *O’Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 963 F.Supp. 1000 (D. Kan. 1997); *Logue v. Unified Sch. Dist. No. 512*, 959 F.Supp. 1338 (D. Kan. 1997). The district also relied on another case from the Sixth Circuit, the same court that decided *Cleveland Heights*. *Kuszewski v. Chippewa Valley Sch. Dist.*, 38 IDELR 63, 2003 U.S. App. LEXIS 536 (6th Cir. 2003) (unpublished opinion). In both of the district court cases, there are subsequent appellate decisions. *O’Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692 (10th Cir. 1998); *Logue v. Unified Sch. Dist. No. 512*, 1998 U.S. App. LEXIS 16280 (10th Cir. 1998). While the school districts prevailed on the issue of the alleged deficiency of IEPs in each of the cases cited by the district, the cases do not state any general rules that apply to this case. They either held the goals and objectives under review complied with the legal requirements, or, if the IEPs were deficient, the deficiency was not of sufficient seriousness to warrant a finding of a violation of the IDEA. See *O’Toole*, 144 F.3d at 703-04.

The parents’ primary challenge to the sufficiency of the IEPs in this case was that many of the goals and objectives were developed without actual data to establish a starting point or baseline for the skill. While the district correctly pointed out that the IDEA does not expressly require that such information be contained in an IEP, the law does require “a statement of the present levels of educational performance” and “measurable annual goals [and] objectives.” 1414(d)(1)(A)(i) and (ii). Moreover, there must be a direct relationship between the present levels and the goals and objectives. See, e.g., *O’Toole*, 144 F.3d at 702. Therefore, while

Congress did not expressly require that IEPs contain baseline data to support the starting point for each objective or benchmark, without such data there is no way to determine that the student actually made progress. If an objective states a student will perform a skill, and the student already knows that skill, mastering that objective would not show any progress. Through the examination of many of the district's staff members at the hearing, the parents did establish that many goals and objectives in the student's IEPs were developed without baseline or starting point data. The IEPs were deficient to that extent. Because of other more serious IEP deficiencies as discussed below, the panel need not determine whether the lack of baseline data for some of the goals was significant enough to lead to a denial of a free appropriate public education.

Did the IEPs address the student's particular needs arising from his disability (particularly in the area of behaviors)?

The parents raised the issue whether the student's IEP goals were meaningful or meager – whether there were goals in the important areas of reading, social interaction, and behaviors. See Clarification of Issues #3,4,5. In that clarification, and throughout the hearing, the parents also challenged the behavior intervention plans developed by the district.

The parents cited *Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003), to support its argument that despite some evidence of progress, a district violates IDEA when the progress was not truly meaningful. Parents' Brief at 36. The parents said the IEPs contained very meager goals and that the goals were compromised by the student's behaviors that were interfering with the student's academic and social/emotional progress and that the district first failed to address the behaviors and then addressed them inadequately. In *Neosho*, the issue was "whether the School District had provided the required behavior management plan necessary to ensure that Robert received a free appropriate public education." 315 F.3d at 1025. With respect to the arguments the school district made in this case, that the panel must examine the entire IEP for evidence of educational progress, the court noted that the *Neosho* case "is slightly different in posture from others we have seen because it involves a **failure to implement a necessary provision of an otherwise appropriate IEP.**" 315 F.3d at 1027 n.3 (emphasis added). Even though there was testimony in *Neosho* from teachers that the student "had attained some benefit academically," and "had progressed 'in a very broad sense,'" and from his mother that the student "made 'some' progress," the panel and reviewing courts agreed that those benefits were insignificant in light of the student's behavior problems that interfered with his education and made it impossible for him to remain in regular classes. 315 F.3d at 1029. The hearing panel in *Neosho*, credited the expert testimony presented by the parents that the student's "autism and resulting challenging behavior required the adoption of a formal behavior management plan," and that the goals and strategies contained in the student's IEPs "were insufficient." 315 F.3d at 1025-26.

Strawn v. Missouri State Board of Educ., 210 F.3d 954 (8th Cir. 2002), is another example of an Eighth Circuit case where although a disabled student was making some progress in many areas, the failure to properly address a key component of her educational need was held to constitute a denial of a free appropriate public education. Lauren Strawn had "multiple disabilities, including profound deafness, cerebral palsy, mental retardation, and spastic quadraparesis." 210 F.3d at 956. She was educated in the Missouri State Schools for the Severely Handicapped from 1985 to 1993, when a teacher who happened to know sign language

discovered that Lauren “had shown ‘sudden improvement.’” 210 F.3d at 956. The district court held that the State School had provided Lauren a free appropriate public education, based on evidence that during the time period covered by the applicable statute of limitations, the student “exhibited **‘much progress in every area.’**” *Strawn v. Missouri State Bd. of Educ.*, 30 IDELR 244, ¶18 (W.D. Mo. 1999), *rev’d*, 210 F.3d 954 (8th Cir. 2002) (emphasis added). Despite that evidence, the Eighth Circuit reversed and reinstated the hearing panel’s decision that Lauren was denied a free appropriate public education because of the failure to provide her with appropriate services in an area of critical need: “The panel concluded that the education Lauren received at the Missouri State Schools for the Severely Handicapped with respect to sign language instruction was ‘wholly deficient.’” 210 F.3d at 958. *Strawn* is further authority for the parents’ argument in this case that even though the student made some progress on his IEP goals, the school district denied him a free appropriate public education because of the deficiencies in his behavior intervention plan.

The Lathrop school district relied on *CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630 (8th Cir. 2003). In *CJN*, the student was making academic progress **and** the district was doing all it reasonably could to try to control the student’s behavior. 323 F.3d at 638-39. The court noted that different behavioral interventions for the student, “did not appear necessary at the time to help him progress behaviorally.” 323 F.3d at 639.

In this case, a majority of the panel finds that the student made progress in some areas, in math and in his language abilities in particular, but that the IEPs were deficient with respect to the student’s behaviors, in several ways. A district court in the Eighth Circuit recently distinguished *CJN* on similar grounds. *Larson v. Indep. Sch. Dist. No. 361*, 40 IDELR 231, 2004 U.S. Dist. LEXIS 3322 (D. Minn. March 2004):

The Court finds that Christopher's IEPs were not reasonably calculated to enable him to receive a meaningful educational benefit. The Court agrees with the School District that Christopher **has progressed and continues to progress at an average rate in his academics.** However, the Court finds that the case before it and *CJN* differ from one another in that the School District in *CJN* had conducted an FBA and an occupational therapy evaluation. Here, the School District did not conduct a proper FBA or prepare an appropriate BIF.⁵

40 IDELR at p. 970, 2004 U.S. Dist. LEXIS 3322 at *39.

There is no doubt that the student in this case had behavioral issues that impeded his educational progress. He could not succeed or even spend a significant amount of his time in the regular education environment because of his behaviors. That was known to Lathrop as soon as he transferred there from Putnam County in the fall of 2000. Putnam County’s IEP says the student “is very noisy and disruptive;” he does not want to do any work; he “needs a very structured one on one intensive program; “[h]e should not be in a regular classroom until behaviors are under control;” “he is destructive;” when an item is taken away “he disrupts the

⁵ “FBA” refers to a functional behavioral assessment, and “BIF” appears to be a typographical error for “BIP” which is a behavior intervention plan. *See* 40 IDELR at 968, 2004 U.S. Dist. LEXIS 3322 at *31.

classroom by screaming and making noises;" he "controls much of his environment by noise;" he will not participate in art. Ex. P-6 at 29.

The student's special education teacher, Cindy Nance, testified that when the student initially came to Lathrop he spent time in the regular classroom where he exhibited many disruptive behaviors, loud outbursts, finger biting, echolalia, talking and reciting. She stated the student's behaviors were severe and very much impeded his learning.

Lathrop's IEP for November 2000 noted that the student's behaviors impede his learning and that they will be "addressed in IEP objectives." The IEP then addressed the student's behavior in one goal, to "reduce noise making when he becomes frustrated to 35% each day for four out of five days, six out of eight weeks." Ex. R-1 at 14. The district reported he met that goal (*id.*), but for the following year his placement remained the same, in the special education classroom for more than 60% of his time. Ex. R-1 at 19; Ex. R-2 at 38. While the IEP for November 2001 again indicated the student had behavior issues, and one can assume he was still making noise when he became frustrated, that IEP contained no goals or objectives dealing with behavior. Ex. R-2. The IEP reported that the district would "conduct Functional Behavior Assessments on targeted behaviors." *Id.* at 32. Nance stated the team was concerned with the frequency of behaviors.

In January 2002 the parents requested an IEP meeting and a behavior plan. The district did not schedule the meeting until May 2002 and did not develop any behavior plan until November 2002. Rand Hodgson testified that at the first IEP meeting he attended, in May 2002, the district staff were forthright about the student's behaviors and reported that a lot of his behaviors were greatly interfering with his progress. They described off task behaviors, perseverative talking, difficulty focusing and following directions, self stimulating behaviors such as hand flapping, and sexual behaviors. The district brought in Marilyn Stubbs, an autism expert, to help understand and deal with the student's behaviors. Although the parents were not informed of her limited role, Stubbs was retained primarily to help only with some of the student's behaviors that appeared to be sexual in nature, not the preexisting behaviors that also impeded his education.

In the student's November 2002 IEP, following a reevaluation of the student (Ex. R-8), the district for the first time included extensive descriptions of his behaviors in the section of the IEP containing his present levels of educational performance. Ex. R-9 at 221-22, 224-25. The IEP stated the student has "significant difficulties" with social conventions; difficulty starting and stopping activities when told to do so; "significant difficulty observing rules" regarding allowed versus restricted areas and objects, bathroom use, talking, and respecting others' property. He "demonstrates great difficulty with skills required for task behavior and completion," including listening, attending, remaining in his seat, staying on task. The student has difficulties with interactions with peers and adults, including sharing, waiting his turn, and modulating his voice. He engages in "self-stimulating behaviors, such as hand flapping, jumping up and down, biting his left index finger . . . and reciting movies." "He may begin laughing at inappropriate times for no identifiable reason." The student "has trouble . . . avoiding provoking others, . . . using nonaggressive actions, using words rather than physical actions to respond when provoked or angry." He also presents a safety risk as he has difficulty keeping unsafe objects out of his mouth, . . . recognizing dangerous areas, . . . and checking for safety before crossing a traffic area." *Id.* at 221-22. In addition, the IEP states that the student's teacher,

Cynthia Nance, rated the student “as having very significant concerns in the areas of excessive withdrawal . . . and poor attention . . . [and] significant concerns in the area of . . . poor impulse control.” *Id.* at 224-25. The IEP also described the student’s inappropriate sexual behaviors and reported that district staff conducted a functional behavioral assessment only with respect to those types of behaviors, which included, using certain words that the staff believed were sexually suggestive, “touching his genitals, and caressing others’ shoulders.”

In the November 2002 IEP the district for the first time included a behavior intervention plan. *Id.* at 208-09. The behavior plan addresses “sexually suggestive” behaviors, “off task” behaviors, and finger biting. While the November 2002 IEP contains 27 annual goals, each with several short-term objectives, none of them relate to decreasing the student’s behaviors that are described in the present levels section of his IEP. *Id.* at 227. Stubbs testified that she did not do any detailed work to analyze or control the student’s non-sexual behaviors because his classroom teacher said she thought they were being controlled in the classroom. Stubbs did not form her own opinion about whether those other behaviors interfered with the student’s education.

One of the places where the district attempted to integrate the student was in PE. Yet the PE teacher testified that he was able to participate in only about five percent or less of the PE curriculum. Knowing that the student was not attending the full PE class, the district’s response was to modify his attendance, meaning he would only stay part of the time. Ex. R-29 at 467.

Reviewing the IEP for the following year, November 2003, Stubbs was unable to discern any indication that the behavior plan was working. *See* Ex. R-29. Stubbs testified that one of the purposes for reducing behaviors is to increase the child’s time in regular education. Tr. 784-85. Yet between the November 2002 to the the November 2003 IEP the student was actually spending less time in regular education. R-29 at 467; Tr. 786-87. The district asserts that the data showed that the student was exhibiting behaviors less frequently (District’s Brief at 51), but both Stubbs and Nance testified that there was no improvement. Stubbs stated she was aware of no data showing success of the behavior plan. Tr. 787-88, 796-801. The November 2003 IEP present levels contain no behavior data. Tr. 804-07. And the student made no progress accessing the general education curriculum. Tr. 778-80. Stubbs agreed with the parents’ attorney that the present levels section of the November 2003 showed no improvement in the student’s behaviors and that she was unaware of any data that showed behavioral progress. Tr. 787-807. Stubbs also admitted that since the November 2003 IEP contained essentially the same behavior intervention plan after a year of no progress, that it was no longer appropriate to continue using it. Stubbs testified that she believed that Cindy Nance and Katie Alexander had data regarding the frequency of the student’s behaviors and that typically that kind of data would be included in an IEP or other reports, and the lack of that data makes the IEPs inappropriate. On examination by the school district’s attorney, Stubbs stated that at one time the district was keeping data on the student’s behaviors, but “at some point they quit using the charts and were making notations, just some general notations on notebook paper.” Tr. 906. Stubbs testified that in her opinion, the behavior plan was working and the student was improving. Tr. 907. The district’s documentation included behavior charts from November 2002 through May 2003, but no charts from May 2003 through the November 2003 IEP meeting. Ex. R-15 and R-15A at 304-397. Cindy Nance also testified that during the first year that the behavior plan was in place, from November 2002 to November 2003, there was no change in the student’s behaviors, she was still seeing them and at the same rate. Tr. 1765-66. The district prepared no analysis of the data

reflected in the behavior charts that it kept from November 2002 through May 2003. The charts indicate a lot of inconsistency, some days indicating good focus and many days indicating very little on task behavior, such as 30 seconds or one to two minutes on task during a one-hour instructional period.

A majority of the panel therefore concludes that the student was denied a free appropriate public education due to the district's failure to adequately address his behaviors in his IEPs for the 2002-03 and 2003-04 school years, and that the district is incapable of providing the student a free appropriate public education.

Stubbs also testified that in May 2002 the IEP team agreed that social skills were the main concern or at least very important for the student. Tr. 832-33; Ex. R-2 at 74. She testified, however, that the IEPs of 11/02 and 11/03 did not sufficiently focus on social skills, and to that extent the IEPs were not appropriate. Tr. 833-35. That too is denial of a free appropriate public education for the student.

The IEPs created by the district might look good to an outside expert, such as Lisa Robbins. They have extensive present levels, many goals and objectives, and some efforts to address behavior; but the district did not really make a serious effort to address the student's behaviors, except the sexual behaviors, and the district failed to prove that it got any progress on the student's behaviors. The evidence from the IEP progress reports shows he made some progress in some areas, but they were not in the important areas for this student. There were no data regarding the frequency of behaviors, but Cindy Nance and Marilyn Stubbs both testified there was no change in his behaviors during the 1st year that the behavior plan was in effect. Yet the district made no significant changes in the plan. The IEPs since November 2000 contain no behavioral goals.

III. Are the parents are entitled to reimbursement?

The parents make a general legal argument about the right to reimbursement, but point to no evidence that the parents expended any funds on a private education for student. Thus, they are not entitled to reimbursement.

IV. Did the district fail to provide proper prior written notice and did the district make decisions without including key people with knowledge, including the parents?

The parents do not specify which notices they complain about or how the alleged failure to give proper notice amounted to a loss of educational benefits or a denial of their right to participate. The issue regarding failure to allow participation was addressed above. The panel does not find a denial of a free appropriate public education on these issues.

DECISION

As stated above, a majority of the panel (Chackes and Allee) finds that the school district did not violate the IDEA with respect to the issues of parent participation and notice of action. A majority of the panel (Chackes and McClure) finds that the district violated the student's right to a free appropriate public education, both procedurally and substantively, in the development of the student's IEPs. As the parents did not expend funds for a private placement, a majority of the panel (Chackes and Allee) finds they are not entitled to reimbursement.

Having found a violation of the IDEA, the hearing panel has the same authority as courts, to "grant such relief as the court determines is appropriate." 20 U.S.C. §1415(i)(2)(B). As a remedy for the district's violations of the IDEA, to provide the student a free appropriate public

education, to provide compensatory education services to the student, and due to the animosity that has developed between the parties and the district's inability to provide the student a free appropriate public education, a majority of the panel (Chackes and McClure) orders the following:

The district shall change the student's placement to a full time state approved private educational agency authorized to serve children of the student's age who are diagnosed with autism. The district and the parents shall attempt to agree on the appropriate placement, which might include PBM or the Sherwood Center, two agencies that were discussed in the evidence in this case. If the district and the parents disagree as to the appropriate private placement, and/or other aspects of the student's program, they shall mutually agree upon a mediator, from the state's approved list of mediators, to help them resolve the disagreement. If the state will not pay for the mediator, it shall be at district expense. In order to compensate for the denial of a free appropriate public education, the district shall ensure that summer school services are made available to the student for the next four years, in all areas addressed by the student's then current IEP.

APPEAL PROCEDURE

This is the final decision of the Department of Elementary and Secondary Education in this matter. Either party has a right to request review of this decision pursuant to the Missouri Administrative Procedures Act, §§536.010 *et seq.* RSMo. The parties also have a right to file a civil action in federal or state court pursuant to the IDEA. *See* 20 U.S.C. §1415(i).

Dated: October 20, 2005

s/Kenneth M. Chackes
Kenneth M. Chackes
Chairperson

As to the above findings that the district did not violate the IDEA with respect to the issues of parent participation and notices of action, and that the parents are not entitled to reimbursement:

Terry Allee
Panel Member

As to the above findings that the district did violate the IDEA with respect to the drafting of IEPs and as to the remedy:

s/Marilyn McClure
Marilyn McClure
Panel Member

Copies of this decision will be mailed to the parties on this date, by certified mail, return receipt requested.

, by his parent,

vs.

LATHROP R-II SCHOOL DISTRICT

A dissenting opinion from panel member Terry Allee will follow.

Marilyn McClure, BSEd, dissenting in part.

I dissent with the panel relating to the issue of Violation of the parent's right to participate (relating to the failure to appropriately draft IEPs and the failure to provide records)

The parent was advised in writing, by both a medical doctor and a LCSW, to not attend meetings on the school property; the parent testified that he provided a copy of the doctor's letter to the school district in 2003. The school district was in receipt of a Missouri DESE child complaint decision that referenced the father not being able to attend on school property for medical reasons. The school district proceeded to conduct the Nov 03 IEP meeting on school property without the parent's participation. Previous meetings had been held off-site to accommodate attendance of a parent. The school-contracted behavior therapist, Marilyn Stubbs, who attended the Nov 03 IEP meeting testified she was concerned because she wanted the parents there. In my opinion, the district was indifferent to the need to accommodate the parent(s). As a result, parental input was denied in the Nov 03 IEP process resulting in improper drafting of the IEP.

A second instance of this violation is when the parents requested an IEP meeting in January 02; the meeting was not held until months later after the parents filed a child complaint with MODESE. MODESE found the district out of compliance in its April 25, 2002, decision. *Honig v. Doe*, 484 U.S. 305, 311 (1988).

IDEA Sec.300-345(a)(2) Scheduling the meeting at a mutually agreed on time and place.

Another violation occurred that undermined the IEP teams ability to reasonably calculate the student's program occurred when records were kept by staff that included data about student performance that was not made available to the school district or neither to the parent. This data was not presented as evidence for this panel to review; the parent learned of its existence during the testimony of the hearing. It is my experience as an educators that it is common practice that educators are asked by administration to surrender any student records at the end of a school year to the administration.

I dissent with the panel on III, the issue "Are the Parents Entitled to Reimbursement".

The parent testified to the effect that the student was being kept home since the school program wasn't working. He also said that because the family lacked the means to enroll him in another school the student was being kept home. He described the activities that the family worked on at home with the student. To a certain extent, this family, as a last resort, reluctantly provided services in home to the student. Provision of in-home services comes at a cost--financial and otherwise. The burden of having to become an educator-of-sorts impacts the family unit to an extreme.

This panel is choosing to deny this parent reimbursement based on the premise that since the parent didn't expend any funds the parent isn't entitled to be reimbursed for the expenses incurred, intangible or otherwise. This student was receiving programming, be it at home, for periods of time pending the outcome of this hearing. **The student and the parent was in this predicament solely because the student was a student with a disability. This student would have been attending school without question and without burden to the family and**

community if the student not disabled. The burden placed on this family while waiting for FAPE to come about was above and beyond what parents on non-disabled students experience. Personnel, in this case the parent, had to be present during the days to supervise/instruct the student. At a minimum, this panel member would award reimbursement for costs related to the student receiving services at home during the pendency and conduct of this hearing. 34CFR Sec **300.403** Reimbursement is appropriate.

**DUE PROCESS HEARING PANEL
MISSOURI STATE BOARD OF EDUCATION
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

,)
by his parent,)
,)
Petitioners,)
)
vs.)
)
LATHROP R-II SCHOOL DISTRICT,)
)
Respondent.)

ORDER UPON REQUEST FOR RECONSIDERATION

BACKGROUND

The hearing panel in this case issued and mailed to the parties the final decision on August 18, 2005. Part of the relief ordered by the panel is a change in placement for the student and a requirement for mediation if the parties are unable to agree on the new placement or other aspects of the student's program. On August 22, 2005, the attorney for the parents made the following request:

The Parents request that the decision be reconsidered, modified or otherwise clarified to provide for implementation of the mediation provision should the parties fail to agree on a mediator, a timeline imposed for accomplishing that process and the selection of a mediator in the event there is no agreement between the parties within a certain fixed time.

The attorney for the school district responded on August 23, 2005, that it was her understanding that the Missouri Department of Elementary and Secondary Education (DESE) prohibited modified decisions. The hearing chairperson then checked with DESE, but did not get a definitive answer as to whether a hearing panel retains jurisdiction to reconsider or modify

a final decision.

Several court decisions, however, indicate that even without express statutory authority, an administrative agency retains jurisdiction to rule on motions to reconsider that are filed during the time allowed for an appeal. *Farmer v. Barlow Truck Lines, Inc.*, 979 S.W.2d 169 (Mo. Banc 1998); *Woodman v. Director of Revenue*, 8 S.W.3d 154 (Mo. App. W.D. 1999); *Dillon v. Director of Revenue*, 777 S.W.2d 326 (Mo. App. W.D. 1989). We are still within that time and, therefore, the panel still has jurisdiction.

MODIFIED DECISION

The hearing panel majority that ruled in part in favor of the parents in this case (Chackes and McClure), hereby modifies the relief ordered in the decision of August 18, 2005, and orders the following relief:⁶

The district shall change the student's placement to a full time state approved private educational agency authorized to serve children of the student's age who are diagnosed with autism. The district and the parents shall attempt to agree on the appropriate placement, which might include PBM or the Sherwood Center, two agencies that were discussed in the evidence in this case. If, **by September 20, 2005**, the district and the parents disagree as to the appropriate private placement, and/or **they later disagree about** other aspects of the student's program **during the 2005-06 school year**, they shall mutually agree upon a mediator, from the state's approved list of mediators, to help them resolve the disagreement. If the state will not pay for the mediator, it shall be at district expense. **If, within three business days after such a**

⁶ New provisions are printed in bold.

disagreement arises, the parties are unable to agree upon a mediator, the school district shall provide to the parents the names of five mediators from the state's approved list who would be acceptable to the district. The parents shall then have two business days to select a mediator from that list. The parties shall meet with the mediator as soon as possible thereafter, and no longer than five business days following the selection of the mediator. If after meeting with the mediator the parties are unable to agree upon the appropriate private placement or other aspects of the student's program, the district shall proceed in accordance with this decision and the IDEA.

In order to compensate for the denial of a free appropriate public education, the district shall ensure that summer school services are made available to the student for the next four years, in all areas addressed by the student's then current IEP.

Dated: October 20, 2005

s/Kenneth M. Chackes
Kenneth M. Chackes
Chairperson

s/Marilyn McClure
Marilyn McClure
Panel Member

Copies of this decision will be mailed to the parties on this date, by certified mail, return receipt requested.

**DUE PROCESS HEARING PANEL
MISSOURI STATE BOARD OF EDUCATION
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

STUDENT ,)
by his parent)
,)
Complainants,)
v.)
LATHROP R-II SCHOOL DISTRICT,)
Respondent.)

I. DISSENTING STATEMENT

A. Introduction

I disagree with the decisions reached by the two other panel members, (Chackes and McClure) in their finding that the School District violated the student’s right to a free appropriate public education, both procedurally and substantively, in the development of the student’s IEPs.

The panel chairperson (Chackes) of this three member Due Process Hearing Panel provided his “**findings of fact**” and “**conclusions of law**” relative to the question that he framed on page 40 of the decision: **Did the IEPs address the student’s particular needs from his disability (particularly in the area of behavior)?**

After reading the chair's findings of fact and conclusion of law that he used to arrive at the violation of FAPE, it is clear to this panel member that the conclusions reached were not based upon the overwhelming preponderance of evidence but simply based upon isolated bits of testimony taken out of context. Further, the chair went beyond the IDEA'97 statutes established by Congress, then of the US Office of Special Education and Rehabilitation Services regulations, and the Missouri State Plan. In addition, he refers to case law that does not apply to this hearing.

The following relevant testimony are direct quotes from the transcripts of Ms. Marilyn Stubbs, Ms. Cynthia Nance, Ms. Christi Foreman, Ms. Katie Alexander, and Ms. Lisa Robbins that were omitted, ignored or discounted from the chair's findings of fact and conclusions of law that provide overwhelming evidence that contradicts the chair's conclusions and resulting decision.

II. TESTIMONY

A. Marilyn Stubbs Weber:

pp. 751-752, ll. 12-11:

Q: And what did you understand that you were called in for specific –

A: I was called in – specifically, he was not a behavior problem particularly in the classroom, they were concerned about sexual behaviors.

Q: After you got here, did you learn that he had a number of other behavior problems that were interfering with his education?

A: What I learned was, when we wrote up – when we had talked at the IEP meeting about

writing up a plan, we would include any behaviors and not just make it specifically about one thing.

However, I wasn't asked to do any detailed work about those behaviors because the teacher felt as though any behaviors that were occurring were being dealt with in the classroom.

Q: Okay. Well, then, this was different than how you did most of your work?

A: This was different because, usually, we – usually, when I'm called in, we have a child with a lot of behaviors in a lot of different areas or the behaviors are disruptive to a classroom. Yeah, this was different because it was a specific – these weren't disruptive behaviors to the classroom, they were behaviors of concern to the people working with him.

p. 761, ll. 20-24:

Q: Now, are there certain legal requirements necessary or that trigger the requirement that a functional behavior assessment be done?

A: I'm not sure I understand what you mean by "legal requirements." I don't –

p. 792, ll. 15-23:

Q: Okay. Were you given enough information, while you were employed by Lathrop concerning , to know whether his perseverative behavior was a result of this, that or the other – or whether he even had it?

A: Again, that wasn't part of why I was called in to work with .

The teachers believed that he was fairly easily redirected, as I recall, and that he was – and they believed that he was progressing.

pp. 793-794, ll. 23-2:

Q: Okay. And, in fact, he was off-task significantly enough that that was part of the behavioral plan, correct?

A: When we wrote the behavior plan, we put in every behavior that they dealt with.

pp. 808-809, ll. 3-3:

Q: Well, I have a problem – well, let me just ask the question: If he’s reciting movie lines and phrases when he’s stressed and doesn’t know what to say, why would redirecting him to a task – to me, that doesn’t seem like you’re making him less stressed. Wouldn’t there be something that we should do to reduce his stress?

A: Well, if you look in the second column –

Q: Right.

A: – and, probably, I could have – I should have put this like as an “A,” “B,” “C.” One of the reasons was when he was entertaining himself.

There were times – we put – I remember this, as well, because of those very reasons. There were times when redirecting him visually or verbally to task worked immediately. And, so, there were times when they felt like he was entertaining himself, and they would redirect him visually or verbally to task, and that worked.

There were other times, when he was stressed, we – they thought there were times – again, at some teacher discretion – reminding him of an upcoming break because it may not be that far away – “finish these two and you have a break coming” – would work. There would be other times that they would decide to use the sensory diet.

p. 813, ll. 7-13:

Q: And I’m fine with that. But when he’s stressed, there doesn’t seem to be anything here that’s relieving him of the stress, I mean, whatever is causing the stress.

A: Again, maybe this isn’t clear enough. Because they believed that the stress was often due to sensory processing issues, which is why it says to refer to the sensory diet.

pp. 818-819, ll. 2-2:

Q: And how important do you think it is to help an autistic child learn to develop those skills so that he can interact with his peers?

A: I think it’s very important.

Q: Was there any attention given, by the IEP team, to developing a social skills program to

increase 's ability to interact with his peers?

A: I remember it being discussed. It was not – I remember particularly the speech therapist talking about social skills. But I don't recall programming or any details of what was discussed, I just remember that it was.

Q: Well, had a need to develop his social skills, didn't he?

A: Yes.

Q: Well, I want you to look at Page 475, which is the beginning of the goals and objectives for the 11-16-03 IEP, and tell me which, if any, of these goals or objectives relate to specifically improving his ability to initiate and interact with his peers?

A: No. 11, asking questions. I would say some of these – 11, 13 are – I'm not – if it was the speech or if it was the teacher – but those would be some of the initial kinds of goals you might work on with someone. Who has very limited social skills and you're trying to begin some social skills development.

pp. 851-854, ll. 24-15:

Q: Were you able at least at that point prior to this first meeting to come to any tentative opinions about what was going on that led to these behaviors?

A: No. Not then. We discussed, as I typically would, where did these behaviors take place? Are there any times you can guarantee they don't take place? Any time you can guarantee that they probably will take place? How frequent are the behaviors? They had thought that perhaps the behaviors occurred more if happened to be sitting on the floor. The para who was there then said, "Except they do occur at other times" and gave us that information.

In talking about the behaviors and what we might need to determine, Katie Alexander had already done a lot of trying different things and trying some different scenarios, approaches, environmental kinds of things, so I did rely on her expertise because not only had we worked together, she had done this before. And we agreed that it was possible that because he has autism, he had misunderstood something that he had seen or heard and that he was using those – I mean, there were a number of varieties. We agreed that probably, and I think that was substantiated, that you could not substantiate for sure that anything had occurred and it was just one of those things we could never know for sure.

Q: Were you able ever to pin down what the triggering event was that led to those behaviors?

A: We were not. And we did try to do that. Katie Alexander, again, in that short two and a half week period before I could get in had – and because she had done behavioral plans and followed through before, had started doing something in a little different way with , which was he really liked and was motivated by potato chips. And she would have a plate of potato chips there, and this is not typically something she or I would do, but she would show those to and say, “Do your work and you get this.” If the behaviors occurred during that time, she would just not say anything and take a chip away.

And my first question to her was, “Will he understand what you’re doing,” and she said “Yes because I will explain it and I think he will catch on very quickly.” And he did and her data showed that those behaviors started decreasing, which was the first thing she had tried and it was, like I said, differently – usually we don’t do something that’s negative such as taking something away. We would try to be – she had tried reinforcing and none of those other things would work.

Q: So when you talked to Mr. Walker about the behavior plan, there were potato chips built into that plan?

A: Yes. At some point, yes.

Q: Was it Ms. Alexander’s data that led to that strategy?

A: It was. It was because she had been – because it happened so frequently with her, we had decided that that was probably a good approach. It was working. And we talked a little bit and discussed a little bit would Student satiate on potato chips, but they thought they could try some different things and that she would – but Katie also knew that we would fade some of those prompts or reinforcers a little bit over time, so that was part of what she was doing with him.

p. 855, ll. 11-13:

Q: Did that particular behavior or behaviors in your opinion interfere with Student’s ability to have appropriate social skills with peers.

p. 856, ll. 6-23:

A: His behaviors were of concern with – not just with peers, but also being in the school because he might go over to someone who was walking down the hallway. It had happened. And part of the discussion that we later had during IEP meetings was not only for his behavior and how it affected others, but also for his own safety.

Q: (By Mrs. Goldman) So if the behavior plan had – and I’ll ask this question later – if you

were able to write a behavior plan that reduced those sexually-related behaviors, would that increase Student's ability over time to appropriately interact with his peers?

A: That was definitely discussed.

Q: And if you can recall over the two and a bit years I believe that you've been involved in Student's situation, did you see a decrease in those sexual – I'm just going to call them sexual behaviors?

p. 857, ll. 19-20:

A: Yes. I was told that the data showed that those behaviors had decreased.

pp. 858-859, ll. 8-5:

Q: (By Mrs. Goldman) Go ahead. And I'll just ask you to follow up on what you were going to follow up on.

A: I could also add that I was not asked in the second year to deal with those behaviors because they were not as significant part of Student's day as they had been before.

Q: (By Mrs. Goldman) We're in the spring of '02 based on Page 58. And you've already told us that you did some observation prior to that meeting.

A: Yes.

Q: The next year, which would have been the '02-'03 school year, I believe it was the sixth grade year, did you conduct any school-based observations of Student if you remember?

A: I remember seeing him a number of times when I would be in to see other children in that classroom. I honestly don't recall how much I was there just to see Student because – I recall that his behaviors did not seem as disruptive to him or the class, or that was my impression at the time, to warrant that. I did see him in the classroom.

p. 860, ll. 5-12:

Q: did your consulting arrangement with the Lathrop District, if you know, permit staff or Dr. Quick to call you if they had new concerns or old concerns that they didn't feel were being managed?

A: That was my understanding, yes.

Q: And during those two years '02-'03, '03-'04, did staff call you about any behavioral concerns?

A: Not that I recall.

pp. 860-861, ll. 22-19:

Q: During the time you were involved with Student's IEP process, did anyone, school or parent side, ever say to you, "We don't think the behavior plan is working, can you come in and help us out some more and come up with a new approach?"

A: No.

Q: Did Mr. or Mrs. ever indicate that there were concerns that they felt were not being properly managed?

A: No. They mentioned – no. Not about the behavior plan.

Q: What concerns did they express to you?

A: They had expressed in the staff meeting or in the IEP meetings about the social issues.

Q: And did Mr. Hodgson ever express any concerns that the behavior plan was not working?

A: Not that I recall.

Q: During the times you saw Student at school over the subsequent period of time, did you see anything that caused you some concern that you needed to come back, do a new functional assessment and rewrite the plan?

A: No.

p. 862, ll. 17-20:

Q: Tell us with respect to Student, what was your process for conducting the functional assessment? Not generally how you do one, but what you did for Student at this time.

p. 863, ll. 14-20:

A: We all agreed though that since that behavior program was working, we were not going

to mess around with the child just to take some data, so we decided that this was working for whatever reason. We all discussed again that we would like to know the purpose of those behaviors and could not quite determine what the purpose of the behaviors were.

p. 868, ll. 7-10:

Q: (By Mrs. Goldman) What was your understanding of what nothing meant?

A: I was told by the staff that there were no occurrence of that behavior on those days.

p. 869, ll. 6-7:

A: These were the types of sheets I asked the staff to complete and give to me when I came back in.

p. 874, ll. 1-4:

Q: (By Mrs. Goldman) And did you feel like that was sufficient data to be able to write an appropriate behavior plan to address that behavior?

A: Yes.

pp. 874-875, ll. 14-20:

Q: And look at the pages that are included on 88 through 113 and tell me if you know what those sheets are.

A: Yeah. These were data sheets regarding the sexual behaviors that Student exhibited.

Q: And were those from the spring of 2002?

A: Yes, they were.

Q: And did you rely on those in formulating the behavior plan?

A: Yes, we did.

Q: Now, tell me how you take your functional assessment information and convert that into

a behavior plan.

A: Well, it very much follows a typical scientific process. You define the problem, you gather information in a variety of ways, including data. You create a hypothesis about the function of the behavior if it's possible and from the function of the behavior you write interventions. What was different about this is that we could never be sure what the functions were. Some of the information that we had, and again, this was also with parent input, was that some of it could be an attempt at interacting socially, particularly with young women, but no one knew for sure, so we wrote and we developed an intervention.

We developed interventions or ways of working with Student that decreased the opportunities for those behaviors to occur and to try to increase his socially appropriate interactions, like, with his teachers. They typically had happened when someone was working with him, which of course in a school, that's going to be where you have most interaction.

pp. 883-884, ll. 9-7

Q: And again, without, I mean, going into what you've already talked about, if you could tell us how you got from the first call, the functional assessment, and what's actually in the plan.

A: Okay. Well, again, we took – we defined the behavior as using words and gestures in sexually suggestive ways, sometimes inappropriate touching. I took information from the people who had seen and experienced the behaviors. I asked them to take data, which they did. We got back together – I observed – before I had asked them to take the data, I had observed and took my own notes.

We got back together and discussed what we had determined and found from that and then we discussed possible interventions. And I had also stated, I do recall clearly that I said, "And we really need to ask the parents at the IEP meeting if when we are doing interventions, would this be – is this what you want" because interventions have to match with the family as well.

Q: And at this meeting did that discussion take place?

A: That was – it was my – we discussed all of the possible interventions and asked for and discussed the behaviors and possible interventions, yes.

p. 884, ll. 15-24:

Q: And at the end of the meeting, did you have an opinion as to whether there was a consensus about all the components of this first page that addresses the sexual behaviors?

A: My feeling and my understanding was that we were all in agreement at that point in time.

Q: And at this time, November of '02, did you think Page 208, which is Page 1 of the behavior plan, appropriately addressed the sexual behaviors?

A: I thought that it did.

p. 886, ll. 9-18:

Q: Now, the being off task, did you view that as part of the autism?

A: That's not atypical. I see that a lot with kids who have autism and I also saw him redirected to task, which often worked.

Q: Okay. And what about the biting of the finger, did you see that as part of the autism?

A: I did see that as part of the autism. Again, perhaps some of the sensory – I mean, self-injury is not unheard of with individuals with autism.

pp. 886-887, ll. 22-10:

Q: Did you see the biting the finger as interfering with learning?

A: I saw it as a possible interference. It wasn't – my recollection wasn't a high rate behavior, but they were concerned about it because it was self-injurious.

Q: And at the end of the meeting, had the team discussed those two behaviors and interventions for those?

A: Yes.

Q: And do you recall if there was agreement or disagreement about this aspect of the behavior plan?

A: It was my understanding at the time that there was agreement about this aspect.

p. 892, ll. 13-20:

Q: And if you'll go to Page 226, were you part of the team that prepared this list of accommodations and modifications?

A: Yes.

Q: And by the end of the meeting do you recall if there was agreement or disagreement about what was in here?

A: My recollection is that we agreed.

p. 893, ll. 1-10:

Q: Do you recall if you had any suggestions for accommodations and modifications?

A: I know social stories was one of them. Visual cues and visual supports given in all settings was another recommendation. Visual schedule was. Although I think they may have been using some visual schedule at the time. Task adaptations. And obviously I don't remember if that one was strictly minor or if that was also from the family, the team. Those are the ones that I recall.

pp. 894-896, ll. 6-25:

Q: If you would look on Page 232. Mr. Walker this morning asked you some questions about social skills development.

A: Yes.

Q: If you could look at Goal 10 and tell me if you think that goal is related in any way to social skills development?

A: Yes.

Q: And how would that help Student with social skills?

A: Well, because he would be practicing asking a conversational question such as how are you or what is your name and then typing the results on a computer word processor. I really don't remember how we had determined – I remember the discussion. I just don't remember what led to that determination in giving him examples, but yes, that was part of the social – that would be a social skill.

Q: And do you know what opportunities he would have during the school day to do that, to ask the questions?

- A: Yes. They had discussed that there – first of all, there would be some naturally occurring ones in different specials and at lunch for example. Also that there were times that he was accompanied by a para or a teacher or therapist into the building that that would be also the time to approach different peers and/or adults.
- Q: Did you observe Student in those specials or lunch or those naturally occurring times?
- A: I – let's see. I know I saw him once outside of the special education classroom. I don't remember what the – I think it was music, but I don't remember for sure.
- Q: Could you look at Page 234, Goal 12 and tell me if you think that goal relates to social skills development?
- A: Yes.
- Q: And how would that relate to that?
- A: Well, playing is probably one of the first social interactions children develop. It's very typical sometimes for children with autism to have difficulty playing typical games, being reciprocal, so that definitely would be a goal that would lead toward social skills, being able to interact and play with other children.
- Q: You told us earlier that we should start with kids where they are, where they're currently functioning and go from there?
- A: Yes.
- Q: Based on what you knew about Student at this time, based on the goals that we've looked at thus far, do you think that was consistent with your philosophy that we start where kids are and go from there?
- A: It was consistent with my philosophy. I did rely on the accuracy of the school and family, who knew him better than I did, on what they thought Student could do and learn to do.
- Q: You're relying on sort of two different pots of information, school and family. At the meeting were what both sides – and I hate to characterize it that way, but both groups reporting, were they different or were they pretty similar?
- A: Well, I thought they were fairly similar. I thought the family had some information that was very useful to the team, particularly about some of the behaviors we had seen that they had also seen some of the behaviors. I mean, those were good things to know. So with some explanation from the parents and some additional information, I thought that

we were very close in our understanding.

pp. 897-899, ll. 8-10:

Q: Can you tell me if you think Goals 13 and 15 – or do Goals 13 and 15 on Page 235 address social skills?

A: I believe 13 does. Yes.

Q: And can you look at 236 and tell me if Goals 16 and 17 address social skills?

A: Yes. Yes, 16 does. Yes, 17 does.

Q: What awareness did you have at this time of what regular education classes Student was in?

A: What I recall is that I thought that he went to his specials. My recollection was that Student did not always seem to want to be in those specials and that sometimes he wouldn't be required to stay there.

Q: And is there any relationship between being integrated into those special classes: art, music, PE, whatever and social skill development?

A: Well, certainly can be, yes.

Q: And for Student did you see opportunities for social skills development there?

A: I did see Student have opportunities, yes.

Q: And you talked about naturally occurring kinds of things before. How important is that in developing social skills?

A: Well, I think it's extremely important. He can learn a number of things. This would be typical probably of other children as well, but certainly with autism, that children may be able to do something with a speech therapist in a speech therapist setting. It doesn't always generalize or translate across environments, so it's good to have those opportunities and some goals that address those so that he will generalize those skills across the environment.

Q: No, if you look at the goals and objectives on 237 through 240, they appear to be OT goals and some of them deal with throwing a ball, lunch time independence, that sort of thing. Do those have any bearing on social skills?

A: Well, yes. Recreational movement for example and being able to participate with other children in either a structured game or play, certainly that influences social skills. Lunch time and independence with his lunch time routine allows him to function more as his typical peers would in that kind of a setting. Go ahead.

Q: Given the things that we've looked at, and Mr. Walker asked you some questions about social skills and asked you if you thought the IEPs were appropriate as to social skills. Having looked at the IEP as a whole, do you have an opinion right now as to whether that IEP, when it was drafted was appropriate in terms of Student's social skill development?

pp. 899-900, ll. 19-16:

A: Looking at the goals and objectives as a whole and the IEP as a whole with everything else that we've discussed, then yes, I do think that it was appropriate. It did address social skills.

Q: (By Mrs. Goldman) Now, you testified this morning that the parents said their primary concern was social issues and social skills.

A: Yes.

Q: At the conclusion or during this meeting, did they request any additional types of goals, strategies, interventions or anything relating to the social skills?

A: I don't recall anything else.

Q: By the end of the meeting did the parents indicate, the parents or their advocate indicate, in any way that they were dissatisfied with this IEP as to social skills?

A: I was not under the impression that they were.

Q: Did they indicate – do you recall whether they specifically indicated by the end of the meeting that they were happy with the IEP as written?

A: My understanding was that it was a pleasant meeting and that they were satisfied with the IEP.

p. 902, ll. 4-9:

Q: (By Mrs. Goldman) Did you do informal training?

A: Yes.

Q: And can you just generally describe for us what that consisted of?

A: It consisted of – they were already aware of using social stories --

pp. 902-903, ll. 19-10:

A: I tweaked some of the social stories. I suggested they use the visual schedule a little differently than they had been using it. I suggested and showed them what I meant about using a visual schedule to help break down casts. I went over particular situations that had occurred and discussed and role played a little bit on how I wanted them to respond or not respond to the child's behaviors that had occurred.

Q: (By Mrs. Goldman) And do you know if any of your suggestions or recommendations were incorporated or used?

A: I saw them used.

Q: At any time did you have any concerns about the ability of the District's staff working with Student to be able to implement his program?

A: No.

p. 908, ll. 14-25:

Q: You did make some changes to this plan. In overall substance, did it vary a great deal?

A: No.

Q: Does that mean Student didn't make progress?

A: No.

Q: What does it mean?

A: It means that some of the behaviors that Student exhibited were still being exhibited, but probably at a lesser – well, my – at a lesser frequency. We still wanted to track them and we still wanted to make sure that we were able to deal with those behaviors appropriately.

p. 909, ll. 8-13:

Q: And in terms of social skills development, is there any relevance to the behavior plan?

A: Well, yes. The – especially the sexually suggestive behaviors that limited his interactions or opportunities for interactions outside of a highly structured setting definitely.

p. 910, ll. 9-23:

Q: If you would go to the next page, or actually two pages over, 483, and tell me if Goals 11 and 12 relate to social skills development.

A: Yes, they do.

Q: And on Page 484, what about Goal 13?

A: Yes.

Q: How does that relate to social skills?

A: Part of social skills development is identifying facial – any kind of body language, especially, like, facial expressions that another person exhibits and a lot of communication is non-verbal, so that was an attempt to help Student attend to different facial expressions and to try to get him to be aware of differences in happy, sad that someone might exhibit.

p. 915, ll. 17-25:

Q: Did you agree with the decision to refuse placement at PBM?

A: Yes, I did.

Q: During your testimony this morning, you said usually when you're called in to consult, you see kids with lots of behaviors in lots of areas, but this was different, meaning when you came to consult for Student. How was Student different than most of the kids you consult on?

pp. 917-918, ll. 9-12:

Q: (By Mrs. Goldman) My question was how was Student different from the other children she was called in to consult on?

A: Typically I'm called in to look at children who have a lot of disruptive behaviors or behaviors that are so off task they cannot learn and are not progressing. But typically I would say even more so than that, it's children who are disruptive. And parents may be the ones who are concerned about how much the child is learning sometimes. I also usually am not looking at those – at sexual behaviors. That was different.

Q: Okay. If you're usually called in to see kids so off task and disruptive and not progressing, compare Student to that child.

A: Student – according to information I looked at when I came about Student, I didn't make notes, but I read through some information, was making progress. He was not disrupting others. He was typically easy to redirect. There were some supports in place in the classroom that sometimes are not in place in classrooms that I go to observe. Some of the supports that I might suggest and often suggest were already in place.

Q: Were the staff or was the staff, I'm not sure if it's was or were, at Lathrop receptive to your ideas and suggestions?

A: They were not only receptive, but tried to be very proactive in how to approach Student.

p. 923, ll. 15-23:

Q: At the meetings, had you believed that the IEPs were deficient in any way, would you have felt free to speak up and say, We need to do this?

A: Yes, definitely.

Q: And did you do that?

A: Not that I recall.

Q: At the time those IEPs were written, did you believe they were appropriate for Student?

A: I believed that they were appropriate for Student.

p. 982, ll. 21-23:

Q: Marilyn, I think you tried to explain before but were not able to how interfering, how impeding, did you view Student's behaviors?

pp. 983-985, ll. 4-12:

A: I can answer, okay. When we had discussed the behaviors, we did have to agree. And our understanding was in the IEP that we needed to mark that section that said it impeded his learning because we had a behavior plan, because we did address them. We did not feel, and I include myself in that, but I based a lot on the staff that I was familiar with, that they did not impede him to the extent that he could not learn. In fact he was progressing, so both are accurate. It did impede his learning to some extent, not perhaps as much as children who are so off task that they're not learning or progressing at all.

Q: Okay. Thank you.

A: You're welcome.

Q: Have you ever been involved in a situation when behaviors were either not impeding or were minimally impeding that a team wrote a behavior plan simply to be proactive?

A: Yes.

Q: As an autism behavior specialist, what is your preference, to wait for the behavior so you can just wait and address what happens or to be ready for something that might come to avoid them?

A: I much prefer being proactive. I also prefer to have a plan that addresses, as the last column does, the preventative actions. Sometimes the behavior plans are also a teaching tool for people who are not implementing strategies. That wasn't the case here, but that's also why sometimes behavior plans are written even if the behaviors are not a huge part of a child's day.

Q: Mr. Walker asked you whether school districts didn't write behavior plans unless the behaviors were significant and you said in most places.

A: Yes. In many places I probably should have said.

Q: Given your experience with Lathrop, would that statement be true of Lathrop?

A: No.

Q: He also asked you if schools were reluctant generally to have behavior plans and you said some. Would that be true of Lathrop?

A: No.

Q: You said usually by the time you're involved, the team is not reluctant to have a plan. If you can, and I don't know if you can, where in the scheme of things do you feel you were

brought in for Student, early in the more proactive stages or after everything else had been tried and everybody just gave up and needed some outside assistance?

p. 985, ll. 7-12:

A: I felt like I was brought in early on about – again, about specific behaviors, but that I would not have been had those behaviors not occurred with Student, that he – again, that they felt like things were going well and that they were making progress and I felt like I was brought in very early.

p. 995, ll. 5-11:

Q: And you've talked about some strategies that you discussed using with the team: the visual schedules, social stories, those sorts of things. Was that intended just to address the sexual behaviors or other aspects of Student's autism?

A: While initially we addressed the sexual behaviors, we did talk about other uses for that as well.

pp. 999-1000, ll. 24-4:

Q: And for a child with autism such as Student, does he need academic or functional or both?

A: Well, I'd like to see both when that can happen. There's some disagreement with people. I personally prefer functional goals that lead to long life – lifelong skills for an individual.

p. 1006, ll. 10-14:

Q: Do you want to explain what PECS is?

A: A PECS is a picture exchange communication system for people who are either non-verbal or who have limited verbal or other communication skills. Sometimes it's augmentative.

pp. 1007-1008, ll. 17-5

Q: You mentioned earlier this afternoon something about when you were working with the

school staff that you tweaked a social schedule and –

A: Social story.

Q: Okay. And something about you made changes or something to the effect of a visual schedule when you were working with them?

A: Some recommendations. They were using and implementing some of the supports and strategies that I like to see utilized. We talked about how to use some of the social stories a little differently and it seems like I even wrote one up quickly for Cindy. I don't quite – I mean, I remember doing it, but I don't remember much about it.

pp. 1014-1015, ll. 4-4:

Q: Could you turn to 485 in the respondent's book and it's Book 2 I think. There's been a lot of talk about social skills and goals in this day, during the day, by lots of people. And you've been asked questions about is this to be considered as a social skills goal. And I don't think anybody's ever asked you if No. 14 would be considered a social skills goal?

A: Well, yes, it would be.

Q: Could you turn to Page 447. There's a list of occupational therapy goals. The first on –

A: Did you say 447?

Q: 487, I'm sorry.

A: That makes more sense. Yes.

Q: The independence part of that is, I mean, for a lot of things including socially. Is it important to have good social skills when you eat out or eating with other people?

A: Yes. Definitely.

Q: Turn to 488. There's a goal for toileting and hygiene. Could that be considered a social skills goal?

A: We typically – well, I can see what you're saying. It certainly would affect social skills.

Q: Maybe that's a better question.

A: It would affect social interactions.

pp. 1018-1019, ll. 17-10:

Q: You said that you had information from the staff that Student was not very disruptive in his class and typically easy to redirect. How much of that did you observe to determine what you were told was accurate?

A: Well, I should clarify that Student did – many times was working with someone next to him, either the teacher, a therapist or a para, so that he was easy to redirect. There were also times that he did work alone and I saw him do all of those: working with a therapist, working with a teacher, working with a para and working alone.

Q: Okay. And in those different settings?

A: All within the special education classroom or special education – or the therapist's room.

Q: And did you observe in all those settings that what you were told that he wasn't very disruptive and easy to redirect was accurate?

A: Yes. I did see that happen.

B. Cynthia Nance:

p. 1638, ll. 2-22:

Q: And can you look at Page 3?

A: Yes.

Q: And can you tell me what this is?

A: This is our notice that we would like to hold an IEP meeting and to develop an interim IEP.

Q: And what's the date on this notice?

A: This was sent on November 1st, 2000.

Q: Okay. And, if you look down at the people who were invited, there is Diana King?

A: Yes.

Q: Can you tell me who that was?

A: At that time, she was employed at the St. Joseph School District, and also served as an autism consultant for other districts besides the St. Joe School District.

Q: And did the District contract with her to serve as an autism consultant?

A: Yes.

Q: And why did you do that?

A: Again, being proactive, we knew that she would have the knowledge that we needed to, hopefully, develop an IEP that would be appropriate.

pp. 1647-1648, ll. 24-1:

Q: Okay. Behaviorally, when he entered your classroom, your classroom —

A: Right.

pp. 1679-1680, ll. 17-15:

Q: Can you compare the Student that you saw and knew in May of 2004 with the Student of that first year at the Lathrop School District?

A: Yes.

Q: And if you could do that for us.

A: Okay. As of May 2004, the biting had significantly diminished. He had made progress in reading comprehension. He was able to complete a checkbook if you gave him that information to fill in. In fact he would even go to the computer and make up his own assignments. He would put down places that he would go and shop, how much. He would list his own deposits and then we would use his created assignment then for the next day.

He was able to tell time. He was — to the five-minute interval. He could even — if I gave different scenarios of your purchase costs \$15.10, give me enough money so that you can make that purchase, he was able to give me enough money to a cashier that he would have been able to make that purchase. Hand flapping had decreased. There was still the echolalia. The sexual behaviors that we had seen over the four years had greatly diminished by May of 2004.

pp. 1681-1683, ll. 19-5:

A: This document is our annual review for Student. This would have been during his fifth grade year.

Q: And can you tell us if the s attended?

A: Yes, they did.

Q: And were you in attendance?

A: Yes, I was.

Q: Now, if you look — I apologize for it being sideways, but on Page 29, the right-hand part of the page, the special considerations documents.

A: Yes.

Q: It says, “Does the student exhibit behaviors that impede his or her learning or that of

others”?

A: Yes.

Q: Did the team discuss that at this meeting?

A: Yes.

Q: And what did the team conclude?

A: That there were behaviors that were impeding his learning.

Q: And did you agree with that?

A: Yes.

Q: Did the team discuss whether a behavior plan should be written?

A: As I recall, no.

Q: At that time did you believe that a behavior plan was necessary for Student?

A: No. I felt like we were implementing different strategies.

Q: Now, as of 11/17/01 when this meeting occurred, what were Student’s behaviors that impeded learning?

A: We continued to see some of the same behaviors: biting of the finger, hand flapping, echolalia.

Q: Had you seen any of the sexuality suggestive behaviors at this time?

A: Yes. Near the end of the fourth grade year there was one incident where there was a substitute in the resource room and Student went over and sat on her lap.

pp. 1690-1691, ll. 19-1:

Q: When you first saw the one incident in fourth grade, did you view that as part of Student’s autism?

A: Yes.

Q: When you saw the increased incidents beginning in fifth grade up until this

December '01 time frame, did you see it as part of the autism?

A: I started questioning.

pp. 1694-1695, ll. 4-1:

Q: If you look down, again the left-hand side of Page 30, it says in the third paragraph, "Student demonstrates a desire for social interaction and a sense of belonging."

A: Yes.

Q: Can you tell me why that statement is in there?

A: I believe that is a statement from — that Katie Alexander kind of brought to the team that she felt like he did want to be a part of being around other peers.

Q: And did you agree with that?

A: Yes.

Q: If you look down at the next paragraph it says, "Progress has been noted since the last IEP conference."

A: Yes.

Q: Was there any disagreement about that among the team members?

A: No, there was not.

Q: And then the next statement says, "Student has decreased noise making when frustrated to less than 40% each day."

A: Yes.

p. 1707, ll. 10-23:

Q: And if you look at Goal 9, tell me what the point of this goal was.

A: This is in regards to being social skills where possibly he could play with a peer, a board game, or even play different games at home with his family.

Q: And did you implement this goal?

A: Yes, I did.

Q: And what peers were included in the implementation?

A: These peers were other students that were in my room.

Q: Okay. And tell me how Student did with this goal.

A: This one is very difficult for him. He needs — at this point in fifth grade, he needed many reminders and prompts.

p. 11708, ll. 7-25:

Q: You said he had difficulty on this.

A: Yes.

Q: What do you attribute the difficulty to?

A: His autism.

Q: Did he make progress?

A: Yes.

Q: Do you think this was an important goal for him?

A: Yes.

Q: What was Student's ability to follow directions?

A: In a game?

Q: In any situation.

A: He could follow one-step directions.

Q: Over the four years that you worked with him, did you see any increased ability to go beyond one-step directions?

A: He would need a prompt if there were a two step.

Q: And what do you attribute that difficulty to?

A: His autism.

p. 1709, ll. 17-25:

Q: What about Numbers 13 and 14? Were those goals to implement or someone else's?

A: That information would have come from the para that would accompany him at lunch.

Q: And who made the reports, you or the para or someone else?

A: She gave the information to me.

Q: And where did Student eat his meals?

A: In the cafeteria with the regular children.

pp. 1713-1714, ll. 12-19:

Q: At this time when you developed this IEP in November of '01, what was Student's ability to stay on task? How long could he stay on task?

A: In special classes?

Q: In your classes where you worked with him.

A: In my class? I would say in a one-on-one setting, his attention span was probably five to ten minutes.

Q: And within that five to ten minutes, how many, if any, redirections would he need?

A: He would need redirections. I would say approximately three to four.

Q: Verbal, physical, both?

A: Verbal and physical being pointing to the task that he should be completing.

Q: Over the four years, did you see an increase in his ability to attend?

A: Yes.

Q: If you can quantify that for us?

A: I would say that he could stay with a task independently for approximately 15 minutes.

Q: And when you say independently, do you mean no prompts?

A: Without any prompts, he could complete a task.

p. 1723, ll. 9-14:

Q: Under the “Academic Concerns” paragraph towards the bottom —

A: Yes.

Q: — it says, “They all agreed that he has progressed quite a bit from last year.” Do you see that?

A: Yes.

pp. 1727-1728, ll. 8-13:

Q: Were you only collecting data on the sexual behavior or were you collecting on any other behaviors?

A: At this time it was just the sexual tendencies.

Q: And why were you not collecting data on the hand flapping, the finger biting, the echolalia and those sorts of things?

A: At this time this was our greatest concern.

Q: What did you do with the data after you collected it?

A: It was given to Marilyn Stubbs and then brought to the meeting that we had then, which would have been the next school year.

Q: Were you seeing sexual behavior every day?

A: Not every day, no.

Q: Did you ever go through these sheets and try to come to some conclusions of your own about what was going on with these behaviors?

A: Uh-huh.

Q: And did you come to any?

A: No.

Q: Why not.

A: Because it was sporadic. You know, some days there was a lot of the behavior and then there'd be another day that there wasn't any of that sexual tendency behavior.

Q: Did Marilyn ever come to any conclusions that she shared with you about why these behaviors might be occurring?

A: I know that she had seen them in other autistic students, but a specific reason for Student I don't recall.

pp. 1762-1763, ll. 25-12:

Q: Tell us about Goal 10 and whether that's one of yours.

A: Yes, it is.

Q: And how does this relate to the prior IEP?

A: We had never attempted anything like this.

Q: And what was the reasoning behind putting it in now?

A: We felt it was another way that he could practice on forming complete sentences and also gave him an opportunity — the speech pathologist and I kind of worked on this together. She would take Student out and about in the building to ask people these questions and then bring that information back and we would work on forming sentences.

pp. 1764-1769, ll. 13-12:

Q: Can you tell us if Goal 12 was a goal that you were responsible for?

A: Yes.

- Q: And tell us what this was all about.
- A: Again, this was an opportunity for social skills, turn taking, to play a game with peers.
- Q: And how did this relate to the prior one?
- A: On the prior one we were hoping to have him play the game with eight or less reminders and were just trying to, again, decrease the number of prompts he needs to play, to turn take.
- Q: And how did he do with this?
- A: Slow progress.
- Q: You've told us there were new goals in here that had never been worked on before. Tell me why you added so many new goals.
- A: Because previously we had seen the progress that Student is able to make and so I wanted Student to continue to grow and make improvements.
- Q: How as his behavior impacting ability to progress in all these areas?
- A: Even with his behaviors, he was still able to make progress in these goals. I think as we noted, the one goal where maybe it had more of an impact was the one where to play a game with a peer.
- Q: And what behavior was interfering with that?
- A: I know we had a lot of hand flapping during this time. Different times also finger biting.
- Q: Through the course of this IEP, which started on 11/0 — gotta get my years straight here, 11/02, was this IEP in place for a year?
- A: I believe it was.
- Q: And can you give us some indication of whether there was a change in the behaviors that you've described?
- A: This is his sixth grade year. We are still seeing the same behaviors.
- Q: Are you seeing them at the same rate?
- A: Yes.

Q: What about the sexual ones?

A: At about the same rate.

Q: Now, could you look at Page 208 and 209. Could you clarify at what time she was still seeing the same behaviors at the same rate?

A: That would have been his sixth grade year, from November 2002 up through then November 2003.

Q: Was there any change in the behaviors?

A: No.

Q: Can you look at Page 208 and 209 and tell us what those two pages represent?

A: This is a behavior plan.

Q: And how was this developed?

A: At the IEP meeting.

Q: I think you already told us you didn't recall if there was a draft.

A: No.

Q: You still don't recall?

A: No.

Q: And what was the reaction of the team to this plan?

A: I believe everybody felt it would serve a purpose.

Q: And did you implement this plan?

A: Yes.

Q: Do you know if the other staff people working with Student implemented this plan:

A: Yes.

Q: Did you find the strategies to be useful?

A: Yes.

Q: Did you find them to be helpful?

A: At times.

Q: Was there ever any consideration to coming back and revamping the plan?

A: Throughout —

Q: Throughout the year that this was in place.

A: Not that I recall.

Q: You've told us that the behaviors stayed approximately the same.

A: Yes.

Q: Was that a concern to you?

A: Yes. But I felt like it may take a long period of time to try to replace some of these behaviors.

Q: And why is that?

A: Because Student had been — had these behaviors for so many years I didn't expect to see them diminish over a matter of weeks or months.

Q: Did you think that the strategies needed to be changed if the behaviors weren't changing?

A: No.

Q: Why not?

A: Because I think we needed to just continue to implement those strategies.

Q: Did you continue to implement some of the same strategies into the seventh grade year?

A: Yes.

Q: Did you see any change in his behaviors that year?

A: After we had reconvened in the fall of his seventh grade year.

Q: And what did you see change?

A: I saw the sexual tendencies start to diminish. The finger biting also his seventh grade year started to diminish as well as the hand flapping.

Q: You talked about needing to teach replacement behaviors. Did you do that during — from the point of this IEP into the seventh grade year?

A: Right. For instance, the biting, although we had used that same type of replacement behavior, biting on an object as opposed to the finger, so yes, we continued. The new strategy as of the seventh grade year that we started to try with the sexual tendencies was just to tell Student head down.

Q: And was that effective?

A: Yes, it was.

Q: And whose idea was that?

A: Marilyn Stubbs.

Q: Did Marilyn Stubbs come in during the time that the IEP that's in front of you, the 11/02 IEP that's in front of you, did she come in during the course of that year to observe or consult?

A: I do not know if she came in. I talked to her on the phone.

Q: Okay. And did you — during those phone calls, did you tell her that some of the behaviors were still there?

A: Yes.

pp. 1770-1771, ll. 5-23:

Q: Did you ask her to come in and change the plan?

A: Not that I recall.

Q: Did she offer to come in and change the plan?

A: I don't recall.

Q: Were the s getting data on Student's behavior?

A: Yes, they were.

Q: Did they ever request that the team reconvene to revisit the plan?

A: No.

Q: Did you ever get a call from Rand Hodgson asking to reconvene to change the plan?

A: No.

Q: Was Student ever disciplined for the behavior?

A: No.

Q: Was he ever suspended for the behavior?

A: No.

Q: Did those behaviors prevent you from instructing Student?

A: No.

Q: Did those behaviors prevent Student from making progress on his goals and objectives?

A: No. We continued to make progress.

Q: Was Katie Alexander involved during the time of this IEP if you remember?

A: Yes. Her signature is here in November 2002.

Q: Can you look at Page 210 through 212. Well, actually through 213 and tell me what that is.

A: That's a sensory diet plan.

Q: And what was the purpose of that?

A: To help with some of Student's sensory needs.

Q: Did it relate at all to his behaviors?

A: Yes.

Q: And who developed that?

A: Katie Alexander.

Q: And did you implement the things that are in the sensory diet, you and others?

A: Yes.

Q: And did you find them to be helpful in terms of Student's behaviors?

A: Most days.

Q: Did anyone ever ask or suggest that someone other than Marilyn Stubbs come in to consult on behavior?

A: No.

p. 1772, ll. 5-17:

Q: How did Marilyn Stubbs come to be a consultant?

A: She was recommended through Katie Alexander.

Q: As a special ed teacher in the Lathrop District, have you ever asked to reconvene the IEP team when a student wasn't doing as well as you had hoped?

A: Yes, I have.

Q: Did you think about doing that with Student that particular school year?

A: No, I didn't.

Q: Why not?

A: Because he was making progress and with the strategies that we had in place, we would continue to implement those.

pp. 1832-1833, ll. 22-17

Q: And can you describe the changes that you saw?

A: The finger biting had decreased and also the sexual tendencies had also decreased.

Q: Do you have an opinion as to why you saw those decreases in seventh grade but not in sixth grade?

A: During seventh grade, Marilyn Stubbs -- and this is in reference to the sexual tendencies - - wanted us to try using a different wording. During the sixth grade year it was -- when we saw those behaviors, we would just tell him “no” or “stop.” His seventh grade year we started using “head down.” The finger biting -- was not in school that year so was never in the trailer for any of his instruction. I believe that impacted the finger biting.

Q: And what effect do you think 's presence had on Student behaviorally?

A: I think at times agitated him, increased his stress.

Q: Did Student, during sixth grade, exhibit any aggressive behaviors?

pp. 1834-1835, ll. 3-4

Q: (By Ms. Goldman) Was your goal to eliminate any -- or sometimes we use the word extinguish. Was your goal to eliminate or extinguish any of the behaviors described on 208 and 209?

A: Trying to extinguish the sexually suggestive behaviors that we were seeing. On Page 209 we're looking at behaviors that were off task. No. That was one not to try to extinguish, nor the biting the finger.

Q: And why?

A: Just to try to replace those off task -- we're all off task at different times and I knew Student needed frequent breaks to get back to what he was doing or redirection and that was just part of his autism.

Q: Do you, or at the time this IEP was developed and this behavior plan was developed, did you have an opinion as to whether the behaviors addressed on Page 208 resulted from Student's autism?

A: No. I don't think that is a result of his autism.

Q: If your goal was to eliminate or extinguish these behaviors on Page 208, if they weren't part of the autism, were you optimistic that they could be extinguished?

A: Yes.

Q: Were they extinguished during seventh grade?

A: There was a great decrease in these behaviors during seventh grade.

pp. 1835-1836, ll. 16-24

Q: (By Ms. Goldman) Did all staff working with Student during sixth grade, was everyone aware of the behavior plan?

A: Yes.

Q: Was everyone aware of the sensory diet that starts on Page 210?

A: Yes.

Q: And was there any discussion about everybody following those two things?

A: Everybody was comfortable in following the plans that were established.

Q: And did you have an opportunity as his teacher and as his case manager to monitor or follow up to see if that was being done?

A: Yes.

Q: Do you have an opinion as to the importance of everybody being on the same page in terms of his behavior plan and his sensory diet?

A: We all needed to be consistent on how we were trying to replace or extinguish the behaviors that were in the plan.

Q: When you didn't see a decrease during sixth grade, and the date of this is from 11/02, did that ever lead you to believe that the behavior plan was appropriate?

A: No. We just needed to continue each day following the different preventive actions that we were attempting to take day in and day out.

Q: When you, and I mean the team, in conjunction with Marilyn Stubbs prepared the behavior plan, did you expect to see a significant change right away?

A: Not a significant.

Q: Did you expect to see some change right away?

A: Not even right away.

pp. 1837 - 1838, ll. 12-4

Q: Now, can you give us some sense of the frequency of the behaviors described on Page 208 during sixth grade year?

A: During sixth grade there would be days that we would see all of these behaviors. There may be a day that we didn't see any of these behaviors or we might just see one or two of the behaviors.

Q: On the days when you didn't see the behaviors, was Student able to make progress?

A: Yes, he was.

Q: On the days when you did see the behaviors, was learning able to take place?

A: Learning was still able to take place.

Q: Were there ever days when you just saw these things all day long and they didn't stop?

A: I think if we looked back at some of the data pages, there would be some days where it was throughout the day.

pp. 1839-1840, ll. 5-1

Q: With respect to the off task, when he was off task, could learning take place?

A: Yes.

Q: And did it make learning more difficult?

A: It would make it more difficult.

Q: When we talk about off task behaviors, we talk about ability to redirect. Describe for us how, or if you were able, to redirect Student when he was off task.

A: Yes. Student could be redirected to get back on task. Just kind of tapping the paper, that was what it was supposed to do. We also had note cards on a ring and we would flip to that card that would say, "Student, finish this task" so that they weren't just constantly verbal prompts that we were giving him.

Q: And if you know, the number of verbal or nonverbal prompts to get him redirected on average?

A: I'd say on an average maybe two to three.

Q: If you can estimate for us during sixth grade, and this may be difficult, an average time Student could stay on task?

A: I've seen Student on task for at least ten minutes. I've seen Student on task for at least two minutes.

pp. 1840-1843, ll. 20-4

Q: Did you view the behaviors, the off task and the finger biting, as part of the autism?

A: Yes.

Q: What kinds of strategies did you use on the finger biting?

A: The finger biting we -- I bought some football mouth pieces. We started using those a lot his sixth and seventh grade year. Before his diet was limited, we also used Tootsie rolls, Twizzlers.

Q: And were those effective in minimizing or decreasing?

A: Probably for just at that moment.

Q: When he was engaged in finger biting, was he able to learn?

A: Not at that second because, I mean, he would always use both hands, you know, they were up there like this, so he wouldn't be able to write. He wouldn't be able to give a verbal response for that brief second that he was actually biting.

Q: Okay. And after that --

A: After that, yes. We could get back on task.

Q: Was that redirecting as well?

A: Probably with his verbal -- his ring of cards.

Q: Can you tell us -- you've already mentioned on the sexually suggestive behaviors at first

you used “no” or I forgot what the other phrase was that you were trying during sixth grade, “no” or “stop”?

A: Uh-huh.

Q: Did you have any other strategies that you used to address the sexually suggestive behaviors?

A: The OT used chips, using them as a reward. And every time there was a sexual comment, she would take one of the chips away.

Q: And do you know if that was effective at all?

A: At times.

Q: Did Student respond well to tangible reinforcement, things that would either be given or taken away in relation to behaviors?

A: Tangible if it were an edible.

Q: What about things like stickers or little concrete rewards?

A: He liked stickers, but I don’t know if it was he liked them because he knew that he had done a good job or he just liked them being on his paper.

Q: Now, on 208 it talks about using social stories in a preventive way.

A: Uh-huh.

Q: Did you do that?

A: Yes. I had --

Q: Tell us about that.

A: --pictures of different family members, of Mrs. and Mr. , and I made a social story about that, about these were the people that we could go up and hug and touch. I also had pictures of different people that Student would work with during the day and would say these are people that we shake their hands or we say hi.

Q: And did you find that to be an effective strategy as a prevention?

A: At times. But other times, no, it didn’t work.

pp. 1843-1844, ll. 10-4

Q: On that same preventative action column on Page 208 it says, "Always use visual schedules and supports so he can be easily redirected to tasks."

A: Uh-huh.

Q: Did you use a visual schedule with him?

A: His schedule was typed and it was right in front of his desk.

Q: Did you use pictures or words?

A: Words.

Q: And could he read the words?

A: Yes.

Q: And did you find the visual schedule to be helpful in getting him back to task?

A: He had that schedule memorized, so I don't know that that visual schedule really helped him get back on task. I mean, I think it was more pointing to his paper, showing him his flash cards on the ring that helped him as opposed to pointing to his schedule because he could just recite that to you. He knew what was supposed to be happening.

pp. 1844-1846, ll. 16-10

Q: How was Student transitioning from activity to activity during his daily schedule?

A: At the end of each of his activities we would take a break. He would choose to look at a book, listen to a tape.

Q: Did he ever get so caught up in some activity that he was dosing that saying, okay, it's time to put that away, start something new, that would cause upset or tantrums or anything of that nature?

A: He really liked his tapes. We tried to put those out for a while and then we would have to put them away and try to replace it with some other things that he could use at the break.

Q: Did he throw tantrums if you took things away of that type?

A: No. He would go around looking for them and asking for them, but it wasn't a tantrum. And he would search hard.

Q: Now, on page 208 in that fourth column again down at the very bottom, it talks about "Provide him with scripts and appropriate social greetings, requests, etc."?

A: Uh-huh.

Q: Did you use that?

A: Yes. We had greetings that were on the ring that when he was out in the hallway, we could provide him with appropriate greetings.

Q: Tell me a little more about the ring. What did it look like? What did it have?

A: Index cards that contained "It's time to get back to work," "Get a Kleenex," just any type of behaviors that we may need to address during the day. It had also greetings that we would use, that he could use out in the hallway.

Q: So were they directives to Student telling him this is what you need to do now?

A: Yes.

Q: And what was the point of putting it on the index cards as opposed to just saying it to him?

A: Katie had told us that it was easier to start diminishing those prompts if they were in writing as opposed to constantly giving them to him verbally.

Q: And did you find the ring to be an effective strategy?

A: Uh-huh.

pp. 1847-1848, ll. 2-9

Q: (By Ms. Goldman) Page 209 in the same last column, it says in relation to off task behavior, "Task analyze the work, if necessary." Do you see that, last sentence of the first little box?

A: Oh, uh-huh.

Q: What does that mean?

A: Breaking down a task into small steps.

Q: And how would that help -- or did it help Student?

A: Yes, it helped him.

Q: And did you -- you'd break it down. Would you verbalize do this, then do this, then do this?

A: It was written, so he was receiving both verbal and he was able to read it in print.

Q: It sounds like -- was he -- was it more effective to use written directive to him?

A: Yes.

Q: Was that intended to increase his reading ability?

A: No.

Q: Do you know if it did?

A: I can't say.

Q: Now, I think we went through the goals and objectives of this IEP when we were here before, so I'm not going to do that again. Did you use the sensory diet that's represented on Pages 210 to 13?

A: Yes.

Q: And what was the point of putting it on the index cards as opposed to just saying it to him?

A: Katie had told us that it was easier to start diminishing those prompts if they were in writing as opposed to constantly giving them to him verbally.

Q: And did you find the ring to be an effective strategy?

A: Uh-huh.

pp. 1847-1849, ll. 2-3

Q: (By Ms. Goldman) Page 209 in the same last column it says in relation to off task behavior, "Task analyze the work, if necessary." Do you see that, last sentence of the first little box?

A: Oh, uh-huh.

Q: What does that mean?

A: Breaking down a task into small steps.

Q: And how would that help -- or did it help Student?

A: Yes, it helped him.

Q: And did you -- you'd break it down. Would you verbalize do this, then do this, then do this?

A: It was written, so he was receiving both verbal and he was able to read it in print.

Q: It sounds like -- was he -- was it more effective to use written directive to him?

A: Yes.

Q: Was that intended to increase his reading ability?

A: No.

Q: Do you know if it did?

A: I can't say.

Q: Now, I think we went through the goals and objectives of this IEP when we were here before, so I'm not going to do that again. Did you use the sensory diet that's represented on Pages 210 to 13?

A: Yes.

Q: And did you find that the sensory things that were utilized were helpful with Student?

A: Yes, at times. There may be one day when one was more effective and the next day maybe not. For example, the weighted vest. There were days that he would leave that across his lap and other days when we tried to use that, he would just kind of throw the

vest down.

pp. 1848-1849, ll. 16-3

Q: When you used sensory, did you use it in a proactive way or a reactive way?

A: Proactive. Days when he would come in and be reciting, there would be a lot of echolalia going on, we may start a day on the trampoline, with the vest, going to one of his preferred grade items before just jumping right in.

Q: Were you able to determine if a period of sensory input like what you've talked about, maybe some jumping on the trampoline, would then increase his ability to stay on task and learn?

A: I don't know that it increased his ability to stay on task.

p. 1881, ll. 2-21

Q: What behaviors are you tracking with these documents?

A: We're looking at more than just the sexual tendencies now with Student's behaviors. We're looking at off task, biting the finger and reciting, his echolalia.

Q: And do these sheets do just targeting of inappropriate behaviors or do they do other things besides that?

A: It also notes when Student's had a great day. Maybe a note of something that he really liked to do.

Q: Did these go home?

A: Yes.

Q: Did they go home on a daily basis?

A: They went home on a daily basis.

Q: Was that what they were designed to be, were notes home or data keeping?

A: A way to communicate with the parents on Student's day.

pp. 1881-1882, ll. 25-8

Q: Can you tell me -- column one says, "Word/Gesture" and then "Word/Gesture" "Social."

A: Right.

Q: What was that?

A: Looking at any of the sexual behaviors, did they happen when he was receiving instruction or were they happening more in a social setting as walking through the hallway at lunch time.

p. 1883, ll. 7-19

Q: And tell me what the smiley faces signify.

A: Great. No problems.

Q: Tell me about his schedule.

A: His schedule pretty much followed what you see listed here. He took breaks after completing his math assignments, pretty much after each activity. His IEP states frequent breaks and those seemed to help Student transition into the next part of his day.

Q: Were those breaks for sensory input or just breaks?

A: Mostly just breaks.

Q: And special class would be the specials you've referred to?

pp. 1885-1886, ll. 4-4

Q: Tell me about the reciting movies because that's the first time we've seen that as a separate category.

A: Student loves Disney movies and was able to recite many Disney movies.

Q: Verbatim the script or?

A: Oh, yes. He could tell you who wrote them, credentials, everything.

Q: When he would do that, would that interfere with learning?

A: There were times that he would stop and not be able to complete a task because he was reciting a movie. There were other times that Student could just be working away on a task and recite the movies at the same time.

Q: Do you consider that to be characteristic of his autism?

A: Yes.

Q: Now, can we use these sheets in the same way to track frequency of behavior?

A: You can look -- yes. That will do the same.

Q: So look at 306 and tell me what you would deduce from that page.

A: He had an excellent day. All of -- he was very appropriate as far as communicating with peers and adults, was able to focus that day. There wasn't any finger biting or reciting movies.

pp. 1886-1887, ll. 24-9

Q: Now, you've told us that you didn't see improvement on the sexually suggestive behaviors during the sixth grade year. Does that mean they were always happening?

A: No.

Q: Was he able to make progress?

A: He was able to make progress.

Q: Even though those behaviors existed?

A: Yes, he was.

p. 1888, ll. 15-20

Q: Did you see an increase, a decrease or no change in the finger biting and some of the echolalic behavior?

A: There was a decrease in the finger biting. There was also a decrease in the echolalia and hand flapping.

pp. 1889-1890, ll. 7-23

Q: And during seventh grade, you've already told us you saw a decrease in the sexually suggestive behaviors.

A: Yes.

Q: What did you attribute that to?

A: During the seventh grade year we changed the language. Sixth grade year it was no, stop. Marilyn Stubbs suggested that we try head down.

Q: And why do you think that led to improvement?

A: In my opinion we weren't mentioning that behavior again because if it was no, we might say no toes or no touching. We weren't repeating that behavior that we had just seen. It was just head down.

Q: And would he respond?

A: Oh, yes.

Q: Immediately?

A: Oh, yes.

Q: And how long -- I assume he would respond by putting his head down?

A: Yep. He would just drop his head and --

Q: Not --

A: No. No. Because it was just a drop of the head like that and it was in a matter of seconds his head would be back up.

Q: And the behavior would be gone?

A: Uh-huh. It would stop at that moment. I know a couple of times where he did something and he immediately dropped his head. I mean, he had become to -- we saw glimpses of him self-regulating.

Q: Now, are you saying that behavior disappeared during seventh grade?

A: Oh, no. It decreased.

Q: With the exception of going from the “no” or “stop” to the “head down,” were there any other strategy changes or behavior plan changes that you used to address the sexually suggestive behaviors?

A: No. With the social story that I have already spoken about and the “head down,” that was consistent, the “head down,” so no other changes.

Q: So what conclusion can you draw if any from that change?

A: That was a change that showed us that we were able to decrease those type of tendencies.

p. 1893, ll. 2-9

Q: And how did he do in those activities behaviorally?

A: His behavior was appropriate. And when I say appropriate, I mean he rode the bus fine. There wasn't any problem. He stayed with us.

Q: Did you have to do anything special or nonroutine to prepare him for those things?

A: A social story so he knew what was happening that day.

p. 1898, ll. 1-18

Q: (By Ms. Goldman) Can you tell me in comparing Page 214 to 461 if that paragraph in and of itself shows any changes from the prior IEP?

A: Page 461 shows that Student has learned to greet people with visual prompts. Also is able to ask a simple question with visual prompts and adult assistance.

Q: And did you consider that to be a sign of progress?

A: Yes.

Q: And an important sign of progress for Student?

A: Yes.

Q: And why is that?

A: To be able to communicate with people we felt that was important.

Q: Okay. If you go down into the next paragraph, the fourth paragraph that starts “Progress has been noted.”

A: Yes.

p. 1921, ll. 12-21

Q: Was the modification to the plan, on page 469, effective in addressing the behaviors noted on this page?

A: Yes. We saw a decrease in the sexual intense look that had been there previously. There was also a decrease in when Student would start to say those words of him just then going and laying on the floor.

Q: To what did you attribute that decrease?

A: Applying the strategies that we had in our behavior plan.

pp. 1923-1924, ll. 14-3

Q: At the meeting in 11/03 did anyone suggest that the strategies from the prior plan were not working for Student?

A: No.

Q: And at that time did you personally believe that modifications needed to be made to the plan with respect to off-task behavior?

A: No.

Q: What about biting the fingers, same question. Did you make changes when the team met in November of '03?

A: No. Those strategies stayed the same.

Q: And you, as a member of the team, did you believe that changes needed to be made?

A: No.

p. 1958, ll. 20-25

Q: Within that is also an allegation that the school failed to draft an adequate behavior plan. Can you tell me your opinion as to whether the behavior plans included in the 6th and 7th grade IEPs were appropriate for Student?

A: They were appropriate.

p. 1962, ll. 15-25

Q: If you look at No. 4, there is an allegation that the school failed to address all of Student's educational and social emotional needs. Are you aware of any educational needs that the IEPs failed to address?

A: No.

Q: Did the s ever indicate that they thought you were failing to address any of his educational needs?

A: No, they did not.

Q: What about Student's social emotional needs?

A: They were met as well.

pp. 2324-2325, ll. 24-14

Q: What goals do you think, that you worked on -- not speech and language or OT, were in the communication domain? Let me ask you a preliminary question. Do you know what is meant by communication domain as it's reported on this test?

A: Speech language.

Q: So I'll leave that to the speech language person?

A: We both did No. 10.

Q: Okay.

A: Okay. Conversational question, and that I think would fall under communication.

Q: Okay. I think we already talked about daily living skills?

A: Right.

Q: And socialization domain?

A: Socialization would be from Goal 12, playing a game.

p. 2342, ll. 11-19

Q: You testified about Dianna King being present at the beginning as an autism consultant.

A: Yes.

Q: If you need to look at that first IEP, Page 7 of Volume 1, she signed in as a Missouri autism consultant.

A: Yes.

Q: Do you know what that is?

A: I believe that is courses through Projects ACCESS.

p. 2344, ll. 18-21

Q: Did Student ever manifest work refusal? I mean, did you have any days where he just wasn't going to participate in learning?

A: No.

pp. 2346-2348, ll. 12-9

Q: During the breaks that you've talked about, those sort of -- you would do math and you'd take a break or reading and take a break --

A: Right.

Q: -- what happened during the breaks?

A: Student would choose an activity that he wanted to do.

Q: And was there a typical activity that he would choose? Was there something he liked more than others?

A: One of his preferred ones would be listening to a Disney tape along with the book.

Q: And what was the point of the breaks, if there was one?

A: Just to give him a chance to relax.

Q: Did you ever have difficulty getting him to stop that break activity and moving on to the next, for lack of a better word, educational activity?

A: He would be reminded that after he had completed that activity that we would be moving on to the next and so no.

Q: Based on your knowledge of autism, was that what you expected?

A: Yes.

Q: Would you consider those reminders to be a behavioral strategy?

A: Yes.

Q: Did you write that into the IEP?

A: No, I didn't.

Q: Did you write all your strategies into the IEP?

A: No, I didn't.

Q: Do you know if you're required to?

A: I believe I'm not required to.

Q: If you could only use the strategies that are identified in the IEP, would that limit your ability to be an effective teacher?

A: Yes, it would.

Q: Do you know if you're obligated to inform parents of every strategy that you're going to use or that you do use?

A: I'm not obligated.

Q: Do you know if Marilyn Stubbs was asked or directed by the Lathrop District to generate a report that analyzed the FBA data in great detail?

A: She brought -- there's a written report, yes, of that information.

Q: Okay. And do you know where we would find that?

A: I believe in the evaluation report.

pp. 2350, ll. 12-13

Q: Cindy, I'm going to ask you to turn to Page 207 in the same book.

pp. 2350-2353, ll. 17-4

Q: (By Ms. Goldman) The box that starts "Does the student exhibit behaviors that impede his/her learning or that of others." Do you see that?

A: Yes.

Q: And the team marked "Yes."

A: Correct.

Q: Then after that it says, "If yes, strategies including positive behavior intervention and supports must be considered." Do you know where that language comes from?

A: From the law.

Q: In looking at that statement, does that tell you that you have to write a behavior plan whenever there are impeding behaviors?

A: It just says that we need to consider strategies and positive behavior interventions.

Q: Does that tell you you have to write anything into the IEP?

A: It tells me I don't have to write anything into it.

Q: Do you know if IDEA requires under any circumstances that a behavior plan be written?

A: I believe a behavior plan is supposed to be written after a student has been suspended ten days.

Q: Was Student ever suspended for ten days or more?

A: No.

Q: If Student had not started manifesting what we've referred to as the sexual behaviors, in your opinion would you have suggested a behavior plan for him?

A: Probably not.

Q: In your opinion was he able to receive an appropriate education during fourth and fifth grade years without a behavior plan?

A: Yes.

Q: Were you using any strategies to address the other behaviors that you've testified about?

A: Yes.

Q: I'm going to ask you to go to the first IEP that starts on Page 6 and if you could go to Page 10 specifically. If you would look in the third paragraph and tell me if that paragraph includes any behavioral strategies?

A: He's motivated by food. He also enjoys computer time and a timer is also another strategy.

Q: And if you could go down to I guess it's the next long paragraph --

A: Okay.

Q: And glance at that and tell me if it references any behavioral strategies?

A: It talks about seeking out sensation orally. Well, it doesn't state. I was thinking about he had something that he chewed on at that time, but that's not a strategy that's listed there.

Q: Was that a strategy that was used?

A: Yes, it was, but it's not listed there. It talks about his sensory needs and so those would

be different strategies to try to help meet those sensory needs.

Q: Looking at the same paragraph, does it address antecedents to behaviors at all?

A: It talks about his sensitivity to touch and oral processing and maybe seeking out those sensations.

Q: Do you consider those to be antecedents?

A: Yes.

p. 2372, ll. 4-6

Q: Do you think Katie Alexander had sufficient time with Student to provide opinions as to the reason for the sexual behavior?

p. 2372, ll. 9-12

A: Yes.

Q: (By Ms. Goldman) Do you think Marilyn Stubbs had sufficient time and information to give opinions about those behaviors?

pp. 2372-2373, ll. 16-7

A: Yes.

Q: (By Ms. Goldman) Do you think Katie and/or Marilyn had sufficient time with Student and information to make recommendations about behavioral strategies?

A: Yes.

Q: Can you compare Katie Alexander's and Marilyn Stubbs' time and experience with Student to the time and experience of Dan Matthews with Student?

A: Dan Matthews was in my room for one day, approximately six hours. Katie saw Student an hour a week and that was during direct therapy. She would also work with other students in my trailer, so had additional time to also observe Student.

Q: How important is the amount of time and experience that somebody has with the student before you're going to look at their recommendations and conclusions as being valid and

reliable?

p. 2373, ll. 10-19

A: They need time to gather the information and observe Student.

Q: (By Ms. Goldman) Were you asked to react to Dan Matthews' recommendations?

A: No.

Q: Are you familiar overall with his recommendations?

A: I've only seen that report maybe once.

Q: Would you give Dan Matthews' recommendations and conclusions the same weight that you would give to Katie Alexander's or Marilyn Stubbs'?

p. 2374, ll. 7-11

A: Mr. Matthews saw Student for six hours. That was it. Katie had been with Student since fourth grade. Marilyn started making observations at the end of his fifth grade year. They had been with Student much more than six hours.

p. 2375, ll. 16-18

Q: -- would you give more weight to the recommendations and conclusions of Marilyn Stubbs, Katie Alexander or Dan Matthews?

pp. 2375-2376, ll. 21-5

A: I would give more weight to Katie Alexander and Marilyn Stubbs.

Q: (By Ms. Goldman) Did Cory Royer ever observe Student at school?

A: No.

Q: Were you ever asked to provide Cory Royer with information about Student?

A: No.

Q: If he made recommendations for Student, how much weight would you give to those?

p. 2376, ll. 8-9

A: His recommendations would surely be a generalization because he had –

p. 2376-2377, ll. 15-13

Mr. Chackes: How much weight would you give to Cory Royer's recommendations if he made them?

The Witness: None.

Q: (By Ms. Goldman) During fourth grade year and fifth grade year, do you have an opinion as to whether you adequately addressed Student's behavior?

A: Yes, we did.

Q: The behaviors that you've described in your testimony, do you see those as resulting from or not resulting from Student's autism?

A: They are a result of his autism.

Q: Has your goal through your IEPs been to eliminate all those behaviors?

A: No.

Q: Do you know if IDEA requires you to eliminate all those behaviors?

A: I do not know.

Q: If Student didn't show any of these behaviors, or characteristics as they've sometimes been referred to, would he be classified as autistic?

A: If he didn't show any of those behaviors or characteristics, he would not be categorized autistic.

pp. 2377-2378, ll. 25-14

Q: (By Ms. Goldman) After the implementation of the behavior plan and the sensory diets

during sixth and seventh grade years --

A: Yes.

Q: -- do you feel like you adequately addressed Student's behaviors?

A: Yes.

Q: Now, you testified in response to Mr. Walker's question that the amount of progress on the goals and objectives was the same before the plan and after the plan.

A: Yes.

Q: And you wanted to explain your answer but were not permitted to do so. Do you still recall what you wanted to say?

p. 2378, ll. 21-23

Q: (By Ms. Goldman) What did you mean by the progress was the same? Did that mean the behavior plan was --

p. 2379, ll. 1-5

Q: (By Ms. Goldman) What did you mean?

A: Just because the strategies were not in a written form as the behavior plan does not mean that there were not strategies being implemented to help decrease the behaviors that we were seeing.

pp. 2379-2380, ll. 16-1

Q: (By Ms. Goldman) If progress was the same before the behavior plan and after that behavior plan, does that mean that the behavior plan wasn't working?

A: No.

Q: What does it mean?

A: It means the strategies that were on that paper implemented were able to help Student make progress to his goals. The strategies that were implemented in fourth and fifth grade, even though they were not in a specific form, were able to help him make progress

towards his goals.

p. 2380, ll. 13-15

Q: (By Ms. Goldman) Cindy, could you turn to Page 467, Volume 2 of respondent's. Can you just tell us what the page is?

pp. 2380-2381, ll. 19-3

A: A list of accommodations and modifications.

Q: (By Ms. Goldman) Can you tell us in looking at this page whether there were any behavioral strategies that would have been communicated to the parents through the IEP?

A: Social stories, visual cues, frequent breaks, visual schedule, task adaptations (sic).

Q: Was this all the strategies that you used for Student during this IEP period?

A: No.

pp. 2381-2382, ll. 20-13

Q: Now, during the morning time today Mr. Walker showed you a few things in Katie Alexander's OT evaluation. Do you recall that?

A: Yes.

Q: And you acknowledged a lot of difficulties that Student had through that process.

A: Yes.

Q: Do you know if you're required to write goals and objectives for every separate and specific difficulty that a child has?

A: We are not required.

Q: If you addressed every difficulty that Student showed just in Katie Alexander's report, and if you want to look at it, please feel free, I'll help you find it, how many goals and objectives do you think his IEP would contain?

A: Numerous. Numerous.

Q: Would it have been possible to work on all of those as separate goals?

p. 2382, ll. 17-21

A: It wouldn't have been possible.

Q: (By Ms. Goldman) Do you know if IDEA requires you to write a separate goal and objective for every identified difficulty?

A: They do not require that.

Q: What is required?

p. 2383, l. 2

A: The team agrees on what is most important.

p. 2383, ll. 6-7

Q: And is that what happened in Student's IEP?

A: Yes.

p. 2396, ll. 15-24

Q: And if you'll go back to Page 188 in the same volume, the four domains of the Vineland. Do you see those?

A: Yes.

Q: Communication, daily living skills, socialization and motor skills.

A: Yes.

Q: Do you know if Student's IEPs addressed all those domains?

A: I believe they were all addressed, yes.

C. Christi Foreman:

pp. 2482-2484, ll. 2-8:

Q: And in the fall of '02, did you utilize any strategies to help reduce those behaviors?

A: Yes.

Q: What were you using, at that time?

A: We'd tell him – at that time, I'm trying to remember if his behavior plan was in place where we did the head down, and that appeared to really help with that and decrease that a lot.

Q: And was that strategy, this head down, that you came up with or someone else?

A: No, Marilyn Stubbs.

Q: And were there any particular strategies, at that time, that you were using in relation to the verbal outbursts?

A: No. Just following his routine.

Q: How important – or was it important for Student to have an established routine?

A: I think it's very important for Student to have an established routine.

Q: And if you would deviate from the routine, would you see a difference in behaviors?

A: I normally didn't deviate from his routine. I tended to work on the same goals and the same order, and he normally anticipated that and expected it.

Q: And was that important, in terms of addressing behaviors, do you think?

A: Yes.

Q: Now, the three behaviors you've mentioned, the sexual ones; the verbal outbursts and the biting fingers, did any of those interfere with his ability to work on the goals and objectives that you'd worked on?

A: No, just momentarily.

Q: Can you tell us if other – did you work with Student for two full school years?

A: Yes.

Q: During those two years, did you see any change in the behaviors that you've described for us?

A: Yes.

Q: Okay. What changes did you see?

A: Especially the sexual connotations, the naming of body parts, the reaching really diminished, probably by January of '03, they were starting to diminish, especially with me. And I don't – you know, at that time we had the head down in place and it seemed to be working with him.

Q: And what about the verbal outbursts and the biting of the finger?

A: I found those to be pretty inconsistent throughout the two years. A lot of those depend on Student and his personal feeling and stress level, I think.

Q: Besides the head down, did you utilize any other behavioral strategies to address any or all of those behaviors?

A: Yes. If he was – especially with the biting the finger, I would just try to let him know it was okay or, you know, try to be calming to him and, you know, explain what we're doing or what we're working on or what we're going to do.

Q: Anything else in particular that you know that you used?

A: No.

pp. 2484-2485, ll. 21-5:

Q: Okay. Did you always do your therapy in an isolated setting with Student?

A: No.

Q: Okay. Can you explain that answer.

A: During the week, usually I'd be working on skills, obviously, to make him more communicative. And normally on Fridays we would go out and about and practice some of those skills inside the building. Student was learning to tell jokes. He was learning to do greetings, to relay personal information to people.

pp. 2487-2489, ll. 7-6:

Q: If you'd look at Page 31, there are a couple of sections dealing with speech and language. It talks about his greatest weakness, his expressive language. When you began working with him in August of '02, is that consistent with your observation?

A: Yes.

Q: And when you began working with Student in August of '02, can you tell me if you became responsible for the implementation of the speech and language goals and objectives of this IEP?

A: Yes.

Q: Can you look through the goals and objectives and tell us which ones you were responsible for?

A: On Page 34, the goal on the right hand — goal number ten.

Q: Okay. And while I've got you on that page, can you tell me — there are four quarters indicated for progress. Do you see those?

A: Yes.

Q: January of '02, March of — no, I think it's January, March and August of '02 and October of '02; is that right?

A: This one has January, March, May.

Q: Okay. Maybe I misread that one. And then October of '02. Can you tell me if you were responsible for the preparation of any of those four sets of progress reports?

A: 10/18/02.

Q: Okay. So that would be the only one that you did?

A: Correct.

Q: Okay. Can you tell me which other goals that you were responsible for in this IEP?

A: On Page 35.

Q: Uh-huh.

A: Goal number 11 and goal number 12.

Q: And is that it for this IEP? I'll give you a minute to look through.

A: Yes.

Q: When you began working with Student in August, did you form any opinion as to whether these goals and objectives, in the area of speech and language, were appropriate for him, at that time?

A: I felt they were appropriate.

Q: Did you form an opinion as to whether the amount of speech/language therapy being provided through this IEP was appropriate, at that time?

A: Yes.

Q: Yes, you formed an opinion?

A: Yes, I felt it was appropriate.

Q: And were you able to form an opinion as to whether the placement called for in this IEP, which is listed on Page 38, was appropriate for Student?

A: Yes, it was appropriate.

p. 2490, ll. 5-9:

Q: Based on your two years of experience with Student and all the knowledge that you have about him, would you expect him to be capable of grade level performance in academic curriculum?

A: No.

pp. 2491-2492, ll. 15-21:

Q: On goal ten, once you began working with Student in August of '02, can you tell me — describe for us some of the strategies or techniques that you utilized with him on this particular goal?

A: Yes. Let me review this real quickly.

Q: Sure.

A: One of the things it talks about here is eye contact. And normally I would use — call Student's name and see how he was responding; if needed, ask him to look at me. Seldom, at that point, even, did I really need to do anything more than that.

It's hard for Student to do turn talking without written cues. I normally used note cards with Student for turn taking and for carrying on conversations with others where I scripted questions, and he did learn to wait with that type of response, wait to — learn to wait for an answer from someone else. And then, generally, I would have another card scripted for him to respond, until he got to the point he could do that a little bit on his own.

Q: Tell me what that note card would look like. I mean, I understand the concept of scripting, but tell me a little bit more specifically what that would look like.

A: What I might have, I might have a note card, and it would say, "Hi", and it would have a blank for whomever he was speaking with. And then that person, you would assume, would respond "hi."

And I had another note card, "How are you?" And then I usually used a hand signal, just a hand up, for him to wait. And then when that person responded, he might say, "How was your weekend? What did you do today?" I had several cards that we could go through in order to try to get him to carry on a conversation.

p. 2493, ll. 1-18:

A: And we even worked on jokes with him eventually where he — where we scripted jokes, including the laughing part.

Q: So you would tell him when to laugh?

A: Yes, we would script ha, ha, ha.

Q: So, in the therapy setting, he would then say "hi" and then you would be the person to come back and say —

A: Yes, we would initially practice those in the therapy setting.

Q: Okay. And then did, at any point, you take that out of the therapy setting?

A: Yes. I had certain students that would come in and we would practice with him in the therapy setting. And then normally, once a week, I would take him out and about in the building and we would practice it with others throughout that setting.

Q: And would he take those scripted note cards?

A: I would carry them and use them with him.

pp. 2494-2497, ll. 20-5:

Q: Could I take you back to goal ten for a minute? Objective two is decreased disruptive outbursts in the clinical setting. There's nothing filled in on your quarter there.

A: Correct.

Q: Can you tell me why?

A: The "met" goal in March of the previous year would have been with a different therapist. So, at that time, that goal was met with that therapist.

Q: And when you came into the picture, was that an issue for you?

A: It was inconsistent and it happened at times, not on a daily basis.

Q: And can you just generally describe for us whether Student made progress on the six objectives under goal ten?

A: Yes, he did.

Q: And on goal 11, did he make progress?

A: Yes.

Q: And tell us about objective three, which also doesn't have anything under it for October of '02.

A: That means it would have been met in March with the previous therapist.

Q: Tell us about Student and whether, once he masters something, he retains that information or will tend to lose it, if you don't continue to work on it?

A: He tends to remember it.

Q: Now, some of these have SP. Tell us about SP.

A: SP means slow progress. And that means they're making progress, but it's not rapid, it's not quick, but they are making some progress.

Q: Did you keep data on the various goals and objectives that you worked on from this IEP?

A: Yes. I kept daily percentages on Student and his goals.

Q: And can you tell us about goal 12 and what sort of techniques or strategies you might have used for those?

A: On the noun/verb sentences, I had small colored cards and he would formulate a noun/verb sentence with that. I started with those by providing an example, and then he would go from there, and he was able to pick up on that fairly quickly.

And, also, a lot — usually I used some kind of — something visual for him to answer who and where questions. And then I would also ask who is your occupational therapist, try to take it out of that context, too, with things in his environment.

Q: Okay. Anything else on this?

A: On the yes/no, Student will answer a yes/no question. Sometimes he chooses which way he wants to answer it. And sometimes he's accurate and sometimes he's not. It depends on what you're asking. He learned with the cue cards to exchange greetings and pleasantries.

Q: What would you say Student's ability to generalize outside of the clinical environment was, with these kinds of conversational skills and expressive language skills?

A: With cue cards, with those in place, he did okay throughout the building. Just to carry on a conversation with you or I, that's very difficult for Student. It is still very difficult for Student.

Q: And what would you anticipate, as he gets older, that he will ever acquire the ability to just engage in typical conversation?

pp. 2497-2498, ll. 12-4:

A: I think that Student's not going to carry on a general conversation. I think things he's scripted and things that he's learned occur in a certain manner may occur. I saw Student this morning and he exchanged a pleasantry with me this morning and said, "Hi, Ms. Foreman." I was happy that he remembered me. So — and that was part of what was

done through cue cards. And so that was something that he did without a cue card and without that being in place for a while for him.

Q: Were you surprised that he remembered you?

A: A little bit, yes.

Q: Were you surprised that he said “Hi, Ms. Foreman”?

A: Not completely.

Q: And why is that?

A: Because it was something that we had practiced, and we had practiced out and about in the building doing that, so it was a known thing and a part of Student’s routine.

p. 2498, ll. 8-10:

Q: Did Student make progress on goal 12 and the company objectives?

A: Yes.

pp. 2507-2508, ll. 25-24:

Q: On Page 206 it indicates that Marilyn Stubbs was in attendance, and we’ve already had testimony about what her role is.

My question for you is: Were you able to use Ms. Stubbs as an autism consultant, and do you think she benefited the team through her presence?

A: Yes.

Q: And tell me how that is.

A: Marilyn is the one that came up with the behavior plan, helped us develop it, and then we implemented that, for example, the head down for when Student was naming body parts and reaching, which I thought was very effective.

Q: Now, if you go to Page 208 of that IEP, Pages 208 and 209 are a behavior plan. Do you have an opinion as to whether this behavior plan was designed to assist Student improve his behaviors?

A: Yes.

Q: Did you implement it?

A: Yes.

Q: And did you find it to be effective for him?

A: Yes.

Q: Based on your experience, not only with Student, but with other children with autism, what would your expectation be for the ability to extinguish a behavior that's part of the autism?

pp. 2509-2510, ll. 2-21:

A: I think it's difficult. I think you can diminish behavior. Generally those have taken a long time to be in place and they take a long time to extinguish.

Q: Since this is the first IEP that you were part of developing, was your expectation that, through this behavior plan, all of Student's behaviors would disappear?

A: No.

Q: If you'd look at 210 through, I believe, 212, there's a document entitled A Sensory Diet.

A: Yes.

Q: Do you have an opinion as to whether Student had sensory needs, at this time?

A: Yes, he did.

Q: Did that affect him in the educational environment?

A: I think momentarily, but not in the long term.

Q: Do you know if you implemented any part of this sensory diet for Student?

A: Yes.

Q: And tell me some things you did to address sensory.

A: If Student needed, he had a mouthpiece that he would chew on. And if he was having a day where he needed that, that would come with him to speech.

He also had Tootsie Rolls to chew on, at that time, and that was kind of a calming thing for him. He had a lap pad that, if he chose to bring — or one that would go over his neck that he also could choose, or if he was using it at the time of speech, he would just bring that with him.

Q: Would you have to prompt Student to use something sensory for calming, or would he know to do that on his own?

A: If he needed his mouthpiece, he would just get it on his own. And he also knew where the lap pad was that he could use on his lap or his neck, and he would also get that on his own.

Q: And did you ever suggest to him, “Student, it looks like you’re becoming a little upset or anxious, and why don’t you go get it,” or was it just something you left up to him?

A: It was there in his desk or on his desk and he would just get it, if he needed it. Once in a while, if he seemed overly agitated or anything, there was a mini trampoline available, and I might ask him if he wanted to jump, and we would go do that. And he would choose when he was done and get off and return to the speech room.

p. 2511, ll. 6-8:

Q: And did you have any concerns about whether Student’s sensory needs were being addressed through this IEP?

A: No.

pp. 2511-2512, ll. 21-7:

A: Okay. On Page 214, like you said, at the bottom of the page is a paragraph that notes that he has made progress in speech and language; decreased disruptive outbursts; able to maintain an appropriate distance during therapy; requests attention in appropriate manner; increased his vocabulary; able to sequence two pictures; formulate noun/verb sentences and answer who questions and relate personal information.

Q: Can you tell me if that information comes from the data that you maintained on the prior set of goals and objectives?

A: Yes.

p. 2513, ll. 8-10:

Q: About, I don't know, half a dozen or so down, it talks about the use of a PECS as a support for language skills?

A: Yes.

pp. 2513-2514, ll. 14-10:

Q: Was that something that you were recommending in November of '02?

A: That came through in the IEP team meeting, that it might be helpful to Student to use pictures as a support. PECS is a picture exchange communication system where a child is able to request wants and needs, make choices by using pictures. And so we were making that available to him.

Q: And, at that time, did you think that might be beneficial to aid Student in his communication?

A: Many autism children use PECS as a means to communicate and prefer that as a means to communicate. So it's very appropriate to expose him to that.

Q: And what was your experience with Student in using the PECS?

A: Student did not appear to choose that as a means to communicate. If Student really wants something, he will verbalize that.

Q: And did you attempt the use of PECS with him then?

A: Yes.

Q: At some point, did you discontinue it because it didn't seem to be his preferred mode?

A: Yes, it was not on the next IEP.

pp. 2514-2518, ll. 21-9:

Q: Okay. I want to go into the goals and objectives of this IEP and have you tell me which ones you drafted, if any, and which ones you were responsible for?

A: On Page 232.

Q: Uh-huh.

A: Goal ten would be where my goals start. Well, I worked on those with Cindy, as far as having some of those questions be the ones we would do out and about, because she had them on a — typed them on a computer.

Q: Okay. So did you partially implement goal ten?

A: Yes.

Q: And Cindy partially implemented?

A: Yes.

Q: Who kept the data, if you know?

A: We both did.

Q: Okay. And tell me what your component of this goal was?

A: To have him verbalize those questions to others.

Q: And then she picked it up and had him tell you the answers?

A: Yes.

Q: And then, “Asking the same question to ten adults/peers once a month,” where did you find the ten adults and peers?

A: This was kind of a survey task that Student did, and then he would — so we would do it as part of speech, often when we were going out into the building, and I would, again, have that scripted for him. But he — after the same question with Student, he knew that was the question.

So you would start out, he knew he had the card there, and if needed it, I would cue him that way. But he would ask various people, just people that, you know, we saw in the building, whether it was a student — both students and adults. And then he would use that information to tally the survey results.

Q: So he would write down the response?

A: Uh-huh. Yes.

Q: What kinds of questions — did he come up with those or did you come up with them?

A: Generally Cindy and I would come up with those.

Q: And if you could, just give us an example of the kinds of survey questions that you were using, if you can remember?

A: I remember one we did, because we knew Student would like it, would be what their favorite chip is, because we knew Student preferred a cue.

Q: So he would ask the question and he would write down the responses. And, then, working with Ms. Nance, he would tally everything up?

A: Yes.

Q: Okay. Do you think this was beneficial to Student, in terms of increasing his conversational skills.

A: Yes. And I think just the interaction with people.

Q: Tell us about Student and his socialization skills.

A: Like the most autistic children, Student does not seek interaction, does not seek communication, although I think sometimes he enjoys it. There's times when I would go into, like, PE with Student, and you could tell if it was a day he wanted to interact. There's times we went in there he would say something like "kids," and you knew then he was enjoying it.

But during that same time period, maybe within 20 minutes, his stress was being elevated and he was no longer comfortable in that setting and you would know by his actions, like we talked about before, he might have his hands over his ears or be flapping, and — and you knew he was becoming more stressed and that the situation was no longer comfortable for him.

But he would smile. I — I always asked him if he wanted to go into the building before we ever did it, and he — I remember one time that he ever said no. Every other time he always said yes, and so then he was up and ready to go. So I think he enjoyed it.

Q: Once in an environment with peers and/or adults, did he actually interact without some prompting? Did he initiate interaction?

A: Not much. He would occasionally go in to the secretary in the junior high building

because it was something he had done routinely and he might say “hi” to her.

Q: Were there any particular peers, including his brother, with whom he seemed to initiate more or had preferred interaction?

A: There was one boy at lunch that he would initiate a greeting with.

Q: And was that a disabled or a non-disabled peer?

A: It was a normal peer.

Q: And were you able to determine why that particular peer?

A: I think because that peer choose to interact with Student, also.

Q: But Student did the actual initiation of greeting?

A: Eventually.

pp. 2518-2519, ll. 16-7:

Q: Now, you said, for example, you would take him into PE. He would seem to want to go, but as he stayed there, he might get stressed, put his hands over his ears.

Based on that answer, do you have an opinion as to the importance of flexibility in Student’s IEP for time in integrating?

A: Oh, yes. I think that he needs — there’s times Student can handle more, times that Student can handle less. And he let’s you know in his way when he’s ready to leave a situation.

Q: And based on your experience with him and your knowledge of how public school systems work, is there any value in forcing him to stay in that integrated system, once that stress builds up to a certain level?

A: No.

Q: Is it important to let him tell you when he’s ready to go?

A: Yes.

pp. 2519-2522, ll. 18-14:

- Q: Okay. Tell us about goal 13. Did you implement it?
- A: Yes.
- Q: And tell us what the purpose of this goal with its benchmarks is?
- A: This was for Student to be able to provide information. The — the real idea is, if he were somewhere and needed to provide his name, could he do that. And so that was the real idea behind this, for him to be able to do that.
- Q: And what kinds of strategies, techniques, et cetera, did you use to implement this goal?
- A: I used written note cards, again, for this.
- Q: And did Student make progress?
- A: Yes.
- Q: Now, on some you have M and some you have P. Tell us about — or master your progress. Tell us about the difference in his ability to make progress, as you go down the benchmarks.
- A: Under goal 13, an M on all of those means met. The P means progressing. On goal — on objective three, under goal 13, I have progress with prompts. Generally that's a verbal prompt. It may be a written prompt. The progression with clues would be the written note card.
- Q: Was Student able to give his name, without the use of the note cards?
- A: Eventually, yes.
- Q: And do you think he could still do that today?
- A: I think so.
- Q: And tell us about goal 14, what was the purpose of this goal?
- A: This is one we developed at the IEP team meeting, feeling that if Student was out and about, would he understand signs. Would he know, for example, to stop at a stop sign, because Student is one that may head out without doing that, and I know the parents were concerned about that.
- Q: And if you can give us some examples of, other than the stop sign, what kinds of things

did you work on?

A: We worked on signs throughout the building. This would be — initially I used cards and I used the traffic sign type cards, but we also had entrance, exit. We walked around the building and talked about the library sign for the library, the entrance and exit in the gym and the cafeteria, that type thing, things that were in his environment.

Q: And was he able to make progress on his goal?

A: Yes.

Q: Tell us about 15 and what you did to implement this.

A: This was where we began working especially on where he would practice in this speech setting and then go out and about to share greetings with adults and peers throughout the building. And that was done, again, with the cue cards, with the written cards.

Q: And was he able to make progress in this area?

A: Yes, he did rely — he still needed the cue cards in order to do that goal.

Q: And number 16?

A: Yes. This was a hard goal for Student, because the idea behind it was that it be completely spontaneous, and that's difficult for him. And that's why it made it a difficult goal and he was inconsistent with it.

Q: What sort of things did you do to help him progress on this one?

A: Again, we started with cue cards. You can ask Student, "What do you want," but you may not know — you know, you may not get an appropriate response from that. So that's pretty abstract. He really relies more on concrete information and to respond with concrete information.

Q: And did he make some progress on this goal?

A: Yes.

Q: Is this an important goal for him to have?

A: I think it would be nice for him to be able to do it spontaneous. I don't know how realistic it is.

p. 2523, ll. 22-25:

Q: In your opinion, did the goals that we've looked at that you were implementing provide Student with appropriate education in the speech/language area?

A: Yes.

p. 2524, ll. 9-16:

Q: Christy, the IEP that we were looking at right before lunch, the November of '02 IEP, can you tell me if, in your opinion, that IEP, as a whole, offered Student a free, appropriate, public education?

A: Yes, I believe it did.

Q: And do you have an opinion as to whether his placement was in the least restrictive environment?

A: Yes, I believe it was.

p. 2529, ll. 2-9:

Q: What involvement, if any, did you have with completing these daily log sheets?

A: At this time, I had no cards, and I would list Student's objectives. That's where I documented his percentages, and I also would document if there were any behaviors or anything like that that occurred, and I gave those to his para, para or Cindy, and then they would take that information and transfer it over to these sheets.

p. 2530, ll. 16-20:

Q: And then if you could look at the IEP that starts on Page 459 —

A: Okay.

Q: — and tell me if you participated in this IEP.

A: Yes, I did.

pp. 2531-2532, ll. 5-6:

Q: Now, I want to do the same thing with this one that I did with the last one, which is for you to tell me which parts of the IEP that you had involvement in.

So if you could look at the present level that starts on Page 461, but go to Page 462 and tell me which parts of these you — you helped to draft.

A: Okay. On Page 462, the second paragraph deals with speech and language, and I would have done that part. And it just states that he's made good progress in speech and language. He's able to provide name, age and school and a personal introduction. Knows 25 safety signs. HE will exchange pleasantries with minimal prompting and answer simple w-h questions with visual written cues.

Then formulates noun plus verb sentences. Documents that he's inconsistent with answering yes/no questions, especially those with the answer no, and inconsistent with spontaneous speech.

And then I also documented there that he does not appear to be interested in picture communication but prefers written cues.

Q: And what was the source of the information that allowed you to draft this paragraph?

A: That would be my documentation on the goals and objectives he worked on.

Q: Can you tell me if Student made progress from November of '02 to November of '03?

A: Yes, he did.

pp. 2532-2534, ll. 25-22:

Q: Now, if you could just take a look in the rest of this present level and tell me if there are any other sections that you helped draft based on your involvement.

A: On Page 466.

Q: Uh-huh.

A: The second full paragraph talks about his receptive expressive language skills, and it states that he has difficulty with eye contact, turn taking, initiating and maintaining a conversation, listening to others, voice control and speech production.

It documents that he "speaks in a low monotone voice and runs words together while talking, which can make him difficult to understand. He exhibits frequent echolalia and

recites movies. Student will grab a hand to gain attention instead of verbalizing. He will use oral communication to request a preferred item.”

Q: And what was the source of this paragraph, the information in this paragraph?

A: My working with Student.

Q: It mentions echolalia. If you could, just so the record is clear, tell us what echolalia is?

A: For example, if I said, “How are you, Student?” He might say, “How are you?” And it would be just a repeat repetition of what the speaker is saying.

Q: As someone who worked with Student, did that interfere with his ability to learn?

A: No. At times he would do it more than other times, so it might for a longer period of time, but not consistently.

Q: Is that, in your opinion, characteristic of his autism?

A: Yes.

Q: Would you see more echolalia during periods of higher stress?

A: Yes.

Q: And how would you address that echolalia, or would you?

A: I would just say, Student, we’re talking about whatever topic we were, or whatever item we were on, to redirect him back to the task we were on.

Q: And would that be successful?

A: Depends on what kind of mood he was in. Sometimes it would be, sometimes it took several times before you were able to get him back on task.

Q: Then it also says he’ll grab a hand to gain attention instead of verbalizing. Did you find that that was inappropriate or did you just throw it in here because it was worth mentioning?

A: I think that other people would — it’s some — a behavior that other people would be uncomfortable with, so it’s something to be addressed.

pp. 2535-2538, ll. 21-6:

- Q: Now, if you could look at 469, which is the behavior plan, and tell me if you implemented the behavior plan that's contained in this November '03 IEP?
- A: Yes.
- Q: If you can remember, can you tell me what difference, if any, there was in Student's behaviors from his sixth grade year to his seventh grade year?
- A: With me specifically, he had decreased using the sexual connotations. I found it inconsistent for him to be naming body parts and he definitely was — had the appropriate space between us and just occasionally would he be reaching out towards me.
- Q: And to what do you attribute that decrease?
- A: I think because of the head down because, if he did it, we still did that.
- Q: And what the biting that you had mentioned earlier today?
- A: I think that was — that's still inconsistent with Student and has more to do with his stress factor.
- Q: Do you think it's reasonable to expect that to go away?
- A: I don't think so.
- Q: During seventh grade year, were you seeing it to any extent that made it difficult for him to benefit from education?
- A: No.
- Q: And on Page 470, there's behavior of reciting movie lines and phrases.
- A: Correct.
- Q: Were you seeing that during seventh grade?
- A: Yes.
- Q: Can you give us some idea of frequency?
- A: A lot of times it still might have more to do with, maybe, movies he had seen at home, that type of exposure, more than anything else.

Q: Was it interfering with his ability to benefit from your therapy?

A: No.

Q: And up at the top, it talks about off task. How — what did you see in the way of off task performance in your therapy sessions?

A: With my therapy sessions, I did not have a lot of difficulty with that. I think Student — because I used the cue cards, he likes the written communication, he knew the routine order that I did it. Speech was almost a preferred activity for him.

Q: So did you find it necessary to use the behavior plan, as it relates to off task performance?

A: I would have to pull him back to task, yes.

Q: Okay. And could you do that?

A: Yes.

Q: And then the sensory diet is on Page 471 and the next couple of pages. Did you use the sensory diet during Student's seventh grade year?

A: Yes.

Q: Did you think it was appropriate for this to remain in his IEP?

A: Yes.

Q: And do you have an opinion as to whether the sensory strategies that you used were helpful for Student in improving his ability to progress?

A: I felt that it was.

pp. 2538-2541, ll. 14-1:

Q: Were you using the — I forgot what you called it — the mouthpiece?

A: The mouthpiece, yes.

Q: Was he still able, during seventh grade, to determine, on his own, when he needed some sensory?

A: Yes.

Q: Now, I'm going to ask you similar questions about goals and objectives as we did with the last one. If you could, tell me where yours start.

A: On Page 482, goal ten.

Q: Was this one that you developed for you, or was this one that you were sharing with Cindy Nance, if you remember?

A: We — we coordinate — most of our goals would overlap each other. But this was my goal that I came up with, but she also would ask him questions and use the same goal. My documentation is what we used for progress.

Q: Okay. Can you tell me if this is a new goal or a goal that was continued from the prior IEP, based on memory? And if not, we'll find that other IEP so you can —

A: This, I believe, was a new goal.

Q: And tell me why you added this new goal?

A: Because I felt it was important for Student to be able to recognize things that happened yesterday, things that might happen tomorrow.

It's also important — I felt it was important for Student to anticipate his day, to anticipate if there were changes in his day, for him to answer questions about his experiences, what he had done over the weekend, that type of thing.

Q: And what kinds of strategies and techniques did you use to accomplish this goal?

A: I would try to find out if he had done something over the weekend. For example, one of his favorite things is to go to Wal-Mart. Now, he tended to — if you asked him what he did yesterday, generally he always had been to Wal-Mart, though. And if you asked him what he was going to do tomorrow, oftentimes, again, he would say that he was going to go to Wal-Mart.

But if you talked about things during the day, for example, what he ate for lunch right after he had lunch or right before he went, he was able to answer those appropriately.

Q: And who were you speaking to, to find out what he'd actually done so that you could make sure he was not just always going to Wal-Mart?

A: His mother.

Q: And we'll look at the progress reports when we get to them in the book, but did he make progress on this goal?

A: Yes.

Q: Are these time concepts difficult for him?

A: Yes.

Q: Okay. What about goal 11, is that yours?

A: Yes.

Q: Now, can you tell us if this is the same or different from the goal that was in the last one?

A: I think it's a continuation to build on his conversational skills with adults and peers throughout settings.

Q: And were you doing anything differently in seventh grade to implement this, in terms of strategies and techniques, compared to sixth grade?

A: I still used the written cue cards with Student.

Q: And did you still take him out and about in the building?

A: Yes.

pp. 2541-2544, ll. 21-14:

Q: And then goal 13, was that one of yours?

A: Yes.

Q: And is this a continuation or new?

A: New.

Q: And where did you come up with the idea for this one?

A: In order for Student to be able to identify his own emotions. This was very difficult for him. He learned to identify black and white drawings, but for him to identify it with himself, to be able to recognize if he was sad or made, it was — was not real successful.

Q: Do you think this is an important goal for him?

A: I think it's important for him to recognize how he's feeling, yes.

Q: Now, the goal is independently identify the emotion in a picture or an icon.

A: Yes.

Q: Was he able to do that independently?

A: Yes.

Q: And then did you try to generalize that to his own emotions?

A: Yes.

Q: And is that where the difficulty was?

A: Correct.

Q: Is goal 14 one that you drafted?

A: Yes.

Q: And tell me where the idea for this came from.

A: I believe this was in the IEP meeting and the fact that Student was trying to answer the phone in the resource room.

Q: And was this new or a continuation?

A: This was new.

Q: And tell me how you implemented this one. Did you just wait for the phone to ring?

A: No. We started with — again, with practicing with written cues and then we went to where he — we, of course, orchestrated the situation where we knew — you know, we had two rooms next to each other, so one person could be calling we knew, and I had cue cards, knowing what the other person was going to say, and I would have the cue cards and he would use those as we went through the scenario.

Q: And how would he do on this one?

A: He did well with the cue cards, and even then he kind of memorized it, but he would still

rush through it.

Q: Were you able to ever get him to the point where he could do it without the cue card?

A: He could answer the phone and say hello. What we were trying to get him to be able to do would be to, "Can I speak to Ms. Nance," to be able to do that, and he didn't always do that, but he would answer the phone appropriately.

Q: Okay. And goal 15, was this one that you drafted to implement?

A: Yes.

Q: And do you know if this was new or a continuation?

A: This is new because the baseline is zero percentage.

Q: Okay. And what was the purpose of this goal?

A: For Student to be able to use pronouns appropriately. He was not identifying he/she correctly or referring to himself as I.

Q: Do you know if any other goals were established specifically for you to implement through this IEP?

A: Those were all that were specifically mine.

Q: And do you not think that those address Student's specific needs in the area of speech and language.

A: Yes.

Q: Do you think they provide an appropriate education for him in the speech and language area?

A: Yes.

pp. 2553-2555, ll. 22-5:

Q: Could you look at Page 521, Exhibit R-30A. This is a set of progress reports, and if you could find the goals where you were reporting on and point us to that page.

A: Page 528, goal number ten.

Q: Could you just interpret the information — is that your handwriting?

A: Yes.

Q: Can you just interpret that information for us?

A: Again, the M means met, P is progressing. On objective one, under goal ten, I note that we're talking about last night and yesterday, that that's what he's met. And then the next quarter he's met the goal for talking about today.

Q: And on Page 529, goal 11, is that your handwriting?

A: Yes.

Q: Was Student making progress on that goal?

A: Yes.

Q: And is goal 12 yours?

A: Yes.

Q: And the same question, was he making progress on that goal?

A: Yes.

Q: Goal 13, same question?

A: Yes. The N/A on that goal means not addressed, so it wasn't addressed that quarter. And then the SP is slow progressing for the next quarter.

Q: And Page 531, goal 14?

A: That is also my writing and that's — that was not addressed at that time, either.

Q: Okay. And then goal 15, was he making progress?

A: Yes.

Q: Tell me what the I-M means on objective?

A: That means that we met the goal for the pronouns I and he was progressing on the other pronouns, he and she.

p. 2555, ll. 23-25:

Q: And during your two years of experience with Student, did you observe regression over breaks?

A: No. He did have services in the summer.

pp. 2558-2559, ll. 9-1:

Q: Do you have an opinion as to whether the behavior plan that we looked at for that November '02 IEP was adequate for Student?

A: I felt that it was.

Q: And the same issues are here and present for the '03/'04 school year. Can you tell me whether you believed that his IEP for the '03/'04 year contained sufficiently measurable goals and objectives?

A: Yes, I felt they did.

Q: And what about the related services?

A: I felt that it was adequate.

Q: And the behavior plan?

A: I felt that it was adequate.

Q: Parents ever ask for a modification to the behavior plan?

A: No.

Q: Parents advocate ever ask for a modification to the behavior plan?

A: No.

p. 2561, ll. 9-16:

A: We did not feel like he required that type of placement.

Q: And what was your thinking, your personal thinking about that?

A: I felt Student was making progress in his setting that he was in.

Q: Do you think, at that time, PBM would have been the least restrictive environment for him?

A: No.

pp. 2563-2566, ll. 1-12:

Q: You've referenced the joking several times today. Tell us what that's all about because I don't think we've explored that.

A: Oh, I just think that's such a — we all do that. We all make jokes, even today, you've heard them here, and I just think that's a communication skill and a social skill that most adolescents have that — and it's pragmatic language that a lot of kids don't get. And just going through that scenario, it's something he could share with peers that they would enjoy. It's something that they could even share back with him. It's something that he could go home and tell parents. You know, they worked on jokes. He came and told me jokes that they had taught him.

Q: So you were teaching him to tell jokes at school?

A: Correct.

Q: Not something that's really part of a general curriculum?

A: Correct.

Q: Tell us how you did that with Student.

A: We started — I started by scripting on cards again, and I would do an individual card per each sequence. And again I would have to remind him when he needed to wait. So it would be — we started, I think with knock-knock jokes, and then he would practice those in the trailer with other peers that would come in and out, or with other adults, and then we would take it to other settings.

I did have to script when he laughed and I would script the ha, ha, ha. But he got to where he knew, when he did that, everybody laughed, that was enjoyable. And he would smirk with that, so you know he got something out of it. You could just tell by his

mannerism he knew that, and he seemed to enjoy that activity. You just could tell.

Q: Do you think those jokes were a way of increasing his social skills with peers?

A: Yes.

Q: Do you think he had the ability to actually understand the humor involved?

A: I don't know. He did come back and tell me some jokes that the parents taught him at home. And I don't know if it was just memorization, but he knew that here was a time to smile or smirk about it at the end, so —

Q: And did he actually laugh or did he just go “ha, ha, ha”?

A: He would do the “ha, ha, ha” with the script — with the script that I did. So he got with to where, when we did jokes, he knew the “ha, ha, ha, ha” came at the end, so he would do that. Now, he also — he gets a little smirk, you know, when he's kind of tickled that those that work with him would recognize and he would definitely do that.

Q: Could you turn to Page 633, which is another set of progress reports, and I believe your goals start on Page 640.

A: Yes, that's where mine starts.

Q: Can you just quickly run through and tell us, as of May of '04, where Student was on his IEP, in terms of the goals you were responsible for?

A: Well, this shows, on goal ten, the first objective that he was able to do last night, yesterday and today sentences and was working on last weekend and next week. Those were really hard for him because the time period was further away, that he was progressing on sentences. Again, those were more related to last weekend and next week. That's why it's progressing under there again without met. And, again, the percentage just increases.

Q: And the same thing on the remainder of the goals that you were responsible for?

A: Correct. And then on goal 14, that documents that we'd begun working on the phone conversations.

Q: Would you have worked on these goals, had Student come to extended school year last summer?

A: Yes.

Q: Okay. And was this IEP intended to extend until at least the fall of this current '04/'05 school year?

A: Yes.

Q: And do you know if Student came to this School District during that school — part of the school year?

A: I don't believe he did.

Q: Christy, my last question to you is whether you think, during the two years you've had involvement with Student, he's received an appropriate education through the Lathrop School District?

A: Yes, I do.

Q: And can you, just for the record, elaborate on that?

A: I felt like Student was in an appropriate environment to meet his needs. I felt he was in an environment that was comfortable for him. I felt he had appropriate goals and that they were being worked on, on a daily basis, and he was making progress on those goals.

p. 2605, ll. 2-10:

Q: Okay. So in the period of time that you worked with him, and I guess he made some progress, according to you, on all the short-term objectives that have some reference point, some indication on it?

A: Yes.

Q: But he never met — over this six-month period of time, he never met any of the annual goals that were set for him, correct?

A: The IEP time was not up.

p. 2607, ll. 9-18:

Q: Okay. So he has a given group of ten pictures to choose from?

A: Correct.

Q: And even with that closed set, his progress was slow?

A: Yes.

Q: And by that, over the course of this six months, he didn't even achieve a 20 percent skill level?

A: Correct.

Q: Do you think that was adequate progress for this goal?

A: Yes.

pp. 2610-2611, ll. 22-16:

Q: "Student will correctly answer the phone and tell an adult who the call is for or from."

A: Who the call is for. From — from refers to the person.

Q: Okay. And I gathered from your testimony, when you were done with this goal, the only thing Student could do was say "hello."

A: No. He was answering the phone saying hello. He was not conveying "The phone is for Ms. Foreman." With script, he was doing it, with cards he was doing it, not independently.

Q: Yes. But did you know whether he was just memorizing the cards or he actually understood the concept of telling the person who it was for?

A: We weren't to that point yet.

Q: When you say you weren't to that point yet, my question is: Can you tell from him scripting — from him reading —strike that.

You knew that Student was very good at memorizing things, right?

A: Correct.

pp. 2729-2730, ll. 19-4:

Q: Yesterday we looked at what you called, I think, daily data sheets or logs. There's —

there's some at the very back of Volume I, for example, Page 319.

A: Yes.

Q: Were those used to communicate information to the s about how Student was doing at school?

A: Yes.

Q: Do you know if the IDEA or Missouri rules require you to report daily to parents?

A: I don't believe so.

pp. 2730-2731, ll. 14-24:

Q: If you would take a glance at Page 640, which is in Volume III. And that's — is that the last set of progress reports that you were involved in for Student?

A: Yes.

Q: What was the ending date of the IEP from which these goals and objectives are taken?

A: It would be October 18th, I believe, or around — well, no, it was November 6th and the 14th that we met, I believe. So it would be — at that time period we would be reconvened.

Q: And do you know if Student's ability, or the estimation of Student's ability to master the goals from this IEP, were based on his attendance at the extended school year during the summer of '04, and attendance from August through, let's say, November of '04?

A: He had attended summer school every year, the years previously, I believe.

Q: But when you — when you estimated the amount of progress that he could make on this set of goals, was it based on the fact that he would attend over the summer and attend through the fall of '04?

A: Yes, there was that understanding.

Q: And do you know if he attended during the summer of '04?

A: He did not.

Q: And do you know if attended during the fall of '04?

A: He did not.

Q: Can you sit here today and say whether or not he would have mastered these goals within the one year time contemplated by the IEP, since he did not attend during those additional two time frames?

A: I cannot say for sure if he would have accomplished all those goals.

pp. 2737-2738, ll. 14-16:

Q: And my question is: What skills did you work on in your sessions that then you observed he was able to generalize to other people and/or other settings?

A: Okay. Of course, we've mentioned before the one about being able to answer his name, age and school; him being able to identify signs and symbols; him being able to answer w-h questions from various people about various things. Also had people ask him what he had done last night, what he was going to do this weekend. Also had him practice asking others what he was going to do — what they were going to do.

Q: In the very first IEP that you implemented, one of the objectives was maintaining that appropriate proximity, giving people space. Can you tell us, through the time you worked with him, whether he was able to generalize that skill into a variety of settings?

A: Yes, he — his facing with people was appropriate throughout settings.

Q: And another one in that particular IEP was exchange pleasantries such as hello and good-bye?

A: Yes, Student does that independently.

Q: And another one from that IEP is "Student will apologize for unintentional mistakes." Do you know if he was able to generalize that?

A: He's inconsistent with that ability.

p. 2739, ll. 8-21:

Q: If a student fails to completely master a goal, do you have an opinion as to whether that makes the goal inappropriate?

A: I don't believe it makes it inappropriate.

Q: Do you have an opinion as to whether a failure to completely master a goal deprives the child of educational benefit?

A: It does not.

Q: Have you ever — how many years have you worked in a setting where you worked with IEPs?

A: Twenty-two.

Q: In your experience, at the end of the one year time, do most children achieve mastery on 100 percent of their goals and objectives?

pp. 2739-2740, ll. 24-11:

A: No, they do not.

Q: In your opinion, does that mean that that particular IEP denies that child a free, appropriate, public education?

A: It does not.

Q: Yesterday, Mr. Walker asked you about whether head down, as the behavioral strategy, was inappropriate for Student because it was not age appropriate.

Based on your experience with Student and all the information that you have about him, can you give us your opinion about what his developmental level is?

A: Developmentally it was appropriate for Student.

p. 2745, ll. 11-13:

Q: Do you recall, when the team checked yes, whether the team checked yes because the decision was Student exhibited behaviors that impeded his learning?

pp. 2745-2746, ll. 23-6:

Q: Do you know why the team checked that box?

A: Yes.

Q: Why?

A: Student had behaviors that interfered with his learning and that of others.

Q: In your opinion, was Student able to learn with those behaviors?

A: Yes.

p. 2750, ll. 5-18:

Q: Mr. Walker, this morning, asked you about scripting of the jokes and — and whether you were really teaching Student anything by that scripting method.

A: Correct.

Q: What were you — what were you teaching him by that method?

A: Turn taking and conversation.

Q: And do you find that method to work with Student?

A: Yes.

Q: Do you think that was a necessary method to use with him?

A: I think Student bought into that method, and that's why I used it throughout many goals, because he seemed to — it seemed to work with him.

p. 2751, ll. 14-22:

Q: Can a student generalize a skill, even if mastery of the goal is not present?

A: Yes.

Q: Even though Student did not master all of the goals and objectives that you worked on, at least in the time frame that you worked with him, do you have an opinion as to whether he received benefit from implementation of those goals and objectives?

A: Yes, I believe he did.

D. Katie Chaffee Alexander:

pp. 3018-3019, ll. 6-18:

A: I contracted with the Lathrop District starting in, I believe it was August of – that would have been August of 2000, so the school year of 2000/2001, 2001/2002, and then August, September and October of 2002 to work on the evaluation for Student and one other student.

Q: And then why did you quit working with the Lathrop District in the fall of '02?

A: Because I was finishing my graduate degree, my husband was sent to North Carolina to work with the Marine Corps and basically I wanted to focus on school so I could leave Kansas City and join my husband in North Carolina.

Q: Okay. Can you summarize for us what your academic degrees were up through October of 2002?

A: Yes. I had completed my bachelor of science degree in occupational therapy, which was the entry level clinical degree, and I finished that in spring of 1998 and then immediately began work on my advanced graduate degree in occupational therapy with a focus on pediatrics and autism. And so I had been working on that, I guess, about two years, so I was about halfway through the courses when I started working at Lathrop.

Q: Have you since obtained your masters?

A: Yes, I have.

Q: When did you get that?

A: I completed that in September of 2004. It was a long journey. And I was the first to graduate from the occupational therapy program at the University of Kansas with honors.

Q: Congratulations.

A: Thank you very much.

Q: And –

A: And I did, my research was cognitive behavioral interventions for adolescents with Asperger Syndrome, and I really enjoyed it. But that was why I got the honors degree, was through my research work.

pp. 3024-3025, ll. 15-12

Q: Tell me some of the things, the strategies, the activities that you did to implement that theory or philosophy.

A: Yes. We then looked at different, what can we give him to do with his hands, like fidgets, something to do with his hands. And then we looked at incorporating a ball into activities and have him sit on a ball while he's performing work time activities. Looking at especially transition supports, story transition times to see -- I should say when I look at implementing a sensory diet I look at a way to implement it in the most naturally occurring way as possible so that if I can show that a child does better with use of things like activities that are imbedded to the tasks that the child is already performing, I prefer to do that than to use an intervention that might be more stigmatizing. So we explored those pockets first, so making sure that when he transitions from one activity to the next that he could carry something with him giving him more deep pressure input and that he is also walking from one part of the room to another so building in those types of activities.

pp. 3025-3026, ll. 17-17

Q: Now, can you tell me if the things that you brought into his program during this IEP implementation period helped Student increase attention to task and decrease some of the behaviors you've described?

A: Yes, it did to some extent. It didn't eliminate the behaviors. It did not completely remediate attention to task, but that's typical for the use of the strategy. There are usually other things that are needed to help support that performance for a child with autism.

Q: And what are those other supports that you think would be necessary?

A: Using a visual schedule, breaking down a task into simple steps showing a discrete beginning and end point, using things like a timer to help a child understand when to stop performance, when to start performance. Those types of other supports.

Q: And do you know if those other supports were in place for Student during the period of time this IEP was being implemented?

A: If I remember correctly, they were. We had visual schedules. I know I used a visual schedule every time I worked with Student. And if I remember correctly, Cindy Nance was as well. And she used a timer. So we were looking at putting a lot of those supports in place.

pp. 3027-3028, ll. 14-3

Q: During that period of time did you make any recommendations to Cindy Nance on how she might work with Student?

A: Yes. She and I worked very closely together so we would talk with one another like over lunch times or after school, and I would just give her -- especially with the implementation of the sensory diet, and especially at that time it was something that was relatively new in practice, relatively speaking, so just helping her and anyone working with Student to understand those concepts and what that could look like in the classroom.

Q: And was Ms. Nance and the other people working with Student, were they receptive to your ideas?

A: Yes.

pp. 3028-3030, ll. 17-12

Q: Did you develop goals and objectives for Student for purposes of that IEP?

A: Yes.

Q: Can you recall if Student made progress on those goals and objectives during that first year?

A: Yes, we were especially -- I say we -- I was especially focusing on skills with buttoning his shirt. And I remember going through several different ways of modifying the task, especially to help him understand how to complete it. He made a lot of improvement that way, did a lot of work with his handwriting performance, meaning how he formed his letters, where he put his letters on the line, spacing, and worked on attention to task and decreasing the stereotypical behavior, the primary focuses at the time. I think I added goals in future years.

Q: Based on your work with Student and your work with other children with autism, is it your opinion that Student is a child who fits on the autism spectrum disorder?

A: Yes.

Q: Do you have an opinion as to the degree of severity of his autism?

A: I would place it somewhere in the moderate to severe range.

Q: And in terms of stereotypical autism behaviors, did Student display those during the first year?

A: Yes.

Q: Was it your goal to eliminate those behaviors?

A: My goal was to replace them, meaning that -- what they've found in the literature is that behaviors that are automatically reinforced in that way, that is the function of the behavior. It's very difficult to distinguish the behavior, and usually the child finds something else to do that will meet the same function. So looking for replacements, like using the fidgets and deep pressure, those are the primary things, and looking at what we can do in the environment, like ensuring that he had a quiet environment when he really had to concentrate on work and those kinds of support. I think at times his verbal noise making, I wondered if sometimes he used it to sort of override the other noise in the environment. And I've worked with other students who do that, too, other students with autism.

pp. 3031-3032, ll. 19-19

Q: What types of replacement behaviors were you seeking to provide through your therapy or your interventions?

A: Replacements?

Q: Yes, for those particular behaviors.

A: Okay. For the hand flapping, giving him fidget, something else to do with his hands. We were playing with -- not playing with, but using the ball during -- because when a child sits on a ball -- and there has actually been research since then looking at use of ball chairs -- they are able to get just a little bit of movement while sitting, so we looked at things like that. If I remember correctly, we tried a little sitting disk, and it's basically, it looks like a very large frisbee, but if you took two frisbees together and put them kind of on top of one another, it makes a little cushion, it's filled with air and it just gives you a little bit of bounce. We also tried -- I can't remember what point we tried it, but we used a weighted vest to give him more deep pressure, because deep pressure tends to be A (sic) more organizing sense, and in the literature when children have had like a weighted vest during performance of tasks they show improved attention to task, improved task completion, improved quality of work. So those are some of the things we tried.

p. 3033, ll. 5-12

Q: And can you tell me if you saw an increase in the replacement behaviors and a decrease in the stereotypical behaviors?

A: Yes, he did show a decrease in -- I'm working off memory at this point, but he did show a decrease -- with the use of those supports, he showed a decrease of the verbal and physical or vocal and physical stereotypies.

pp. 3033-3035, ll. 20-2

Q: In other words, do you think it's possible for Student to eliminate all of those stereotypical autistic behaviors?

A: I'm thinking. I would say it's always a goal. I've never worked with a child where, and nor have I heard about a child who was able to completely eliminate all verbal and physical stereotypies at all times, meaning that I've worked with children where we are able to get to near zero rates of verbal and physical stereotypies in certain environments, but it didn't always generalize. Do you know what I mean?

Q: Yes.

A: And my goal as an occupational therapist, my perspective of it is ultimately I need for a child to be able to participate in the critical activities of daily life, which include school activities. And if a child engages in some degree of physical or verbal stereotypies and it doesn't interfere with performance and it's not stigmatizing, I'm okay with that. We all do things. Some of us fidget, you know. So I don't know if 100 percent reduction -- I just I wanted to qualify it.

Q: Okay. And with Student, do you think your goal was accomplished, that he was able to participate in those critical activities at least in the school setting such that the behaviors were not interfering with his performance?

A: He was making progress. He was making progress. He's still -- there were still skills that the IEP team wanted him to acquire when I left.

Q: Do you think he received benefit in the years that you worked with him?

A: Yes.

p. 3050, ll. 5-23

Q: What you've just described to us, did you reduce that to writing anywhere, or did you just go through a mental process?

A: It began in both the combination of data collection and meetings with people who were working with Student and who observed the same kinds of things, and right about the time when I started using the potato chip strategy we brought Marilyn Stubbs on board to make sure that this was the right direction. And I knew Marilyn had expertise in the area of autism and behavior therapy, so brought her on board. And at that point in time is when we really finalized sort of the process of the functional behavior assessment and then the exact procedures that we would use as an intervention plan.

Q: Okay. Did you assist Marilyn in preparing the behavior plan that ultimately became part of Student's IEPs?

A: I did.

pp. 3051-3052, ll. 12-3

Q: Okay. I'm not going to ask you questions other than you said at some point Marilyn came in and you started to formalize?

A: Yes.

Q: I'm just wondering if this was part of the process of formalizing.

A: If I remember correctly, it was. So do you want me to elaborate?

Q: Yeah, please.

A: Okay. What I helped Marilyn with was figuring out what were target behaviors, what seemed to be the behaviors that we really wanted to look at changing. And especially targeting the people who are involved with Student, so it really helped with the construction of those pieces. And then Marilyn created this form and sort of took the ball at that point.

pp. 3059-3060, ll. 24-1

Q: Can you tell me if with respect to Goals 14 through 17 Student made progress on those goals?

A: Yes.

pp. 3059-3060, ll. 24-1

Q: Can you tell me if with respect to Goals 14 through 17 Student made progress on those goals?

A: Yes.

pp. 3064-3065, ll. 1-5

Q: Do you have an opinion as to whether this IEP offered Student an appropriate education at the time it was prepared?

A: Yes.

Q: And what is that opinion?

A: I believe that his IEP at the time it was in place provided for Student's academic needs and also began looking at and addressing a functional curriculum, meaning that we would be incorporating some, you know, independence for daily life-type goals. And my understanding of the literature is that children who have these types of skills addressed in their education curriculum are more likely to be successful upon leaving the schools, that those essential sort of daily life skills, like buttoning and dressing one's self and maintaining personal hygiene, are an essential part of success. In fact, maintaining personal hygiene is one of the key factors to a child or a young adult being successful even in supportive employment after school.

Q: Were you in agreement with the decision to start addressing functional curriculum at that stage in Student's educational career?

A: Absolutely. When Student came to us I was surprised that some of those things hadn't already been addressed. You know, when he came to us, at -- I believe he was nine years old at the time, that his previous IEPs didn't address buttoning and dressing himself. Because those are skills that are usually acquired before a child gets to school, so --

p. 3066, ll. 7-11

Q: Do you believe that if Student's IEPs had not included those kinds of functional skills that the district would have denied him an appropriate education?

A: I do. And I think that I would not have been providing best practice as occupational therapy.

pp. 3080-3081, ll. 22-7

Q: Did you participate in the development of this behavior plan?

A: I participated in the initial data gathering and sort of the intellectual property part, I guess, of it. But the actual construction of it was Marilyn's work.

Q: Did the team discuss the plan at the meeting?

A: I believe so, yes.

Q: At the time it was developed did you have an opinion as to whether it appropriately addressed Student's behavioral needs at the time?

A: At the time, I believed it did.

p. 3081, ll. 13-22

Q: And tell me what participation if any you had in the preparation of this sensory diet.

A: The team would have given me input as far as like critical times of the day and things that were happening. But as far as like all of the information that is in it is all my work.

Q: Do you have an opinion as to whether at the time it was developed this appropriately addressed Student's sensory needs in the school setting?

A: I believe it did, yes.

p. 3085, ll. 5-8

Q: And then generally do you have an opinion as to whether the IEP as a whole offered Student and appropriate education?

A: I believe that it did.

p. 3085, ll. 12-15

Q: Based on what you knew about Student at that time, would you have recommended a placement for Student in a private school separate day program?

A: No.

p. 3171, ll. 15-23

Q: You were asked some questions about one of the earlier IEPs and whether it addressed some of the stereotypic -- is that the phrase that you used?

A: It is.

Q: Stereotypic behaviors the Student had.

A: Yes.

Q: Did you address those behaviors even if they weren't specifically delineated in the goals and objectives?

A: Absolutely. Absolutely.

p. 3178, ll. 7-9

Q: In your opinion did the team, when it met to prepare this IEP, did it have sufficient information to prepare an appropriate behavior plan?

p. 3178, l. 11

A: Yes.

p. 3188, ll. 21-25

Q: During those times that you participated, do you believe that those three IEPs, excluding the extended school year, were designed to provide Student an appropriate education?

A: Absolutely.

p. 3189, ll. 16-22

Q: Okay. Do you believe Student was provided the appropriate related services in order for him to benefit from the special ed services he's receiving during the three years that you participated in these three years of the IEP?

A: Well, I wasn't there to provide the OT the third year.

p. 3190, ll. 1-4

Q: Do you believe that IEP addressed the appropriate related services that would allow Student to benefit from the special education he was going to receive?

A: Yes.

pp. 3190-3191, ll. 23-22

Q: Do you believe that those IEPs for those three years addressed those extreme, significant intraindividual differences or strengths and weaknesses?

A: Yes. I think that's why you have goals like, you know, the higher level reading goals and math goals and a goal that looks at buttoning your shirt, because certainly those are two different tasks completely. I mean, from an age-level standpoint and skill acquisition standpoint. So, you know, as a team we really try to address all of those areas.

Q: Would you have a thought about why at some point Mr. Hodgson thought that in the 2003-2004 school year, at some point during that school year, he thought that Student would need a separate, private agency in order for him to receive a free, appropriate, public education? I know that's projecting out of the future.

A: Right. I guess I don't understand that because Student was making progress. He was making progress in the program at Lathrop. And I guess I may be able to understand it more if there was no progress happening, but he was making progress. I mean, I'm not as familiar with what happened. I can't say what precipitated that request in 2003-2004.

pp. 3193-3194, ll. 14-11

Q: Compared to the complexities of the IDEA, do you find it hard to believe that reasonable

people from the same profession can have disagreements about what should be included in the IEP and what methodologies should be employed to address the goals and objectives, disagreeing about functional behavior assessment, functional behavioral analysis; would that surprise you that there's disagreement?

A: No. I mean, especially when serving a child with autism. You know, if you talk to any expert in the field, you just get different recommendations depending on their approach and background. And some of those approaches have evidence to support it, some of them have empty evidence, but it's some evidence. People come to different conclusions, but I think even in a systematic process and a functional behavior assessment, there's no getting around that there are few things more complex than human behavior. And, you know, when we're making hypotheses about another person's behavior, we're making the most informed decisions we can. But that doesn't guarantee that it's exactly correct the first time.

p. 3202, ll. 6-16

Q: -- this child's progress over the years? While you were there, isn't it accurate to say that the gap between Student's skills and that of his chronologically-aged peers widened? And by skills, I want to include social, emotional and academic.

A: That the gap widened?

Q: Yes.

A: I'm thinking. In some respects the gap widened, in other respects the gap maintained, and in other respects the gap was reduced. But that doesn't mean that Student regressed or didn't make progress.

p. 3203, ll. 3-23:

Q: With respect to social skill development. He had very limited social skill development when he came to this school, correct?

A: Right. Meaning that he had several social skill deficits when he arrived at the school?

Q: Yes, a number of significant social skill deficits.

A: Yes, that's true.

Q: And when you left, he still had significant social skill deficits, correct?

A: Yes.

Q: And while he may have progressed in the goals and objectives that you generated, as compared to his peers, the gap between his social skill acquirements was even greater than when he began; isn't that true?

A: Not in all respects. And I don't know that that statement's fair to Student.

Q: Well, whether it's fair or not, it is accurate, isn't it?

A: I disagree in part. I don't want to be argumentative, but --

pp. 3204-3205, ll. 20-7:

A: I'm not going to remember if it's specific goals. But with playing games with peers. He made improvements in that area. Lessening the gap?

Q: Right. That was my question. Not that he didn't make gains. My question to you was I wanted you to name an area where you felt he lessened the gap between his and his chronologically-aged peers.

A: And I would say social referencing, parallel play, sharing play. Those would be primarily areas that I can recall.

Q: His chronologically-aged peers were well beyond those skills, weren't they?

A: Well, that's how the gap was able to be lessened.

E. Lisa Ann Robbins:

pp. 3574-3576, ll. 10-11:

Q: (By Ms. Goldman) And were you able to read and understand the progress report included on the goal pages?

A: Yes.

Q: And did you draw any conclusions, based on your review of the progress reports?

A: Yes. It appears that, based on the progress, that Student was making significant progress with this goals and objectives. He had met many of them and continued to meet them. And, that, in all areas, he was either – he has either met them or was continuing to make progress.

Q: And I'm going to ask you to turn to the IEP that's part of R-2 that starts on Page 28. This is an IEP dated 11/7/01, and you have to turn it sideways.

A: Uh-huh.

Q: Did you have an opportunity or did you review this IEP, prior to your testimony today?

A: Yes.

Q: And did you review the present level of performance?

A: Yes.

Q: And comparing this IEP to the prior IEP, did you draw any conclusions about where Student was, educationally, as of November of '01?

A: It appears that Student's strengths were still strengths for him, based on the last IEP – last present level and this present level. It also appears that he is making progress. He's able to read stories. While he has difficulty answering questions, he's – he is making improvement there. He's making math improvements. He is doing more – able to complete more tasks independently, with fewer prompts. Functioning within the school environment, he's made improvement. Still continues to have problems with sensory. Still continues to have problems with speech and language. Still continues to function like a child with autism.

Q: And did you have an opportunity to review the goals and objectives of this IEP?

A: Yes.

Q: And, based on your review of these, as well as the present level and the progress from the last IEP, did you have an opinion as to whether these were appropriate for Student, at the time this IEP was prepared?

A: Again, I would have to say they are based on the present level. They are developmentally appropriate, functionally appropriate, age appropriate. You can certainly see a long-range benefit to Student's long-range functioning by these goals. He – based on the data, he continues to meet them and is making progress in them.

pp. 3578, ll. 18-21:

Q: (By Ms. Goldman) At that time, based on the present level in the goals and objectives, would it have been appropriate to have objectives where Student was expected to perform at grade level?

pp. 3578, ll. 24:

A: To perform at grade level, no.

pp. 3600-3603, ll. 3-9:

Q: (By Ms. Goldman) Lisa, based on the reevaluation that we just looked at and the prior IEPs, did you draw any conclusions as to whether the behaviors listed in the left hand, “when Student does this” column, were related to his autism?

A: No.

Q: You didn't draw a conclusion or; no – can you explain your no?

A: Okay. Yes. The reason the behaviors occur is – let's see if I can explain this.

There's a difference between do I think Student behaves this way because he has autism. It's very difficult to separate a behavior from autism and trying to decide what is based on autism and what is based on something else.

Do I think this behavior plan appears to address the behaviors that Student was exhibiting? Yes. Is it clear whether these behaviors have been occurring or were occurring because he has autism or because of something else? No.

Q: Given that answer, as someone who consults in the area of autism, do you recommend that a behavior plan address all behaviors, even if they're not related, or even if you can't determine if they're related to the autism?

A: If the behavior is significantly impacting a child's learning and/or someone else's learning, yes.

Q: Okay. And based on the re-eval that was done, as well as the other documents that you reviewed, prior to the date of his IEP, were you able to form any conclusions as to whether this behavior plan does address all of those types of behaviors?

A: It appears to address the behaviors that were most significantly impairing Student's ability to function in a school setting.

It's difficult to say if there are more. But, based on – it does appear to address the ones that were most significantly interfering, at that time.

Q: And have you helped in the preparation of behavior plans for students with autism?

A: Yes.

Q: And based on that experience, can you give your opinion as to the appropriateness of this behavior plan?

A: Again, based on not ever seeing Student, prior to any of this, I would say, based specifically on just is this a good behavior intervention plan, I think it's an excellent behavior intervention plan. Do you want to know why?

Q: Yes.

A: Okay. Because I think that it looks specifically at here's what the behavior is occurring. Let's possibly interpret why that behavior is occurring, and then let's give a response to that.

But it goes beyond that to the far right column, which you don't typically always see in behavior intervention plans, in looking at let's possibly look at some ways to prevent the behavior from occurring in the first place.

Q: Is there any research, in your experience, that discusses how long it takes, once you have interventions in place, to either significantly diminish or extinguish behaviors in children with autism?

A: I don't know a specific research looking at that standpoint for kids with autism. But what I – what I know about research in a behavior is that what research tells us is that for – for

every year a child engages in a specific behavior, it takes three months of every day intervention with that behavior, in order to make a long-term change on that behavior. Now, that is not to say that you don't make some changes. But for the longer the behavior occurs, obviously the long it's going to take to change a behavior.

But what research does say is behavior – and it doesn't say kids with autism, it says behavior in general, that for every year a child or a person engages in a behavior, it takes three months of daily intervening to make a permanent change in that behavior.

p. 3607-3608 ll. 13-23:

Q: (By Ms. Goldman) The behavior of biting finger, is that characteristic, in your opinion, of autism?

A: Behaviors like biting finger, head hitting, those kinds of things are often associated with kids with autism who exhibit the behavior for a sensory reason. They may be frustrated, whatever, but it does a sensory – fulfills a sensory need. It may be to calm. So, yes, that type of behavior.

Q: And, in your opinion, is that a behavior that can be significantly reduced or eliminated?

A: Yes.

Q: And what kind of strategies can be put in place to do that?

A: Well, common to what she – what – what this person has here, if we are interpreting that, based on data and observation, that Student bites his finger when he is frustrated, excited or over stimulated, we would put something into his environment that would – number one, we'd like to not have him frustrated or over excited, but that doesn't always happen, something that he can do that is more socially appropriate in order to meet that same sensory need, whether it's to help him focus or calm down or whatever, rather than bit his finger, you know, chew a theratubing (phonetic), or as it says here, when he's over excited, to try and give him, you know, some kind of a verbal cue or some kind of a visual strategy to let someone else know he is getting frustrated or, yes, there's something that you would want to do to still get that need met in a more socially appropriate way.

Q: And do you have an opinion as to whether the strategies or interventions included in this behavior plan were appropriate, in light of the behaviors addressed, at the time that this plan was written?

p. 3609 ll. 1-22:

A: It appears to me, based on the present level, based on the behavior plan that is here, and based on the behaviors that they are addressing, and, again, all I have is this information, they appear to be appropriate. They appear preventative actions are appropriate, or they – this person is looking at these behaviors, trying to decide possibly why they are occurring and trying to appropriately deal with that behavior.

Q: (By Ms. Goldman) And could you look at Pages 210 through 213, which is entitled sensory diet. Did you review this prior to your testimony?

A: Yes, I did.

Q: And could you give us an opinion as to the sensory diet, whether it was appropriate for Student, at the time it was developed?

A: Not only is it appropriate, I think it's exemplary. I think it's – it's excellent.

Q: Do you know Katie Alexander?

A: Yes, I have worked with her in the past.

Q: And I don't recall if I asked you about the goals and objectives in this IEP. I don't think I did.

p. 3609-3611 ll. 24-2:

A: I think you did.

Q: (By Ms. Goldman) Okay. Then I'm going to take you to Volume II, Page 459, which is the IEP developed in November of '03, for Student.

Did you review this IEP, prior to your testimony today?

A: Yes.

Q: And can you tell us, within your opinion, if it was IDEA compliant at the time developed?

A: In my opinion and based on my training and understanding of IDEA, I think the IEP exhibits best practice.

Q: And what does best practice mean?

A: Well, I think it's – it's a Cadillac. It's – it's what I would like all of my students to know

how to write one, as well. And I would be honored to be able to say I wrote this one, but I didn't. It's an excellent present level. Its accommodations and modifications are listed. It has a sensory diet attached that's appropriate. It has a behavior intervention plan that appears to be appropriate. It's goals and objectives are derived straight from the present level. They're all age appropriate and developmentally appropriate and functionally appropriate. It exhibits best practice, in my opinion.

Q: In terms of what IDEA requires, which is a free appropriate, public education, would best practice be consistent with FAPE?

p. 3611 ll. 6-18:

A: As an educator, best practice would go beyond FAPE. And, in my opinion and my years of experience, this is probably one of the best, overall, complete IEPs that I have seen written.

Q: (By Ms. Goldman) In looking at the four year's worth of IEPs, were you able to determine whether they – whether Student made progress over the four years?

A: Yes.

Q: And were you able to determine, based on your review of the four IEPs, whether the placement called for in the IEP was least restrictive environment for Student?

p. 3611-3612 ll. 25-5:

A: Based on the information that I have seen here and the evaluation information that I was – have seen here, I would say yes.

Q: (By Ms. Goldman) Lisa, are you familiar with a program or a facility known as PBM?

A: Yes.

p. 3613-3614 ll. 9-5:

Q: Based on what you do know about the PBM on-site school, do you have an opinion, based on the four IEPs that we've looked at, the progress reports and the evaluation information, whether that would be appropriate for Student or in the least restrictive environment?

A: Based on what I know, because I've only heard, I have not seen firsthand, but my

understanding of the school and the intent of the school and based on these IEPs and these present levels and the progress that Student was making, my understanding of what the PBM school has – was set up to accomplish, Student would not be, in my opinion, the kind of student that would benefit from going there.

In my opinion, and, again, my understanding of that school, it would be a stepping stone. And it would be a, here, beginning place, and Student is way down here. And it would be a step back in Student's progress, again, based on my understanding of what that type of school is set up and the purpose of it. It is not for kids that have the needs such as Student's.

p. 3760 ll. 1-19:

Q: (By Ms. Goldman) How did you report progress to parents?

A: On a – well, two ways: On a quarterly progress report, as required, and my parents received information from me daily.

Q: Was that verbal or written?

A: Both. Some parents got both; some, when they picked their child up, we discussed it.

Q: If you would look – let's just go to Page 305 in Volume 1 – well, look at Page 306. And could you tell, in looking at these targeted inappropriate behavior sheets, as to the frequency of when they were provided to the s?

A: From this one particular or from –

Q: From this series.

A: It appears they were – yes, I can.

Q: And how frequently were they provided, based on your review of the record?

A: It appears they were provided daily.

p. 3760-3761 ll. 25-8:

Q: (By Ms. Goldman) And how would you provide verbal information to the parents of your students? I mean, in what context would that communication take place?

A: They – often my students were picked up by their parents, and we would discuss – often

at length – concerns, progress, issues.

Q: And as part of that, did parents ever request the raw data to verify what you were telling them?

A: No.

p. 3765 ll. 11-22:

Q: (By Ms. Goldman) And then, going down to the fourth paragraph, can you tell me if this present level of performance discusses progress that Student had made since the previous IEP was written?

A: Yes.

Q: And can you tell me if that paragraph and the following paragraph includes some data that would support that statement about progress?

A: Yes.

Q: In looking at Student's IEPs successively over time, were you able to determine whether Student had made progress over time?

p. 3766 ll. 5-21:

A: Can you repeat your question, please?

Q: (By Ms. Goldman) Were you able to look at the four IEPs successively over time and determine, based on looking at the present levels, whether Student had made progress?

A: Based on that information, yes.

Q: In your opinion, did the present levels of each of the four IEPs contain identical language that would suggest Student had not made progress?

A: No.

Q: The present level of this IEP that starts on 214, does it contain information from the most recent reevaluation?

A: Yes.

Q: Would you consider the information from the reevaluation to be data on Student?

A: Yes.

p. 3769-3771 ll. 20-1:

Q: (By Ms. Goldman) Can you define for us what the term “behavior” means to you in relation to the section of the IEP that asks the team to look at whether behavior is impeding learning?

A: The section where you mark an X –

Q: Yes.

A: -- in that section? To me, I interpret that as “does the individual exhibit any type of behaviors that would interfere with his learning and/or the learning of someone else”.

Q: And based on the language on Page 207, in relation to that little section that you have to put an X by, is it your understanding that, if a student exhibits behaviors that impede learning or that of others, the team is required to write a behavior plan?

A: It is my understanding that they are not required to write a behavior intervention plan just because that area is marked with an X.

Q: Have you helped IEP teams develop behavior plans for students with autism?

A: Yes.

Q: And is there any typical type of behavior that would, in your opinion, warrant the inclusion of a behavior plan in an IEP?

A: Typically – yes, they are typically behaviors that are fairly persistent and pretty aggressive either to themselves or to someone else, usually imposing some sort of danger on a regular basis to someone, as well as fairly disruptive on a regular basis.

Q: And based on your review of the records in Volumes 1 and 2, did you see any document that would suggest that Student exhibited those types of behavior?

p. 3771-3773 ll. 16-12:

Q: (By Ms. Goldman) The next question is: Did you see anything in the record that conveyed to you that Student had exhibited those types of behaviors that generally result

in a behavior plan?

A: No.

Q: Based on your review of the records, what types of behaviors that might impede learning of self or others could you tell us that you noted Student exhibited?

A: That would warrant a behavior plan –

Q: No, just the type of behaviors that you saw that might impede learning.

A: Well, certainly, his sensory issues, that he exhibited those behaviors associated with sensory issues, his biting—

Q: Did you say “biting” or “fighting”?

A: “Biting”. I don’t think I saw fighting other than with , but I don’t think I saw any – I did not see any of that physical aggression.

Look at some present levels here (indicating). I would say appropriate behavior regarding issues of sexuality and maintaining appropriate social or physical boundaries by keeping his hands to himself. Eating only his own foods. Respecting others’ privacy. His difficulty with sharing, waiting for his turn, initiating and maintaining conversations, listening to others. Self-stimulatory behaviors such as hand-flapping, jumping up and down, biting his index finger when stressed or excited. Laughing at inappropriate times, tolerating unexpected changes in routine, avoiding provoking others, regulating behavioral control in large groups, using words rather than physical actions to respond when provoked or angry, resolving conflict, handling frustration.

Q: Can you tell us where the information that you’re sharing with us is coming from?

A: This particular information is from present level in the IEP dated November 6th, ’02 and November 14th, ’02.

Q: Can you tell me if the behaviors you described are generally the types of behaviors that you see addressed through a formal behavior plan?

A: No, they’re typically not addressed in a formal behavior plan.

Q: And based on what you’ve read about Student’s behaviors in Volumes 1 and 2, do you have an opinion as to whether a behavior plan was required, either in the November ’02 or the November ’03 IEPs for Student to receive a free, appropriate –

p. 3773-3774 ll. 16-19:

A: In my opinion, a behavior plan did not need to be written in order to provide FAPE for Student as far as his IEP was concerned.

Q: (By Ms. Goldman) If you remove the behavior plan and the sensory diet from those two IEPs – the '02 and '03 ones – do you have an opinion as to whether those IEPs, without those two components, would provide Student with a free, appropriate public education?

A: I believe they still would provide that without the behavior plan and without the sensory diet.

Q: And why is that?

A: Because, in my opinion, the sensory diet and the behavior plan are good teaching for a child with autism and don't need to be required and shouldn't be required as part of an IEP. They should be part of a good teaching program and plan for a child with autism.

Q: And as someone who's taught children with autism, did you include every teaching strategy that you utilized in a student's IEP?

A: No.

Q: Did that prevent you from utilizing those strategies?

A: No.

Q: Do you need to have the antecedent of the behavior in the behavior plan to have the behavior plan be effective?

A: No.

Q: As somebody who helps prepare behavior plans and who's used behavior plans, what's more important to you, to know the antecedent or the function of the behavior?

p. 3774-3776 ll. 22-6:

A: Oftentimes – speaking specifically with kids with autism – it's the function of that behavior that may be more important than the antecedent.

Q: (By Ms. Goldman) And what is the function of the behavior compared to the antecedent?

A: Well, it's to understand – for example, if a child does – cannot communicate, often the

reason the behavior is occurring is because of their inability to effectively communicate. The antecedent may change daily, may change every fifteen minutes, depending on what it is; you may have the same ending result behavior based on the fact that he has an inability to communicate effectively.

So, it's not always important to know what led to that behavior, other than to know the antecedent of that is this child is frustrated and try to come up with – because there's always going to be frustration, there's always going to be those kinds of things. And being able to predict what frustrates them isn't always going to be something we can do. It's important to give them strategies to help them in a more socially appropriate way deal with their frustrations or deal with their inability to effectively communicate by helping them, you know, put those things in line, get them better ways to communicate, get them better ways to effectively deal with their frustration.

Q: And on Student's IEPs and the accompanying behavior plans, do you have an opinion as to whether the behavior plans are designed to help alleviate the frustration or the behaviors resulting from the frustration?

A: It appears to me that possibly they are trying to alleviate or help him deal with “when you are frustrated, this is what you can do” or things to do to avoid the behavior like the biting the finger.

p. 3776-3777 ll. 10-5:

Q: (By Ms. Goldman) Lisa, we took a look at that one targeted behavior sheet on, I believe, 305 or 306. And there were some more of those in Volume 2. Did you have an opportunity to review those targeted inappropriate behavior sheets?

A: Yes.

Q: Were you able to draw any conclusions about whether Student's behaviors, as targeted in his behavior plans – let me strike that.

Were you able to determine, based on your review of those sheets, whether the behavior plans were having the effect intended?

A: Based solely on that, no.

Q: Based on all the information that you reviewed, were you able to draw any conclusions about whether the behavior plan was working?

A: As to specific behaviors? It appears – yes.

Q: Did you see anything in Volumes 1 and 2 that led you to conclude in any way that the present levels of Student's IEPs contained inaccurate information or data?

A: No.

p. 3781 ll. 11-13:

Q: (By Ms. Goldman) In your experience, do paras of children with autism typically receive training in autism?

p. 3781 ll. 16-19:

A: Little to none, no.

Q: (By Ms. Goldman) And did Student's paras, based on your review of records, receive little to none?

A: No, they received quite a bit.

p. 3789-3791 ll. 24-2

Q: Yesterday you told us that you could have an appropriate IEP and not an appropriate program. Could you explain what you meant by that?

A: Yes. I have seen a lot of places that have an appropriate IEP, but the child's program, the placement of the student, the strategies being utilized, the kinds of curriculums being used in the child's programming are not appropriate. The IEP looks good and the IEP is appropriate, but the way they are implementing the IEP is not necessarily appropriate or not necessarily of good quality.

Q: And was there adequate information in Volumes 1 and 2 for you to draw any conclusions as to whether Student's program, as opposed to his IEP, was appropriate at the relevant time periods?

A: Based on this information and the ability to look back at more than one IEP and the progress sheets for more than one IEP, you could see progress, documented progress from one IEP to the next.

Q: And what, if anything, does that tell you as to the appropriateness of the program, as opposed to the appropriateness of the IEP?

A: That Student was making progress in the program that they were providing for him.

Q: You also told us yesterday that sometimes a district is wrong in terms of a district's position as to what's best for a child. In your opinion, would that statement hold true for Student's IEP and program at the Lathrop School District?

p. 3791 ll. 10-12:

A: Based on these two documents of information, does it appear to me that Student's program in the Lathrop School District was appropriate? Is that –

p. 3795 ll. 10-25:

Q: In your opinion, would you need to look at the raw data that Student's teachers maintained on him to determine whether he made progress on the IEPs that you've looked at?

A: No.

Q: In your opinion, did Student's IEPs and/or his program appropriately address his sensory needs?

A: From what I can read here (indicating), yes.

Q: And can you explain that answer?

A: Well, there's only a sensory diet attached to, I believe, the last two IEPs. But, as I stated earlier, good teaching for a child with autism would be addressing his sensory needs. And many, in any programs address sensory needs of a child without putting – and give them a sensory diet without making it part of his IEP.

p. 3796 ll. 19-22:

Q: In your opinion, if Student – the behaviors Student exhibited that impeded learning, if they were so significant in his school day, would he have been able to make the progress documented?

p. 3796-3797 ll. 25-9:

Q: (By Ms. Goldman) Let me ask it a different way. Was Student able to make progress even if he exhibited some behaviors that interfered – if you know?

A: Yes.

Q: Have you ever seen students whose behaviors so interfered that they were not able to make progress on their goals and objectives?

A: Yes.

Q: And would you put Student in that category?

A: No.

p. 3799 ll. 11-14:

Q: Based on your knowledge of PBM and that school-based program – whatever knowledge you have – do you have an opinion as to whether PBM would offer Student the best opportunity for advancement?

p. 3799-3800 ll. 25-5:

A: Based on my understanding of PBM's program, given the fact that I have not seen it, my understanding of the program and based on my understanding of this information on Student, Student does not appear to be a child that would benefit from being in that type of more restrictive environment.

p. 3800 ll. 11-14:

Q: (By Ms. Goldman) In the automobile scheme of things, Chevy to Cadillac – wherever else on the spectrum we now have cars – where would you put the Lathrop program, based on your review of the records?

p. 3800-3801 ll. 21-1:

A: Based on the review of the records that I have here and my understanding of Student and

my understanding of this program, I would say that it is pretty – getting closer to the Cadillac. I mean, there are a lot of things addressed here that go beyond only providing FAPE and only providing what is necessary.

p. 3868 ll. 15-22:

Q: (By Ms. Goldman) Would you necessarily include, in a behavior plan, behaviors that one individual observed on one date?

A: Not necessarily, no.

Q: And if those behaviors were only observed on April 1st, 2004, could those behaviors have been addressed in behavior plans that were prepared prior to that time?

A: No.

p. 3869 ll. 8-14:

Q: (By Ms. Goldman) In your experience, do IEP teams include behavioral strategies to use in an IEP present level of performance?

A: No.

Q: Can you include behavioral strategies in an accommodation or modification component of an IEP?

A: Yes.

p. 3870-3871 ll. 8-10:

Q: (By Ms. Goldman) Could you look at the list on Page 226 and tell me if any of those items listed are – would be considered by you to be positive behavioral strategies or support?

A: Yes.

Q: And can you identify the ones that you think would positively address behavioral issues for Student?

A: I would have to say that possibly all of them, if you were looking at his behavior plan and possibly dealing with his frustration being possibly because he's frustrated with the assignment. There's modification in his spelling, there's modification in grading for music, art and PE, there's modification in reduced assignments, reduced paper/pencil, there's task adaptations, there's use of computer for large writing assignments. There's also visual cues in place, there's a Picture Exchange Communication – I mean recommended visual cues and visual supports in all settings. A Picture Exchange Communication System is listed as an accommodation or modification, a sensory diet, frequent breaks between tasks or subjects. All of those could be looked at as – use of private bathroom – all of those things there could be modifications or strategies to implement changes in Student's behavior.

Q: On Page 241, it indicates that Student had a paraprofessional. Would you view a paraprofessional as a positive behavioral support or strategy for Student?

p. 3871-3872 ll. 22-9:

Q: (By Ms. Goldman) What role, if any, would a paraprofessional play in terms of addressing Student's behavior?

A: Well, it could easily be someone that would help deal with those behavior problems as far as being able to see, you know, the signs, the antecedents of some of his behaviors coming and knowing when to, you know, use a verbal prompt or a visual prompt or something or use some kind of sensory strategy. If Student was not of the ability to know, by reading it himself, to choose to use one of those alternative strategies, a para could prompt him to either employ it himself or employ it for him.

p. 3872 ll. 14-24:

Q: Did the information you have in Volumes 1 and 2 provide you with sufficient or adequate information to draw any conclusions about whether good teaching strategies were in place for Student during the time frame covered by the two volumes?

A: Yes.

Q: And could you explain your answer?

A: Based on the information in these volumes and, specifically, his IEPs, their present levels, as well as the goals and objectives, and the objectives being met and showing progress towards those objectives.

* * *

It is not appropriate and it shows a lack of objectivity to start with “conclusions of law” and then attempt to find bits and pieces of evidence to support those conclusions. It is also inappropriate to go beyond the standards and intent established by the US Congress in IDEA’97 and use case law that doesn’t apply.

This Due Process Hearing was about whether or not the Lathrop School District provided the student a Free Appropriate Public Education. The standard for determining whether Lathrop School District provided FAPE is a 2-prong test outlined in USSC Rowley decision, and applied to this case the Lathrop School District did not deny the student a Free Appropriate Public Education (FAPE).

When this evidence is examined objectively, and the appropriate legal authority applied, the only conclusion a panel member could reach is that the District not only met the Supreme Court’s two-prong test, it exceeded the standard set forth by Congress and the Court in many instances.

The District more than complied with procedures required of the IDEA’97 and because Lathrop School District IEPs in 2002-03 and 2003-04 school years were designed for the student to receive meaningful educational benefit, were appropriately implemented and the student made significant progress.

It is clear through the preponderance of evidence that the student derived meaningful educational benefit from the District placement through the implementation of his IEPs.

34CFR300.341-350 outlines all of the requirements for Individual Education Programs. Both the 2002-03 and 2003-04 IEPs developed for the student met and exceeded all IDEA'97 procedural requirements

34CFR300.347 describes the specific content of the IEP. Each of the student's IEPs contained all mandated components and was uniquely designed to address his individual needs.

District IEPs included as many as 27 measurable annual goals and numerous short-term objectives which enabled the student to be involved and progress in the general curriculum to the maximum extent appropriate based upon the nature and severity of his moderate to severe autism.

Further, the student's IEP included statements of special education and related services, supportive aids and services that were required to allow him to attain and master the annual goals and objectives in order to receive meaningful educational benefit and FAPE.

Each of the goals developed for the 2002-03 and 2003-04 IEPs contained three to six short-term objectives or benchmarks that provided a blue print in direction for

the team to follow and were more than reasonably calculated to provide the student meaningful educational benefit.

34CFR300.350 describes the accountability requirements of the Lathrop School District to make a good faith effort to assist the student in achieving the goals and objectives in his IEPs of 2002-03 and 2003-04.

The District collected data and tracked daily progress and documented mastery of goals and objectives on a quarterly basis. The results of data collection as documented on each short-term objective clearly demonstrated that the student was making progress and receiving meaningful educational benefit despite the severity of his disability.

Although he was not making progress at the rate of his age appropriate peers, he was clearly making measurable progress as substantiated in the evidence presented through goals and objectives of the 2002-03 and 2003-04 IEPs, as well as by the testimony of Ms. Nance, Ms. Foreman, Ms. Alexander, Ms. Stubbs, and Ms. Robbins.

34CFR300.346 requires a district to consider, *if appropriate*, strategies, including positive behavior interventions and supports to address the behavior of a child whose behavior impedes his or her learning or the learning of others.

In the Special Considerations page of the 2001-02, 2002-03 and 2003-04 IEPs the District stated that the student had some behaviors that were impeding his

learning, or the learning of others, and the IEP outlined in the accommodations and modifications sections various strategies and interventions to redirect the behaviors.

Utilizing less restrictive or less invasive strategies in the 2001-02 IEP provided the preferred way of dealing with inappropriate behaviors and allowed the student the opportunity to redirect or develop appropriate replacement behaviors and actions. This is a widely accepted approach used with behavior therapists and behavior interventionists.

With the assistance of the District autism consultant, Ms. Marilyn Stubbs, the District conducted a functional behavior assessment (FBA) and developed a data collection process used to collect information regarding the student's targeted inappropriate behaviors. As a result of the FBA and data collected, the District incorporated a Behavior Intervention Plan (BIP) as a part of the student's 2002-03 and 2003-04 IEPs. Although not required, this was utilized during the entire 2002-03 and 2003-04 school years.

Analysis and synthesis of this data collected clearly demonstrates that the student's inappropriate behaviors were reduced and replaced with more appropriate and acceptable behaviors using these strategies.

It is important to note a BIP is only required when there has been a change of placement as a result of a long-term suspension. During the 2002-03 and 2003-04

school years the IEP team agreed to develop a BIP that was more specific and detailed for the student's current behaviors. According to testimony by Ms. Nance, Ms. Foreman, Ms. Alexander, Ms. Stubbs, and Ms. Robbins the student's inappropriate target behaviors declined.

The IEPs for both years contained not only a BIP, but a list of positive behavior strategies in the Accommodations and Modifications section of the IEP. Lathrop Special Education and Related Services staff all agreed that the behavior strategies were effective and the student's behavior and social skills were improving.

During both the 2002-03 and 2003-04 years the District provided the parents with the student's daily behavior sheets that informed them about the student's behaviors and schedule.

The Lathrop School District exceeded the requirements of IDEA'97 with respect to developing a BIP when it was not required but did so because it was considered a best practice. In addition, they were proactive by providing staff training and autism consultants prior to the student ever enrolling in the District. The student had a one-on-one para; a teacher with a Masters degree in Special Education and 25 years experience in Special Education; a speech pathologist with her Certificate of Clinical Competence as well as experience in working with students with autism; a highly skilled and experienced Occupational Therapist; and three Autism Consultants,

who all agreed that the student made significant progress during the 2002-03, and 2003-04 school years toward mastery of all of his goals and objectives including behavior and social development. Further, the student had sundry special education supports, accommodations, and modifications that are all recognized in the literature as being effective techniques and approaches to use with a student with moderate to severe autism. Some of these included a sensory diet, a picture exchange communication system (PECS), discrete trial training, sensory integration, and a cost response system. Additionally, Ms. Lisa Robbins, an autism expert, testified that the behavior strategies and plans contained in the 2002-03 and 2003-04 IEPs were excellent, and were designed to prevent reoccurrence of targeted inappropriate behavior.

The data collected over both years clearly show that the student's targeted behaviors of concern were decreasing and being replaced by more appropriate behavior. In addition, the student was progressing in the area of social development as evidenced by his progress in communication and social skills areas of his IEP.

IN SUMMARY, I have worked in the field of Special Education for over 30 years, and been involved in all aspects of special education: from classroom teaching; SEA and LEA supervision and program administration; and University instruction.

During my tenure as a Special Educator I've been involved in thousands of referrals, evaluations, diagnostic staffings and IEPs, and I consider the practices and procedures Lathrop used in this case to be exemplary, best practice, and far exceeding the requirements of the IDEA '97.

In addition, the staff that worked with the student all met and exceeded the state standards to provide Special Education and related services.

Ms. Nance, the student's Special Education teacher, not only is certified as a general education teacher, but has a Masters in Special Education, as well as twenty-five years of experience in Special Education.

Ms. Alexander, one of the student's Occupational Therapists, has a Bachelors degree in occupational therapy, and had begun a Masters degree program. Ms. Alexander is licensed in the State of Missouri to provide Occupational Therapy, and is board certified. She has several years of extensive experience in working with students with autism.

Ms. Christi Foreman, one of the student's speech and language pathologists, has Bachelors and Masters degrees in speech pathology. She also has her certificate of clinical competency from the American Speech and Hearing Association. This is the highest credential available through her professional organization. She had experience working with students with autism prior to working with the student.

Ms. Marilyn Stubbs, one of the District autism consultants, is the Associate Director of, and has been employed for twenty-five years at the Sherwood Center, a private not-for-profit agency that specializes in providing special education and related services to students with autism.

Ms. Lisa Robbins, who testified for the School District as an expert witness in this due process hearing, has a Bachelors degree in psychology and special education, and a Masters degree in special education with emphasis in autism. She is certified in elementary, special, early childhood, and early childhood special education. She is a full-time Assistant Professor at Missouri Western State College in St. Joseph Missouri. She was employed in special education in public settings for sixteen years. She has received training from Penn State University in Applied Behavior Analysis, and is a Missouri Autism Consultant through Project Access in Springfield Missouri. She has published in the field of autism, and has written a book on Aspergers Syndrome and has extensive experience working with parents and school districts.

Mr. Rand Hodgson and Mr. Cory Royer testified as expert witnesses for the parents.

Mr. Hodgson has no degrees, no teacher certification, nor does he have any credentials in special education, autism, or any related field. He has no teaching experience.

Mr. Royer has no degrees in education or special education, no certification in education or special education, no licensures for any state, and no public school teaching experience.

Mr. Hodgson observed the student outside of the school setting, and only once briefly at school; and Mr. Royer testified that he never had met or observed the student.

There is no comparison in the credibility and experience of the Lathrop School District staff and the two witnesses for the parents. In addition, the District was very proactive in its efforts to provide on-going training to both certified and non-certified staff that worked with the student.

Further, the student was provided a one-to-one paraprofessional, an Autism Consultant, positive behavior supports, an FBA and BIP, a picture communication system, and eclectic methodologies including discrete trial training, which addressed the student's developmental and functional needs.

During the last several years I have had the opportunity to work with a number of Autism Consultants such as Dr. Rich Simpson, Dr. Teresa Earls-Volrath, Dr. Gena Barnhill, Dr. Edna Smith, Ms. Stacy Martin, Ms. Jennifer Crosby, Ms. Lisa Long. I believe if they reviewed the evidence in this case, they would also concur with Ms. Stubbs and Ms. Robbins' assessment that the Lathrop School District provided

Student with a FAPE in the LRE and that they more than met the standard established by the USSC Rowley decision.

The District's IEP provided FAPE to the student during the 2002-03 and 2003-04 school years. It complied with the procedural requirements and the IEPs were designed for the student to receive meaningful educational benefit. In addition, the student derived educational benefit from the District's placement and made progress as evidenced by the measurable progress on his goals and objectives during both the 2002-03 and 2003-04 school years.

The District collected data, and tracked progress over time that demonstrated educational benefit despite the nature and severity of the student's disabilities.

The IDEA '97 makes it clear that a student's IEP is not an educational contract guaranteeing that the student will receive a certain amount of educational progress. The District is required to make a good faith effort to assure the student is progressing and achieving IEP goals and objectives.

The District clearly met and exceeded that standard.

The IEPs during both of these years were individually, developmentally, functionally and specifically designed to meet the student's unique special education and related service needs.

The District maintained a continuum of placement options that offered the student a FAPE in the least restrictive environment.

All of the staff that worked with the student was highly qualified, with knowledge of an array of systematic and developmentally appropriate instructional strategies and practices.

The evidence that was presented in this case was clear and complete and was either ignored, discounted, or misrepresented by the chair of this hearing panel in reaching his conclusions and decision.