BEFORE THE THREE MEMBER DUE PROCESS PANEL
EMPOWERED BY THE MISSOURI STATE BOARD OF EDUCATION
PURSUANT TO RSMo. §162.961

STUDENT, by and through his Parents, Mother and Father,	)	
	)	August 6, 2007
Petitioners,	)	
vs.	)	
	)	
SCHOOL DISTRICT,	)	
	)	
Respondent.	)	

COVER SHEET INFORMATION

The Parties

- The Student is
- The Student's date of birth is
- Students' Parents are
- The Respondent is
- The Petitioners were represented by Stephen Walker, 212 E. State Road 73, Suite 122, Saratoga Springs, Utah 84043
- The School District was represented by Joseph Hatley, Michelle Wimes and Mackenzie Murphy-Wilfong of Spencer, Fane, Britt & Browne, LLP, 1000 Walnut – Suite 1400, Kansas City, Missouri 64106

Hearing Officers

- Marilyn McClure
- Karen Karns (During the initial stages of this matter, George Wilson was a panel member. Upon his request to withdraw, Ms. Karns was designated by Respondent.)
- Richard H. Ulrich, Esq.

Relevant Dates/Procedural History/Explanation of Deviation from 45 Day Time Line

- Initial request for due process hearing – June 8, 2005
- Dates of hearing: June 12, 2006, October 3, 4, 5, 6, 16, 17, 18 and 19, 2006, February 12, 13, 14 and 15, 2007, March 13, 14 and 15, 2007 and April 26, 2007 (telephonic)

- Date of decision: August 6, 2007

- Explanation of deviation from 45 day time-line: Contained within the body of the Decision

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), and Missouri law, §162.961.3-.5 RSMo.

I. THE ISSUES

1. The following fundamental issues were presented to the Hearing Panel:

Issue Number 1. Did the June 2005 IEP (sometimes referred to as May – June 2005 in the record) afford the Student a free appropriate public education ("FAPE") for the 2005-2006 school year?

Issue Number 2. Did the June 2006 IEP afford the Student a FAPE for the 2006-2007 school year?

The Panel must decide these issues without the benefit of implementation, as the Student was educated during all pertinent times at an outside placement. While the issues are well defined, the controversies concerning them are not, as manifested during the spirited seventeen hearing dates.

II. FINDINGS OF FACT

The Hearing Panel makes the following Findings of Fact:

A. The Parties, Counsel and Hearing Panel Members

1. During all times material to this due process proceeding, the Student resided with his Parents ("Parents"), within the boundaries of the Park Hill School District ("District"). (Tr. 14:1485). [1]

2. The District is a Missouri public school district which is organized pursuant to Missouri statutes. The District is located in Platte County, Missouri.

[1] References to the hearing transcript shall be denoted as (Tr. xx:yyy), with "x" representing the volume number, and "y" representing the page numbers within that volume.

3. The Student and his Parents were represented at the hearing by Stephen Walker, 212 E. State Road 73, Suite 122, Saratoga Springs, Utah 84043.

4. The District was represented by W. Joseph Hatley, Michelle Wimes, and Mackenzie Murphy-Wilfong with the law firm of Spencer, Fane, Britt & Browne, LLP, 1000 Walnut – Suite 1400, Kansas City, Missouri 64106.

5. The Hearing Panel for the due process proceeding was: Richard H. Ulrich, Hearing Panel Chair; Karen Karns, Panel Member; and Marilyn McClure, Panel Member. Ms. Karns replaced Jerry Wright as a Panel Member, who withdrew as a Panel Member.

6. Any findings of fact contained herein that could be deemed conclusions of law should be treated as such, and any conclusions of law that could be deemed findings of fact should likewise be treated as such.

B. Procedural Background and Timeline Information

7. The Parents requested due process by letter to the Department of Elementary and Secondary Education ("DESE") dated June 8, 2005, which was received by DESE on June 9, 2005. (Panel Exhibits 1 and 2).[2] That due process complaint related to an IEP developed for the Student during May and June of 2005 (often referred to as the June 2005 IEP).

8. On June 16, 2005, DESE notified the Panel Chair, Ms. Marilyn McClure and Mr. Jerry Wright of their appointments to serve on the Hearing Panel. (Panel Exhibit 3).

[2] During the hearing, the Panel Chair entered into the record what were then referred to as Panel Exhibits 1 and 1-A. Panel Exhibit 1 was the Parents' initial complaint regarding the June 2006 IEP, and Panel Exhibit 1-A was a letter from the Parents correcting a mistake in Panel Exhibit 1. (Tr. 3:59; 3:122). Near the close of the evidence, to complete the record, the Panel Chair provided the parties with a notebook containing the "legal file", with copies of the pleadings, some relevant correspondence and orders that had been filed at that point in time. The Panel Exhibits were numbered 1-54. In these findings and conclusions, the Panel Exhibits shall be identified by the number assigned to them in the notebook provided by the Panel Chair.

9. On June 22, 2005, the Panel Chair issued an Order scheduling the hearing for July 18 and July 19, 2005, with the decision to be rendered not later than July 22, 2005. (Panel Exhibit 4).

10. On or about June 23, 2005, Mr. Patrick Boyle provided to the parties an agreement to mediate and mediation procedures. (Dist. Ex. 40).[3] The agreement to mediate was signed by the Student's mother ("Mother") on June 27, 2005 and by the District on July 1, 2005. (Dist. Ex. 41). During the July 1, 2005 mediation, a mediation agreement was reached by the parties which served to temporarily resolve the issue of placement. (Dist. Ex. 43).

11. On July 11, 2005, the District requested that the hearing be continued until October 3 and October 4, 2005, with the deadline for a decision extended to December 3, 2005. The extensions were requested in part due to the parties' settlement negotiations. (Panel Exhibit 5).

12. On July 15, 2005, the Panel Chair issued an Order postponing the hearing until October 3 and October 4, 2005, with the deadline for a decision extended until November 4, 2005. (Panel Exhibit 6).

13. On August 29, 2005, Mother sent a letter to the Panel Chair advising that "mediation for [Student] v. Park Hill School District failed," and requested stay-put of the December 2004 IEP. (Panel Exhibit 7).

14. On September 19, 2005, the Panel Chair issued an Order granting the parties' joint request to continue the hearing until November 29 through December 2, 2005, with the decision to be rendered on or before December 30, 2005.

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[3] Petitioner's (Parents') exhibits shall be referenced as Parent Ex._____ and District's exhibits shall be referenced as Dist. Ex. _____.

15. On or about November 1, 2005, the District filed a Motion for Summary Judgment. (Panel Exhibit 9).

16. On or about November 10, 2005, Parents requested a continuance of the hearing dates so that they could respond to the Motion for Summary Judgment filed by the District. (Panel Exhibit 10).

17. On November 22, 2005, at the mutual request of the parties, the Panel Chair issued an Order continuing the hearing until February 14-17, 2006, and extending the deadline for a decision until April 3, 2006. (Panel Exhibit 11).

18. On or about November 30, 2005, the Parents filed a Motion to Consolidate and requested that this due process hearing be consolidated with a due process hearing request instituted on behalf of the Student's twin brother. (Panel Exhibit 12).

19. On or about November 30, 2005, the District filed a reply to the Parents' Motion to Consolidate.

20. On or about December 1, 2005, Parents filed a reply to the District's opposition to their Motion to Consolidate. (Panel Exhibit 14).

21. On or about December 2, 2005, Parents filed a memorandum of law and supporting affidavit in response to the District's Motion for Summary Judgment. (Panel Exhibit 15).

22. On December 9, 2005, the Panel Chair issued an Order advising that the Parents' Motion to Consolidate was denied and a formal order would be forthcoming. However, shortly thereafter, Parents withdrew their request for a due process hearing in the Student's twin brother's case and, accordingly, the issue of consolidation was moot and no formal order was issued. (Panel Exhibit 16).

23. On December 12, 2005, the Panel Chair entered an Order denying the District's Motion for Summary Judgment. (Panel Exhibit 17).

24. On or about January 27, 2006, the District requested an extension of the statutory deadline for a decision, to which the Parents did not object. The Panel Chair granted that motion, and continued the hearing until April 10-13, 2006, with the deadline for a decision extended until May 15, 2006. (Panel Exhibits 18 and 19).

25. On or about March 8, 2006, the District filed a Motion for More Definite Statement, Motion to Set Time Limits, and Motion to Conduct a Pre-hearing Conference. (Panel Exhibits 20, 21 and 22).

26. On March 9, 2006, the Chairperson issued an Order granting the District's Motion for More Definite Statement and granted the Parents ten (10) days to amend. The Order further set a telephonic pre-hearing settlement conference for April 7, 2006, and granted the Parents ten (10) days to respond to the Motion to Set Time Limits. (Panel Exhibit 23).

27. On March 17, 2006, Parents filed a More Definite Statement of their complaints. (Panel Exhibit 24).

28. On March 21, 2006, at the mutual request of the parties, the hearing was continued to June 12-16, 2006, with the decision to be rendered on or before July 31, 2006. (Panel Exhibit 27).

29. On March 23, 2006, the Panel Chair continued the hearing, at the mutual request of the parties, until June 12-16, 2006, and scheduled additional hearing sessions for June 28 and June 29, 2006. The deadline for a decision was extended until July 28, 2006. (Panel Exhibit 28).

30. On May 25, 2006, the Panel Chair issued an Order holding that the Parents' Response to the District's Motion for a More Definite Statement fully complied with the

requirements of IDEA. (Panel Exhibit 29). In addition, the Order set a telephonic pre-hearing conference for June 9, 2006, and granted the Parents' request for ten (10) additional days to respond to the District's Motion to Set Time Limits. (Panel Exhibit 29).

31. On or about May 26, 2006, the Parents filed their response to the District's Motion to Set Time Limits. (Panel Exhibit 30).

32. On or about May 26, 2006, the Parents filed a Motion in Limine regarding mediation discussions and proceedings concerning issues involved in this matter which had previously taken place. (Panel Exhibit 31).

33. On June 2, 2006, the Panel Chair issued an Order denying the District's Motion to Set Time Limits. (Panel Exhibit 32).

34. On or about June 8, 2006, the District filed a Motion to Strike and/or Redact certain parts of the Parents' proposed exhibits and a Motion in Limine regarding two proposed witnesses named by the Parents. (Panel Exhibits 33 and 34).

35. On June 9, 2006, the Panel Chair issued an Order granting the Parents' Motion in Limine regarding mediation testimony; granting the District's Motion to Strike and/or Redact portions of the Parents' proposed exhibits concerning the Student's twin brother; and granting the District's Motion in Limine regarding two proposed witnesses named by Parents. (Panel Exhibit 35).

36. The Parties, their respective attorneys and panel members appeared for hearing on June 12, 2006. Prior to the presentation of evidence, the District filed a Motion to Dismiss, or in the Alternative, for Summary Judgment. (Panel Exhibit 36). The Panel Chair indicated, after argument was heard, that the Motion would be taken with the testimony.

37. Also, on June 12, 2006, Parents' witness, Nanette Moore, briefly testified. Jurisdiction of the panel for the conclusion of the hearing then attached. After discussions, the Parties announced to the Panel that they believed the matter had been settled. (Tr. 1:1 p. 19). After several hours of attempting to formally resolve all issues, the Parties announced that the matter was not, and could not, be settled.

38. In the wake of the unraveling of settlement, and due to the illness of a key witness, the Parents' attorney requested a continuance in order to respond to the District's Motion to Dismiss, or in the Alternative, for Summary Judgment. The Parents further advocated that in the event the District's motion was granted at the conclusion of the case, Parents would incur substantial and unnecessary expenses. The District joined in the request for a continuance and the Parties advised the Panel that a new IEP would be forthcoming and an effort would be made to settle. (Tr. 1:1).

39. On June 15, 2006, the Panel Chair, at the request of the parties, issued an Order continuing the case for hearing to August 21-25, 2006, and to the extent needed, to October 2-6, 2006 with the decision to be rendered no later than December 5, 2006. (Panel Exhibit 37).

40. On or about June 21, 2006, the District filed a Motion to Dismiss, or in the Alternative, for Summary Judgment and suggestions in support, which supplemented its motion filed on June 12, 2006. (Panel Exhibit 38).

41. On or about July 27, 2006, the Parents filed their opposition to the District's Motion to Dismiss, or in the Alternative, for Summary Judgment. (Panel Exhibit 39).

42. On June 28, 2006, at the mutual request of the parties, the hearing set for August 21-25, 2006 was vacated by the Panel Chair, and rescheduled for October 16-20, 2006, resulting in scheduled hearing dates of October 2-6, 2006 and October 16-20, 2006, with the decision to

be rendered on or before December 20, 2006, with the Panel again noting that due to "stay-put", the Student's education would not be affected. (Panel Exhibit 40).

43. On July 3, 2006, Student's Parents filed with DESE a notice of request for due process hearing concerning their son's IEP of June 2006. (Panel Exhibit 41).

44. On or about August 24, 2006, the Parties filed a joint Motion to Consolidate the due process hearing request filed by Parents on July 3, 2006, with this due process hearing. (Panel Exhibit 42).

45. On August 29, 2006, the Panel Chair issued an Order denying the District's second Motion to Dismiss, or in the alternative, for Summary Judgment. In addition, the Parties' joint Motion to Consolidate was granted. Furthermore, Jerry Wright, the original Panel Member designated by the District, was replaced by Karen Karns. Finally, the Panel Chair ordered additional hearing dates of November 13-15, 2006. (Panel Exhibit 43).

46. On or about August 31, 2006, the District filed a motion to recommence the hearing on October 3, 2006 as opposed to October 2, 2006. (Panel Exhibit 45).

47. On September 5, 2006, the Panel Chair issued an Order granting the one day delay for the recommencement of the hearing on October 3, 2006. (Panel Exhibit 46).

48. On September 8, 2006, the Chair Person issued an Order to resolve disputes between the Parties concerning the taking of depositions. (Panel Exhibit 47).

49. Subsequently, the District filed a Motion for Witness Sequestration and Motion in Limine.

50. On September 22, 2006, the Panel Chair issued an Order granting the District's Motion for Witness Sequestration. (Panel Exhibit 48).

51. On or about September 25, 2006, the Parents filed a response to the District's Motion in Limine and also filed a request for clarification and/or modification of the Order of September 22, 2006. (Panel Exhibit 49).

52. On or about September 26, 2006, the District filed a reply memorandum in support of its Motion in Limine. (Panel Exhibit 50).

53. On September 28, 2006, the Panel Chair issued an Order granting the District's Motion in Limine. In addition, said Order clarified the Order of September 22, 2006, regarding sequestration of witnesses. (Panel Exhibit 51).

54. On October 3, 4, 5, 6, 16, 17, 18, and 19, testimony was presented at the hearing.

55. On November 8, 2006, the Parents' attorney requested a continuance of the hearing from November 13, 14, and 15, 2006. (Panel Exhibit 52).

56. On November 9, 2006, a telephonic conference was held between the attorneys and the Panel Chair during which time it was mutually agreed that the hearing would be continued from November 13, 14, and 15 and re-set for hearing on February 12, 13, 14 and 15, 2007, and a decision would be rendered on or before March 16, 2007. In the event the hearing was not concluded on or before February 15, 2007, additional dates of March 13, 14 and 15, 2007 were set aside for hearing dates, in which case the decision would be rendered on or before April 27, 2007. (Panel Exhibit 53).

57. On February 12, 13, 14, and 15, 2007, testimony was presented at the hearing.

58. On March 1, 2007, a telephonic conference was held between the Panel Chair and counsel for the Parties to discuss the duration of the hearing. In the event the hearing could not be concluded on March 15, 2007, additional hearing dates of May 1 and 18, 2007, were set aside

by the Panel Chair, with the decision to be rendered on or before July 18, 2007. (Panel Exhibit 54).

59. The hearing reconvened on March 13, 14 and 15, 2007. The Parents rested their case on March 14, 2007.[4] (Tr. 15:1497). After the District rested its case on March 15, 2007, the Parents advised that they wished to call a rebuttal witness (Molly Pomeroy) who could not be present at that time. (Tr. 16:1959). The Panel Chair granted the Parents' request to call Ms. Pomeroy in rebuttal, and scheduled that testimony for April 26, 2007. (Tr. 16:1968). Thereafter, the Panel Chair ordered that the Parties submit their post-hearing briefs by June 15, 2007, and advised that a decision would be rendered by July 16, 2007. (Tr. 16:1970). On March 20, 2007, the Panel Chair issued a confirming written Order.

60. Ms. Pomeroy testified in person on April 26, 2007 before a court reporter, and in the presence of Ms. Karns and Ms. McClure. Counsel and the Panel Chair participated by telephone. (Tr. 17:1987).

61. On May 24, 2007, the Panel Chair entered an Order granting the Parents' uncontested motion for an extension of time to submit post-hearing briefs, extending that deadline until July 2, 2007. The deadline for a decision was extended until July 30, 2007.

62. On June 22, 2007, the District filed an unopposed motion for an extension of time until July 9, 2007 to submit post-hearing briefs. The Panel Chair granted that motion, and also extended the deadline for a decision until August 6, 2007.

63. During the hearing, exhibits were introduced and received into evidence. On March 20, 2007, the Panel Chair issued an order specifying those exhibits that had been

[4] During the Parents' case, the District was given permission to call one of its witnesses (Dr. Deana Peterson) out of turn.

introduced into evidence. On July 3, 2007, the Panel Chair issued a subsequent Order modifying certain aspects of the March 20, 2007 Order.

The continuances were granted with the assurance and understanding that due to stay-put, the Student's education at the Parents' chosen placement would not be affected.

C. Background Facts

64. Student was born on January 28, 2000. (Dist. Ex. 11).

65. On January 9, 2003, the District conducted an evaluation staffing for the Student for the purpose of determining his eligibility for Part B services. The staffing participants concluded that the Student met the eligibility criteria for a Young Child with a Developmental Delay. (Dist. Ex. 11).

66. The District proceeded to generate an IEP for the Student in January, 2003, (Dist. Ex. 12) although the Parents were still providing services for their son through a home-based program. (Tr. 14:1332).

67. On or about February 27, 2004, another IEP was developed for the Student with the participation of his Mother. (Dist. Ex. 13).

68. Pursuant to the IEP developed in late February, 2004, the Student attended Bright Beginnings, the early childhood special education program in the Park Hill School District, for approximately 15 school days between April 5, 2004 and May 4, 2004. (Tr. 14:1335-1336).

69. Mother allowed the Student to attend Bright Beginnings "[t]o see if it would work." (Tr. 14:1221). On April 5, 2004, the first day that the Student attended Bright Beginnings, Mother filed a due process hearing complaint against the District. (Dist. Ex. 15).

70. The Parents withdrew the Student from the District on or about May 5, 2004, (Dist. Ex. 9) because the Student's experience at Bright Beginnings was, according to Mother, a

"disaster." (Tr. 14:1221). Mother based her opinion primarily on incidents where either the Student or his twin brother ran away after being dropped off at Bright Beginnings, and the Student then bit another child. (Tr. 14:1221-23). Mother also believed that the Student seemed to be regressing in things he had already mastered although there was no evidence of specific examples of the Student's regression while at Bright Beginnings.

71. Subsequently, the Parents elected not to allow the Student to attend the District's autism classroom at Graden Elementary because they believed it would be similar to the early childhood classroom at Bright Beginnings. (Tr. 14:1307-08).

72. Beginning in approximately August, 2004, and continuing through the present, the Student has been enrolled at Partners in Behavioral Milestones ("PBM"), a private facility located in Kansas City, Missouri. (Tr. 11:612). PBM operates an early childhood facility, called Milestones Academy Professional Services ("MAPS"), which the Student has attended the entire time he has been at PBM. (Tr. 10:459). During the hearing, the parties referred to MAPS and PBM interchangeably. The Panel will do likewise in this opinion, unless the context requires otherwise.

73. On December 8, 2004, the District and the Parents entered into a settlement agreement regarding the due process complaint filed by the Parents earlier that year. (Dist. Ex. 18). Among other things, the District agreed to pay for certain tuition and mileage expenses associated with the Student's attendance at PBM through July 31, 2005. *Id.* Under the terms of the settlement agreement, the District denied any liability to the Parents, settling the Parents' claims only to avoid the expense and uncertainty of litigation. *Id.*

D. Development and Description of District's Austin Program

74. The District developed its own autism program in 2003, after Deana Peterson[5] and JoAnn Higgins[6] visited several programs in Missouri and Kansas used by other school districts and reviewed academic research on the subject. The District's program incorporated both classroom activities and individual instruction. (Tr. 6:137-38).

75. The autism classroom in which the Student would have received services from the District was located at Graden Elementary School. (Tr. 4:45). Graden is attended by approximately 500 children in grades K-5. (Tr. 4:165). It has both regular education and special education students, which affords special education students the opportunity to be mainstreamed with typically-developing peers in a number of ways. (Tr. 4:165-66). This provides special education students the ability to generalize skills they learn in the special education classroom by putting them to functional use in their interactions with non-disabled students in places such as the lunchroom, hallways or the playground. (Tr. 4:167-68).

76. Mindy Weinzerl's[7] classroom would have had no more than six students in it at a time. (Tr. 4:31). At a minimum, Ms. Weinzerl would teach the class with the assistance of three

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[5] Deana Peterson is the District's former Director of Special Services. (Tr. 6:133). Dr. Peterson's credentials are set forth in Dist. Ex. 2. She is certified to administer and teach special education in the State of Missouri. (Tr. 6:134-35) Dr. Peterson left the District as of July 1, 2005, but was involved to some extent in the development of the Student's IEP in May and June of 2005. (Tr. 6:145-47) Dr. Peterson has extensive experience in educating children with autism. (Tr. 6:130-136)

[6] JoAnn Higgins is a diagnostic clinician for the District, with undergraduate and graduate degrees in special education. (Tr. 8-2:69) (The reporting firm that prepared the transcript of the hearing created two separate volumes for testimony taken on October 18, 2006, denominating one as Volume VIII and the other as Volume VIII-Continued. However, each of these volumes begins at page number one. The first Volume VIII shall be cited as (Tr. 8-1:yyy) and the second Volume VIII shall be cited as (Tr. 8-2:yyy).) Ms. Higgins has been a special education teacher and administrator for the District for 29 years, with significant experience in educating students with autism. (Tr. 8:69-71)

[7] Mindy Weinzerl is a special education teacher for the District. (Tr. 9:160) Ms. Weinzerl would have been the teacher assigned to the Student had he attended the school in the District in either the 2005/2006 or 2006/2007 school years. (Tr. 9:192-94) Ms. Weinzerl received a bachelor's decree in special education in 2002, and has been teaching students with autism in the District since that time. (Tr. 9:161-62) In addition to her college education, Ms. Weinzerl has received training on a number of topics relating to the education of autistic children. (Tr. 9:288) and worked as a home implementer for six children with autism before starting with the District. (Tr. 9:287-88)

teacher assistants, resulting in a minimum staff-to-student ratio of four adults to six children. (Dist. Ex. 46). The District's teacher assistants were required to have no less than 60 hours of college credit, and to receive specialized training. (Tr. 4:24-25).

77. Dr. Edna Smith[8], whose credibility was firmly established by her impressive and extensive background and experience in the field of autism, testified that in the past, the District has added personnel if needed to reduce the staff to student ratio, based upon the needs of the children in a setting. (Tr. 16:1958). Furthermore, the District would not allow the autism classroom to have more than six students in it; if more than six students enrolled in the District who needed to be educated in a self-contained autism classroom, an additional classroom would have been opened up. (Tr. 4:30-31).

78. The District's autism program utilizes a variety of methodologies that are based upon academic research. (Tr. 15:1517-18). Among those methodologies are discrete trial teaching, in which a task is broken down into smaller steps, with data collected on how the student progresses on each small step, and with the student given a "reinforcer" (typically, an item preferred by the student, such as food) for correct responses. (Tr. 10:474).

79. Another methodology used by the District is incidental teaching, in which the student performs a preferred task while in the course of another activity. (Tr. 15:1515). One purpose of this methodology is to teach a student how to generalize a skill learned in one setting (for instance, in discrete trial teaching) in a different setting. (Tr. 15:1517).

80. Another methodology used by the District is pivotal response training, where the student is taught a particular behavior that is central to a number of other responses. (Tr.

[8] Dr. Edna Smith is the Autism Coach for the District. (Tr. 15:1498) Dr. Smith's credentials are reflected in District Exhibit 3. Dr. Smith has extensive academic and practical experience in educating children with autism. She has spent the last 20 years working exclusively on educating children with autism, and spent more than 20 years prior to that working off and on with students with autism. (Tr. 15:1501)

15:1516). This methodology is also useful for generalizing skills, and for maintaining previously acquired skills, and can teach a child about the importance of a particular behavior in less time than under a discrete trial approach. *Id.*

81. The District also uses the structured teaching methodology from the TEACCH program, in which the student's physical environment and time are structured. (Tr. 15:1521). This methodology uses visual supports and schedules so the child knows what to expect. (Tr. 15:1521-23). This in turn can help to reduce problem behaviors by reducing uncertainties in the schedule and routine of a student with autism. (Tr. 15:1521-22).

82. The particular methodology that will be used with a child at a given time in the District depends on the teacher's understanding of the child's needs at that time. (Tr. 15:1523). As Dr. Smith noted, "when you've got a professional teacher, then that teacher needs to use their best judgment as to what strategy they're going to use with that child." (*Id.*)

83. The District's approach to educating students with autism has had success. Students have made progress toward their goals and objectives, and in some cases, have been able to attend classes with non-disabled students. (Tr. 15:1526-28).

84. Ms. Weinzerl had a general schedule that was used in her classroom. (Dist. Exs. 7 and 46). That schedule provided for some one-on-one instruction for the Student, but the precise amount of one-on-one instruction would have been determined based upon his specific needs after he began at Graden, which in turn would have been based upon his behaviors and his progress on his goals and objectives. (Tr. 3:189-90; 9:351-52). This would be determined by the classroom teacher, in consultation with Dr. Smith. (Tr. 16:1954). Furthermore, if the Student's needs for one-on-one services were such that the District was required to hire additional staff, the District was prepared to do so. (Tr. 16:1852-53; 16:1958).

85. The Parents' primary criticism of the District is for not specifying a specific number of hours of one-on-one instruction for the Student in his IEP. Mother testified that she wanted one-on-one instruction for her son because "that's how he learns." (Tr. 14:1227). Representatives from PBM believed that one-on-one instruction for the Student was needed, although no specific data was presented to determine how the Student might perform when receiving instruction in a setting other than one-on-one.

86. The Parents also contend that the District's IEPs were inadequate because they did not specify that all hours of the desired one-on-one time would be devoted to "errorless learning." Errorless learning was described by Jessica Royer[9] as a "prompting strategy," (Tr. 11:770) in which the student is prompted with the correct answer before the student can make an incorrect response. (Tr. 10:467).

87. The Parents felt strongly that specific methodologies should be mandated and were critical that the District was reserving the right to utilize its professional judgment in deciding on the precise way in which services were to be delivered to the Student. However, PBM clearly exercised professional judgment in educating the Student. For example, Ms. Royer testified that she uses her professional judgment in deciding on the particular prompting strategy to be used in implementing a program at PBM, and that prompting strategies *other than* errorless teaching (specifically, shaping) have in fact been used with the Student. (Tr. 11:770-75). Ms. Pomeroy likewise qualified the extent to which errorless teaching would in fact be employed, testifying that when working on generalizing a skill, errorless learning would be used "if needed." (Tr. 13:1167). Dr. Smith personally observed MAPS personnel using strategies other than errorless prompting (Tr. 15:1536-37) and also noted that MAPS' use of a timeout room (as

[9] Jessica Royer, along with her husband Corey Royer, own and operate PBM. (Tr. 11:686) Ms. Royer has undergraduate and master's degrees in early childhood education and behavior analysis. (Tr. 10:418) Ms. Royer is a Board Certified Behavioral Analyst. (Tr. 10:418) Ms. Royer is not a certified teacher. (Tr. 11:717)

specified under a behavior plan developed at MAPS for the Student) is inconsistent with errorless teaching because it teaches the Student that there is a consequence to inappropriate behavior. (Tr. 15:1538).

88. Moreover, Dr. Smith testified that it would be professionally inappropriate to use errorless teaching exclusively, because there are times when other strategies are more effective, and because there are times when a child must understand that he will not be reinforced for making the incorrect response. (Tr. 15:1534-35). The exclusive use of errorless teaching can also introduce prompt dependency, in which the child will never attempt to respond to a request before being given the prompt to do it errorlessly. (Tr. 15:1535-36).

89. Ms. Weinzerl, who had conducted observations at PBM, believed that her classroom was comparable to PBM's from a sensory standpoint. (Tr. 9:278). Ms. Royer testified that in her view (although she had never observed the Graden classroom), the Graden environment was not "low sensory" because it did not have a separate teaching area to cut down on distractions. (Tr. 10:538-39). Yet Ms. Pomeroy testified that one of the positive aspects of the Graden classroom was that it did have "identified cubbied areas for one-on-one work." (Tr. 13:1197-98).

90. In regard to sensory issues, Ms. Pomeroy testified that the Graden classroom would have been distracting for the Student because of pictures on the walls, and items near his work desk, but the Panel does not believe that these items, in and of themselves, meant that the Student's IEPs were not appropriate. Rather, the Panel finds, based upon the testimony of District personnel, that if they believed these items in fact were hindering the Student's progress once he began school at Graden, the necessary corrections would have been made. Such

corrections would have been relatively minor, and are no different than the changes in teaching strategies that are sometimes needed to help a student succeed.

91. The Parents also contended that the Student was to be educated exclusively with positive reinforcement. However, there was no evidence presented that the District used negative reinforcement, or for that matter, anything *other than* positive reinforcement, in teaching students with autism. Ms. Pomeroy questioned whether Ms. Weinzerl would have used precisely the same reinforcement techniques that were used at PBM based upon Ms. Pomeroy's observation of Ms. Weinzerl's classroom. (Tr. 13:1069-69). However, there was no evidence that the reinforcement techniques Ms. Pomeroy observed at Graden were inappropriate for the children present in Ms. Weinzerl's classroom at the time of Ms. Pomeroy's observation.

E. June 2005 IEP

92. On or about March 10, 2005, the District notified the Parents that an IEP meeting for the Student was being scheduled for April 20, 2005. (Parent Ex. 117).

93. On or about April 11, 2005, PBM delivered to the District some suggestions for the Present Level of Educational Performance (PLEP) section of the Student's IEP. (Dist. Ex. 26).

94. The IEP was rescheduled for May 6, 2005, and proper notice thereof was delivered to the Parents. (Dist. Ex. 28).

95. Prior to the May 6, 2005 IEP meeting, Dr. Peterson, Ms. Weinzerl, Ms. Higgins, and Julie Bates had observed the Student at PBM. Dr. Peterson made several observations. (Tr. 6:143-44; 6:209-10; 9:172-73).

96. In addition to these observations, the District's staff reviewed PBM's suggestions for the Student's PLEP, PBM progress reports, and his evaluation report. (Dist. Exs. 11, 22, 23, 24 and 26; Tr. 6:205-08; 9:254-55).

97. Based upon their observations and the documents they reviewed, District staff met prior to the May 6, 2005 IEP to develop a draft IEP for the Student. (Dist. Ex. 30; Tr. 6:205-11; 9:171-72).

98. Mother and those assisting her received a copy of the draft IEP at or before the May 6, 2005 IEP meeting. (Dist. Ex. 30; Tr. 12:794-95; 12:826-27).

99. Mother was accompanied at the IEP meeting by Ms. Royer, Ms. Pomeroy and Rand Hodgson.[10] Each attended the entire IEP meeting and provided input on the present level of performance, goals and objectives and other concerns. (Tr. 5:121; 9:201-03; 10:509-16; 14:1343-44).

100. At the beginning of the May 6, 2005 IEP meeting, Rand Hodgson, the Parents' advocate, advised that the focus of the meeting was to transition the Student into the District. (Tr. 8-2:74-75). The essence of this statement was confirmed by Mother. (Tr. 14:1344-46) . There was no specific request at the IEP meeting that PBM be considered as a placement for the Student. (Tr. 8-2:85; 12:861).

101. Following the May 6, 2005 IEP meeting, the District revised the draft IEP to incorporate the discussions that occurred at the meeting, and sent that copy of the IEP to the Parents on May 20, 2005. (Dist. Ex. 31).

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[10] Rand Hodgson is a disability advocate. He does not hold a college degree or a teaching certificate and he has never taught in a public school system. Mr. Hodgson has extensive experience in the special education process. (Tr. 5:213-14) Mr. Hodgson testified that his role in IEP meetings was to make sure that the IEP meetings run "smoothly" and that his client's concerns are addressed in the IEP, including concerns with the present level of performance, goals and objectives, accommodations and modifications. (Tr. 5:214-15)

102. On May 27, 2005, Mother sent a letter to Dr. Gayden Carruth, the District's former Superintendent. (Dist. Ex. 32). The letter requested that certain additions be made to the PLEP section, that certain changes be made to the goals and objectives, and that the Student be provided with 30 hours of one on one time per week. The letter did not specifically request a functional behavior assessment, a behavior intervention plan, a transition plan, changes to any of the baseline information provided with respect to any of the goals or objectives, additional goals or objectives relating to the maintenance of skills obtained by the Student at PBM, revision of any goals to make them more clear, or that the District consider placing the Student at PBM.

103. Mother received help in drafting District's Exhibit 32 from Chelle Yaekel, a member of PBM's staff who assisted with the implementation of the Student's program there, and Mr. Hodgson. (Tr. 14:1353-54).

104. Mr. Hodgson testified that if he did not express a concern or objection over a component of an IEP, then it was reasonable for the District's members of the IEP team to assume that he and the Parents believed that area of the IEP to be acceptable. (Tr. 5:217-18).

105. Based upon Mother's suggestions, the District once again revised the Student's IEP and provided a second revised IEP to Parents on or about June 3, 2005. (Dist. Ex. 35).

106. According to Mother, the PLEP section of the June 3, 2005 version of the Student's IEP was accurate. (Tr. 14:1355). The Panel concludes that the PLEP section of the June 2005 IEP was accurate.

107. On June 3, 2005, the District provided a Notice of Action to Parents informing them that the District accepted the following requests for modifications to the IEP made by Mother in her May 27 letter: (a) additional concerns of the parent were added to the PLEP section; (b) a reference to diet restrictions was added to Part 1 of the PLEP section; (c) objectives

for transitioning and staying on task were added to goal 2; (d) objectives for holding a pencil and coloring were added to goal 3, objective 1; and (e) objectives for receptive and expressive labeling were added to goal 4, objectives 1 and 3. (Dist. Ex. 36).

108. On June 3, 2005, the District also provided a Notice of Action to the Parents informing them that the District rejected the following requests for modifications to the IEP made by Mother in her May 27 letter: (a) 30 hours of one-on-one instruction per week; (b) locked doors in the school (due to fire codes); (c) the addition of a food expansion plan since this was a medical issue (although the District noted that it would support such a plan at school); (d) the addition of academic goals relating to letters and numbers, because the Student was not deemed developmentally ready for those skills at that time; (e) the addition of certain social/emotional skills as those skills would be addressed through peer interaction in the autism classroom; (f) the addition of a toilet training objective as that would also be addressed through the curriculum in the autism classroom; and (g) a "recognizing boundaries" objective as that would also be addressed through the curriculum in the autism classroom. (Dist. Ex. 37).

109. The items that were rejected by the District had been discussed at the IEP meeting. (Tr. 14:1402-06).

110. On June 8, 2005, Mother filed a request for due process with DESE alleging that the District's June 3, 2005 IEP failed to provide a FAPE for the Student. (Panel Exhibit 1).

111. On February 7, 2006, the District notified Mother of a meeting scheduled for February 17, 2006 in which existing data would be reviewed as part of a reevaluation of the Student. (Dist. Ex. 54).

112. That meeting was held on February 17, 2006, and resulted in a change of the Student's disability classification from "Young Child with a Developmental Delay" to "Autism."

The Student was no longer age appropriate for the YCDD diagnosis, and there was sufficient data to show that he met the eligibility criteria for Autism. (Dist. Ex. 55).

113. Parents contested the adequacy and appropriateness of the notices of action. The Panel concludes, as detailed below, that the notices of action were adequate relating to the June 2005 IEP and the June 2006 IEP.

114. The parties hotly contested the adequacy and appropriateness of the goals and objectives stated in the June 2005 IEP. The Panel concludes, as detailed below, that the goals and objectives were not appropriate as they did not, without a behavior plan, adequately address the Student's behaviors.

115. The Parents contend that the June 2005 IEP was also deficient because, on the face of the IEP, continued placement at PBM was not considered. The Panel has concerns about the apparent failure of the June 2005 IEP team to consider placement a PBM. These concerns are discussed below.

116. There was consensus by the June 2005 IEP team that the Student had behaviors that interfered with his learning and the learning of others. (Tr. 3:195-196).

117. In regard to the June 2005 IEP, if Student's behaviors were not adequately addressed, no significant educational gains would be obtained. (Tr. 3:197).

118. In regard to the June 2005 IEP, the Student needed behavior intervention. (Tr. 3:101). No behavior intervention plan was formulated.

119. The program as offered by the June 2005 IEP was not appropriate in the absence of appropriate strategies to address the Student's behavior, such as a behavior intervention plan. (Tr. 3:199). The four goals with Benchmarks/objectives contained within the June 2005 IEP did not adequately address the Student's behaviors as expressed in the PLEP.

120. In regard to the June 2005 IEP, the Student had transition challenges and he needed strategies such as a transition plan to address the challenges he would face were he to attend Graden. (Tr. 3:221-222).

121. No transition plan was formulated by the May-June 2005 IEP team.

122. The program offered by the District as set forth in the June 2005 IEP would not have provided the Student with a FAPE, given the lack of needed strategies addressing the Student's behavior such as a behavior intervention plan and lack of appropriate consideration to his transition to Graden.

F. June 2006 IEP

123. On June 12, 2006, the District sent the Parents a Notice of Meeting, whereby an IEP meeting for the Student was scheduled for June 28, 2006. (Dist. Ex. 64).

124. Prior to the June 2006 IEP meeting, PBM sent to the District a program review reflecting the Student's progress on various programs at PBM. Included with that document was a written Behavior Plan that had been developed for the Student in May 2006 by PBM. (Dist. Ex. 62). This Behavior Plan was inadvertently left off the June 2006 IEP.

125. Also prior to the June 2006 IEP meeting, PBM sent to the District Present Level of Educational Performance Suggestions for the Student's IEP. (Dist. Ex. 65).

126. The June 2006 IEP was developed after many hours of observation of the Student by the District's personnel at PBM and considered much data provided by PBM and contained 12 meaningful goals and objectives and accurately stated the Student's Present Level of Academic Achievement and Functional Performance ("PLAAFP").

127. The Parents refused to consent to the June 2006 IEP because "[it] wasn't what [they] had asked for in the beginning." According to Mother, the District is required to give her what she asks for "if it pertains to the needs of my son (the Student)." (Tr. 14:1217).

128. Prior to the June 2006 IEP meeting, District staff, including Jackie Chatman[11], Dr. Edna Smith (Autism Coach), Jackie Jones (Physical Therapist), Dana Worley (Occupational Therapist), Kristen Griesel (Speech Therapist), JoAnn Higgins (Diagnostic Clinician) and Mindy Weinzerl (Special Education Teacher) all observed the Student while receiving services at MAPS. (Tr. 3:72-75; 4:126-27, 146-47; 5:83-84; 8:136; 9:174; 15:1528-30, 1538).

129. District staff utilized PBM's progress reports, information gained through observations of the Student, and conversations with PBM personnel and Mother to create a draft IEP. (Tr. 4:126-27; Dist. Ex. 66).

130. On June 23, 2006, Ms. Chatman sent the draft IEP to Mother; at the IEP meeting, Mother acknowledged having read the document before the meeting. (Dist. Ex. 66; Tr. 4:148).

131. On June 28, 2006, the Student's IEP team met to consider an IEP for the following school year. Mother was accompanied by Colleen Schwalm, who was the assistant director of MAPS. (Tr. 4:129-130). The other participants in that meeting were Jackie Chatman, LEA Representative; Mindy Weinzerl, Special Education Teacher and Regular Education Teacher; JoAnn Higgins, Individual Interpreting Instructional Implications of Evaluation Results; Kristen Griesel, Speech Therapist; Dana Worley, Occupational Therapist; Jackie Jones, Physical Therapist; LeAnn Halverstadt, Principal; and Dr. Edna Smith, Autism Coach. All of those that attended the June 2006 IEP meeting from the District had personally observed the

[11] Jackie Chatman is currently the District's Director of Special Services (Tr. 2:33), having obtained that position on or about July 1, 2005, and is certified by the State of Missouri to administer special education. Ms. Chatman's credentials are set forth in Dist. Ex. 1. Ms. Chatman has extensive experience in educating children with autism. (Tr. 4:166-67). Her testimony was particularly credible.

Student at MAPS, except LeAnn Halverstadt, illustrating the District's desire to fully understand the Student and his educational needs. (Dist. Ex. 69).

132. According to Mother, the present level of performance section of the final June 2006 IEP (Dist. Ex. 69) was accurate. (Tr. 14:1370).

133. District personnel went through each of the proposed goals in the IEP, asking Mother if she had any questions or concerns regarding them. Following the presentation of each goal, Mother said "I don't have any questions at this time," and neither she nor Ms. Schwalm requested any changes to the goals. (Tr. 4:149-50).

134. Mother testified that she did not request changes to the goals because she was already involved in a due process hearing over the prior year's IEP. (Tr. 14:1375-76). She further admitted that during the meeting, she was told that the Student would be provided one-on-one services to the extent they were needed. (Tr. 14:1376-77). She does not know whether, in fact, her son would have difficulties if he is no longer provided with strict one-on-one supervision through the course of a school day. (Tr. 14:1379-80).

135. The goals and objectives set forth in the June 2006 IEP were reasonably calculated to lead to meaningful progress including strategies for addressing behavior and safety issues for the Student for the reasons stated below.

136. Goal 1 was designed to improve the Student's functional gross motor skills, specifically with respect to balance, eye-hand and eye-foot coordination and cardiovascular fitness. These skills would enable the Student to play sports outside of school to promote socialization, and to participate more fully with regular education students during recess. (Tr. 9:332-33).

137. Goal 2 was designed to improve the Student's visual-motor skills, specifically through coloring a picture within one inch of the lines. These skills would eventually be helpful for the Student as he learned to write. (Tr. 9:335-36).

138. Goal 3 was designed to improve the Student's fine motor skills, specifically through the cutting of a circle within one-half inch of the line. These skills would enable the Student to perform more detailed cutting tasks either in his classroom or in an art class. (Tr. 9:336-38).

139. Goal 4 was designed to improve the Student's self-care skills, specifically through learning to independently fasten fasteners such as button, zippers and snaps. These skills are helpful as a part of toilet training, and also to promote independence in the Student's daily life. (Tr. 9:338-39).

140. Under Goal 5, the Student would match upper and lower case letters using different materials, choosing from a field of three. This goal teaches reading skills by requiring the Student to differentiate letters when shown in various colors and fonts; for example, the Student could learn to read signs pointing out a men's restroom in various locations, rather than learning only how such a sign looks at school. (Tr. 9:339-40).

141. Goal 6 would have taught the Student the sequence of his home phone number; aside from learning numbers, this is also an important safety skill so that the Student would know how to call his home if he were to ever become lost. (Tr. 9:340-41).

142. Goal 7 was designed to have the Student check his visual schedule and go to the area indicated on that schedule. Learning this skill independently would have allowed the Student to understand his daily routine, and therefore, to reduce his anxiety. (Tr. 9:341-342). As

Dr. Smith aptly noted, an autistic student who learns and understands his schedule is less likely to engage in problem behaviors. (Tr. 15:1521-22).

143. Goal 8 was intended to help the Student learn to remain on task and participate in circle time or other small group activities, when given prompts by the teacher. This goal would have enabled the Student to become less dependent upon an aide or implementer, and instead to respond to directives from the teacher. It would also promote safety in that he would learn to follow directives immediately when given, rather than relying upon someone else to help him follow the directive. Overall, this goal would help the Student gain more independence. (Tr. 9:342-44).

144. Goal 9 was intended to have the Student sequence the letters of his first and last name using a variety of materials, so that he could learn to spell out his name, and eventually to write his name. (Tr. 9:344).

145. Goal 10 called for the Student to increase his expressive language skills by going to his visual communication book and taking it to a communication partner. Specifically, he would create a sentence from the book, and take it to whomever he wanted to communicate with, perhaps to express a want or need. (Tr. 9:344-46). As Dr. Smith noted, being able to communicate one's wants and needs can often reduce behavioral problems, which are themselves often symptoms of an inability to communicate. (Tr. 15:1546-48).

146. Goal 11 would have increased the Student's ability to imitate physical movements so that he could learn sign language, which was sometimes used in Ms. Weinzerl's classroom. Again, this would have aided in the Student's ability to communicate. (Tr. 9:346-48). In fact, the Student was being taught sign language at PBM, at the Parents' request. (Dist. Ex. 56).

147. Goal 12 would have increased the Student's receptive language skills by having him match 40 objects to non-identical pictures of those objects. These skills would have helped to develop the Student's vocabulary. (Tr. 9:348-49).

148. Goal 13 would also have increased the Student's receptive language skills by having him comply with eight new commands. This would have also increased his vocabulary, and his ability to follow directives from his teachers or other staff. (Tr. 9:349-50).

149. The June 2006 IEP also provided for 120 minutes of speech therapy, 60 minutes of occupational therapy, 60 minutes of physical therapy/consult/monitor, 1560 minutes of specialized instruction in all academic areas, behavior and social skills per week, and the services of an autism consultant to support the classroom staff. (Dist. Ex. 69). The Panel believes that these times were adequate and appropriate for the Student, and notes that the special education services to be provided specifically includes behavior.

150. The District included a draft transition plan in the June 2006 IEP. (Dist. Ex. 69). However, the District did not complete all of the steps outlined in that transition plan because of the fact that the Parents filed a due process complaint regarding the June 2006 IEP on July 3, 2006 (Panel Ex. 41), and because of the District's understanding that completing the steps of the transition plan would not have resolved that complaint. (Tr. 4:137-42). In addition, since the Student was still attending MAPS, to make the transition plan more viable, additional, more current observations and data (as provided for in the Draft Transition Plan) would have been beneficial.

151. The June 2006 IEP provided that the Behavior Intervention Plan ("BIP") from MAPS would be attached to the IEP. (Dist. Ex. 69). The final version of the IEP sent to the Parents did not have the BIP attached which was due to an inadvertent oversight on the District's

part. (Tr. 4:135). The Student's Mother confirmed that the BIP from MAPS was not attached to the June 2006 IEP and was not sent to her as an attachment. (Tr. 14:1243). However, she "assumed" that the behavior plan created by PBM (MAPS) in May of 2006 (Dist. Ex. 62) was the behavior plan that was supposed to get attached to the June 2006 IEP. (Tr. 14:1381-1382). It is also a reasonable conclusion that, since the only behavior plan ever developed for the Student was the one in effect developed by MAPS, it was the one referred to in the IEP. Ms. Chatman concluded, after discussing the issue with Ms. Royer, that the BIP that had been recently developed by MAPS could be implemented at the District, even though the environment would change. (Tr. 4:143-46). The BIP that was sent to the District by PBM, and included in Dist. Ex. 62, was the BIP that was to be attached to the IEP. (Tr. 4:131-35).

152. During the June 28, 2006 IEP meeting, Mother requested that the District include in the IEP a provision that the District would provide 25 to 30 hours of one-on-one instruction using errorless teaching in a low sensory environment with positive behavioral supports. (Tr. 4:135-36; 9:265-66).

153. Following the June 2006 IEP meeting, the District sent the revised IEP, as well as a Notice of Action, to the Parents. (Dist. Exs. 67-69). In the Notice of Action, the District rejected "the parent's request for 27 hours of one-on-one errorless learning per week because the district believes that one-on-one errorless teaching is already incorporated into the Autism program at Graden Elementary. A specified number of one-on-one hours of errorless teaching are (sic) considered a request for methodology. Methodology is determined by the District." (Dist. Ex. 68). The Panel agrees that the request does relate to methodology, which is to be determined by the District.

G. Placement at PBM/MAPS

154. PBM utilizes "implementers" to work with the Student on a one-on-one basis to provide him with educational services. PBM implementers are not certified teachers and are not required to have any college credits. Some are high school graduates who received no more than two weeks of training at PBM before working one-on-one with severely autistic children. Often these implementers have no previous experience in providing educational services to students with disabilities. (Tr. 11:719-22). However, the implementers are guided and directed by Ms. Royer.

155. During the time of the hearing, MAPS had only three students: the Student, his twin brother, and a third child who attends half a day. All three are autistic. MAPS contains no typically developing peers for the Student with whom the Student could interact. (Tr. 5:86-87; 11:698-699; 707-708).

156. The Student has, as acknowledged by District personnel, made progress at PBM in some areas, such as behavioral control and pre-academics. (Tr. 4:163). However, he has not made significant progress in the areas of communication and socialization skills. (Tr. 4:163-64).

157. By entering into the 2004 settlement agreement between the parties, the District placed the Student at PBM which, implicitly, if not directly, confirms that PBM was an appropriate placement for the Student.

158. The District agreed the PBM was appropriate for the Student at the times in question involved in the hearing. (Tr. 3:123).

159. The District had placed other students at PBM/MAPS during the May-August 2005 timeframe. (Tr. 8:101).

160. For the above stated reasons, placement at PBM/MAPS was appropriate.

III. CONCLUSIONS – DECISION[12]

A. General Legal Standards Under the IDEA

1. Nature and Source of the IDEA Requirements

IDEA was adopted by Congress pursuant to the Spending Clause of the United States Constitution. *Schaffer v. Weast*, 126 S.Ct. 528, 531 (2005). Spending Clause legislation is essentially contractual in nature; states are free to accept or reject federal funding offered in conjunction with Spending Clause legislation, but if they accept federal funding, they are required to accept the conditions placed on the receipt of that money by the federal government. However, those conditions must be clear and unambiguous, before there can be knowing acceptance by states of the terms and conditions placed on the use of funds by Congress. *Pennhurst State Sch. and Hosp. v. Halderman*, 101 S.Ct. 1531, 1539-40 (1981).

The State of Missouri has enacted legislation to implement IDEA. Mo. Rev. Stat. § 162.670, *et seq*. Further, the Missouri Department of Elementary and Secondary Education (DESE) has adopted the *State Plan for Part B of the Individuals with Disabilities Education Act* (2005) ("State Plan"). The State Plan constitutes regulations of DESE that further define the rights and responsibilities of public school districts in the State, as well as those of disabled students and their parents.

Missouri law, at least in the context of the issues in this case, does not impose on school districts obligations that exceed those of the IDEA. *See* Mo. Rev. Stat. § 162.670 ("…it is hereby declared the policy of the state of Missouri to provide or to require public schools to provide to all handicapped and severely handicapped children within the ages prescribed herein, as an integral part of Missouri's system of gratuitous education, a free appropriate education

[12] The Panel has basically used the format of the issues as presented in the District's brief, and, given its often accurate and comprehensive analysis, has sometimes directly quoted therefrom, especially on the general legal standards of the IDEA, the law relating to notices of action, and the legal appropriateness of educational methodologies.

consistent with the provisions set forth in state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400 et seq. and any amendments thereto.") (Emphasis added.) *See also Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1035 (8th Cir. 2000).

2. Compliance with the IDEA

In analyzing whether the mandates of the IDEA have been met, we start with *Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982) wherein the United States Supreme Court pronounced:

> [A] court's inquiry in suits brought under §1415(e)(2) [of IDEA] is twofold. 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. *Id.*, pp. 206-207.

While subsequent law emphasizes the importance and focus on substantive compliance, the Panel will first address procedural compliance. Regardless of the order of analysis, the decision would be the same.

a. Procedural Compliance with the IDEA

The IDEA imposes significant procedural requirements on public school districts. *See generally* 20 U.S.C. § 1415. In its seminal *Rowley* decision, the Supreme Court stated 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*, 102 S.Ct. at 3050 (internal citations omitted).

Over the intervening years, however, lower federal courts have recognized the anomaly of permitting technical procedural violations to undermine an IEP that would have resulted in the student making educational progress. "[C]ircuits that have addressed th[e] question head on

have consistently held that 'procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity.'" *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 811-12 (5th Cir. 2003); *accord DiBuo v. Board of Educ.*, 309 F.3d 184, 190 (4th Cir. 2002); *T.S. v. Indep. Sch. Dist. No. 54*, 265 F.3d 1090, 1095 (10th Cir. 2001); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001); *Urban v. Jefferson Co. Sch. Dist.*, 89 F.3d 720, 726 (10th Cir. 1996); *Independent Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 562 (8th Cir. 1996); *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992); *Cordrey v. Euckert*, 917 F. 2d 1460 (6th Cir. 1990), *cert. denied* 449 U.S. 938 (1991); *Mandy S. v. Fulton Cty. Sch. Dist.*, 205 F. Supp. 2d 1358 (N.D. Ga. 2000).

In 2004, Congress codified the lower courts' movement away from allowing cases to turn on strict procedural compliance with IDEA. Specifically, Section 1415 was amended to de-emphasize the role of procedural irregularities, requiring that due process hearing officers focus their decisions on the substance of a student's IEP:

> (E) Decision of hearing officer. –
>
> (i) In general. – Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.
>
> (ii) Procedural issues. – In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies –
>
> (I) impeded the child's right to a free appropriate public education;
>
> (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or
>
> (III) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E).

b. Substantive Compliance with the IDEA

The substantive heart of the IDEA is its requirement that a disabled child be provided with access to a "free appropriate public education." ("FAPE"). *Rowley*, 102 St. Ct. at 3034. The term "free appropriate public education" is defined by 34 C.F.R. § 300.17:

> *Free appropriate public education* or *FAPE* means special education and related services that – (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include an appropriate preschool, elementary school, or secondary school education in the State; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320-300.324.

IDEA is designed to enable children with disabilities to have access to a free appropriate public education that is designed to meet their particular needs. *O'Toole v. Olathe Unified Sch. Dist. No. 233,* 144 F.3d 692, 698 (10th Cir. 1998). IDEA requires the District to provide a child with a disability with a "basic floor of opportunity. . . which [is] individually designed to provide educational benefit to the handicapped child." *Rowley*, 102 S. Ct. 3034, 3047.

In so doing, the IDEA does not require that a school district "either maximize a student's potential or provide the best possible education at public expense," *Rowley,* 102 S. Ct. 3034, 3049; *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1840 (1998); *Rowley*, 102 S.Ct. at 3049; *Peterson v. Hastings Public Sch.*, 31 F.3d 705, 707-08 (8th Cir. 1994); *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163-164 (8th Cir. 1987). Likewise, the IDEA does not require a school district to provide a program that will "achieve outstanding results," *E.S. v. Indep. Sch. Dist. No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); that will provide "superior results," *Fort Zumwalt Sch. Dist., supra,* 119 F.3d at 613; or that will provide the placement the parents prefer. *Blackmon v. Springfield R-XII Sch. Dist.,* 198 F. 3d 648, 658 (8th Cir. 1999).

"[T]he law of [the Eighth] Circuit is clear. A school district meets the statutory obligation to provide a free appropriate public education by providing educational benefit. The statute does not require the school district to provide the best possible education." *Carl D. v. Special Sch. Dist. of St. Louis Co.*, 21 F. Supp. 2d 1042, 1047 (E.D. Mo. 1998). The IDEA is satisfied when the educational agency provides individualized education and services sufficient to provide the disabled child with "*some educational benefit*." *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (emphasis added). According to the United States Supreme Court, IDEA's goal is "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Rowley*, 102 S.Ct. at 3043.

3. Burden of Proof

The burden of proof in an IDEA due process hearing is placed upon the party seeking relief. *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005). Both of the due process complaints in this matter were filed by the Parents. Accordingly, the burden of proof on both issues to be determined by the Panel in this case rests with the Parents.

B. Findings-Conclusions as to the June 2005 and June 2006 IEPs

1. Procedural Compliance

a. Introduction

As noted previously, Congress in 2004 explicitly directed due process hearing officers to base their decisions on the substance of an IEP, and to find a denial of FAPE based upon procedural violations only in limited circumstances. The procedural violations asserted by the Parents must be viewed in that context.

b. Scope of Issues to be Considered

Under IDEA, the party requesting the hearing may not raise issues at the hearing that were not raised in the complaint. 15 U.S.C. § 1415(f)(3)(B).

The Parents' complaint relating to the June 2005 IEP (Panel Exhibit 1 as supplemented by Panel Exhibit 1-A) was initially found to be deficient (Panel Exhibit 23). The Parents then filed a response to the order that they file a more definite statement (Panel Exhibit 24), which the Panel construes as an amended due process complaint. Although this amended complaint contains a list of procedural and substantive defects in the June 2005 IEP, the evidence revolved around four main alleged procedural violations: (1) denial of parental participation; (2) failure to consider a private school placement for the Student; (3) lack of measurable goals in the IEP; and (4) the sufficiency of the Notices of Action explaining the District's decisions. During the hearing, the Panel ruled that the only alleged procedural violation that would be considered with respect to the June 2006 IEP was the Parents' allegation in the complaint (Panel Exhibit 41) that "the notice of action's (sic) are deficient." (Tr. 3:58-61; 3:181). Since the Parents' complaint did not assert any other procedural violations relating to the June 2006 IEP, they will not be considered by the Panel. 20 U.S.C.§ 1415(f)(3)(B).

i. Parental Participation

There is no basis for the Panel to conclude that the Parents were denied the right to participate in the development of the Student's IEPs. There is no dispute that District personnel did conduct a pre-meeting among themselves to prepare for the May 6, 2005 IEP meeting. However, such a pre-meeting is permissible, and even encouraged, by courts construing IDEA. *See Burilovich v. Bd. of Educ. of the Lincoln Consol. Sch.*, 208 F.3d 560, 568 (6th Cir. 2000); *N.L. v. Knox Cty. Sch.*, 315 F.3d 688, 694 (6th Cir. 2003).

On May 6, 2005, the District held the Student's IEP meeting. In addition to attending the meeting in person, Mother brought three other persons who had knowledge about the Student and his disability: Mr. Hodgson, parent advocate, Ms. Royer, and Ms. Pomeroy.

Each of these individuals provided substantial input on the IEP, including the present level of performance, goals and objectives, and modifications and accommodations. Furthermore, the draft IEP was revised in several places based upon the input of Mother and those who accompanied her at the meeting. This evidence refutes any notion that the Parents were denied the right to participate meaningfully in the development of the Student's IEP. *See Brown v. Bartholomew Consol. Sch. Corp.*, 2005 WL 552194, 5 (N.D. Ind. 2005), *vacated and remanded due to mootness arising during appeal*, 442 F.3d 588 (7th Cir. 2006) (although school district refused to yield on placement, the fact that other components of IEP were developed with input from parents and their representatives reflected appropriate parental participation); *see also Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 610 (6th Cir. 2006) (no denial of parental participation where parent actively participated in IEP meetings, made school district aware of her desires, and was able to be a significant part of the discussions concerning the student's IEP); *Paolella v. District of Columbia*, 2006 WL 3697318, 2 (D.D.C. Dec. 6, 2006) (no denial of parental participation where parents were involved in the development of the IEP itself, and they and their representatives were allowed to inform the school district of their requests; disagreement by school district with parent's requests does not show a denial of parental participation).

Mother attended, with representatives of her choice, and participated in, both IEPs. On occasion, she was specifically asked if she had any input or questions. The District revised the May-June 2005 IEP (Dist. Ex. 31) after receiving a letter from the Mother requesting changes to

that IEP (Dist. Ex. 32). The District adopted some of her suggestions, and rejected others, providing her with Notices of Action to explain its decisions (Dist. Exs. 36 and 37), and providing her with a revised IEP (Dist. Ex. 35). This procedure is acceptable. In *N.R. v. San Ramon Valley Unified Sch. Dist.*, 2007 WL 216323 (N.D. Cal. 2007), following IEP meetings that were attended by the student's mother, her attorney, and private service providers, the mother's attorney wrote a letter to the school district requesting that the IEP be revised. The school district proceeded to revise the goals on the IEP. During the ensuing due process hearing, the parent claimed that this revision violated her right to participate in the IEP process. The administrative law judge refused to find that the revision of the IEP violated IDEA, and that decision was affirmed by the district court. *Id.* at 15.

According to Mother, the items that were rejected by the District had been discussed at the IEP meeting. (Tr. 14:1311-12). Furthermore, Rand Hodgson advised her after she received the Notices of Action that she could request a new IEP meeting if she had additional information she wanted to share. (Tr. 6:45-46). She opted instead to file a due process complaint. (*Id.*)

Under these circumstances, and under the applicable law, there is no basis for concluding that the Parents were denied their right to participate in the development of the Student's IEPs.

ii. Placement Consideration

The Parents assert that the District violated IDEA when it did not consider their request that the Student be placed at MAPS, primarily as evidenced by the fact that such a placement was not discussed at the June 2005 IEP and the IEP itself does not reflect that the IEP team considered PBM as the block indicating whether a private separate school (day) facility was considered was not checked. Not surprisingly, the District takes issue with this position by maintaining that the evidence reflects that such a request was not made, and that the District is not required by law to consider a private placement.

The Parents, in support of their position that the District had an obligation to at least consider placement at PBM, cite the case of *Brimmer v. Travers City Area Public Schools*, 872 F.Supp.447, 453 (W.D. Mich. 1964), which basically holds that for a valid IEP, information integral to the placement decisions must be available and considered. *Id* at 453. On this issue, the District cites *W.S. v. Rye City Sch. Dist.*, 454 F.Supp. 2d 134 (S.D. N.Y. 2006), wherein the Court ruled:

> The parents' position rests on the proposition that a school district is required, as part of its assessment of how best to provide for a child's education, to canvass private schools for possible placements if so requested by the parents. That is a faulty reading of IDEA. The law requires the district to evaluate the child's needs and to determine what is necessary to afford the child a FAPE. If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in IDEA compels the school district to look for private school options if the CSE [Committee on Special Education, New York's equivalent of an IEP team], having identified the services needed by the child, concludes that those services can be provided in the public school. *Id.*, p. 48.

However, the reading of this excerpt imparts that for the *W.S.* case to be applicable, a district must first be in a position (and willing) to provide the needed services before consideration of outside placement does not become required.

Although courts have taken divergent approaches as to the depth to which an IEP team must consider placement options, in regard to the June 2005 IEP, the Panel believes that, given the Student's success at PBM, the apparent failure to consider placement at PBM would certainly not have been best practice, if not a procedural defect. Notwithstanding the foregoing, the Panel is not prepared to rule that failure to consider PBM as a placement option was a procedural defect rising to the level of a denial of a FAPE for the 2005-2006 school year.

The June 2006 IEP does, in fact, show that placement at a private separate (day) facility (obviously PBM since no other private separate facilities were ever involved) was considered. In addition, JoAnn Higgins, a member of the June 2006 IEP team, credibly testified that PBM was considered as a potential placement for the Student. (Tr. 8:21).

iii. Measurable Annual Goals

Federal regulations require that IEPs include "a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children)." 34 C.F.R. § 300.320(a)(1).

The Parents maintain that the goals in the June 2005 IEP were not measurable because there was insufficient baseline data in the IEP from which one could determine the Student's starting point on each of the goals and objectives in the IEP. Thus, the Parents argue, it is impossible to determine whether the Student would have made progress on those goals and objectives.

For the most part, the goals and objectives in the June 2005 IEP do tie directly into baseline information provided in the Present Level of Performance (PELP) section. For instance, goal 1, objective 1 was going to require the Student to sort four colors. The PLEP indicated that he was unable to sort colors. Goal 1, objective 2 called for the Student to match seven letters of his first and last name. Again, the PLEP indicated that he was unable to match letters. Goal 2, objective 1, relating to the Student's engagement in center time activities, was not related to any specific baseline data in the PLEP, but only because MAPS did not have such activities. (Tr. 8:112-113). All of the objectives in goal 3 were tied to specific baseline data in the PLEP. In goal 4, objective 2, the Student was to imitate 5 oral motor movements or sounds, but Section IV of the PLEP indicated that while he was vocalizing certain sounds, he was not imitating them.

Even where, however, a particular goal or objective is not tied to specific baseline data in the PLEP section, this does not necessarily constitute a violation of the IDEA. Any absence of baseline data is at most a procedural error, *Nack, supra*, 454 F.3d at 612, and therefore may not form the basis for relief unless the Parents have proven that it significantly impaired their ability to participate in the decision-making process, impeded the Student's right to a FAPE, or caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E).

A PLEP is not required to include baseline data with specific quantitative data on the number of times a student can exhibit a particular skill or deficit. Indeed, even the entire absence of present level of performance does not deny a student of FAPE if the parties involved knew the information through other means. *Doe v. Defendant I,* 898 F.2d 1186, 1189-91 (6th Cir. 1990); s*ee also Logue v. Shawnee Mission Unified Sch. Dist.*, 959 F.Supp. 1338, 1348 (D. Kan. 1997) (alleged defects in PLEP did not compromise the proposed program or the parents' participation, since the parents "were knowledgeable and well informed about [the Student's] strengths, weaknesses and current levels of performance").

The Parents in this case presented no evidence that they were unaware of the Student's true status with respect to any of the goals and objectives in the June 2005 IEP. Quite to the contrary, there was evidence that Mother attended regular meetings to discuss the Student's progress at MAPS, and that she reviewed the books of data collected by MAPS reflecting his day to day progress.

The Parents' advocate, Rand Hodgson, testified that he "understood the measurabilities" of the goals. (Tr. 6:32-33). Furthermore, Mr. Hodgson (and PBM staff members) assisted Mother in the preparation of her letter requesting modifications to the May 2005 version of the

June 2005 IEP, yet that letter makes no request that the PLEP section be modified to make the goals more measurable.

In *Las Virgenes Unified Sch. Dist.*, 104 LRP 44611 (Cal. SEA 2004), the parents and staff from the private school the student attended were given two weeks after an IEP meeting to review the IEP goals and to notify the school district of any requested changes. The parents did not avail themselves of that opportunity, yet advanced the same argument that the Parents are making in this case – that the PLEP section of the student's IEP was insufficiently specific. The hearing officer in that case rejected their argument, noting "it is disingenuous for the Student to now assert that the District failed to identify appropriately his present levels of performance." *Id.* at p. 13 (PDF version).

The goals set forth in the June 2006 IEP were IDEA compliant in all aspects, and of significant importance, addressed safety and behavior issues as will be discussed later in this decision.

iv. Notices of Action

The Parents also assert that the Notices of Action they received in connection with the IEPs, and the revisions thereto were insufficient. The Notice of Action with respect to the June 2005 IEP was admitted into evidence from page 216 of the Petitioners' Exhibits, and the Notices of Action with respect to the June 2005 revisions were admitted as District Exhibits 36 and 37. The Notices of Action with respect to the June 2006 IEP were admitted into evidence as Parents' Exs. 656-657.

20 U.S.C. § 1415(b)(3) requires that parents be given prior written notice whenever a school district "proposes to initiate or change, or refuses to initiate or change, the identification, evaluation or educational placement of a student." Similar notice must be given with respect to decisions regarding the provision of FAPE to a student. *Id.*

20 U.S.C. § 1415(c)(1) requires the prior written notice to include the following:

> (A) a description of the action proposed or refused by the agency;
>
> (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
>
> (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this [part] and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
>
> (D) sources for parents to contact to obtain assistance in understanding the provisions of this [part];
>
> (E) a description of other options considered by the IEP Team and the reason why those options were rejected; and
>
> (F) a description of the factors that are relevant to the agency's proposal or refusal.

"The purpose of the notice requirement is to ensure that parents receive sufficient information about where the agency proposes to place their child and why that placement was chosen, so that parents may reach an informed conclusion about whether the placement will provide an appropriate education. The information in the notice, along with the IEP, the MDT Report [evaluation], and all other information the agency has provided to the parents, should enable them to decide whether to contest the placement. If the notice provides such information, then it is sufficient." *Smith v. Squillacote*, 800 F.Supp. 993, 998 (D.D.C. 1992).

The Notices of Action provided by the District relating to both IEPs, to the Parents, contained all of the information required by statute. The Parents expressed dissatisfaction with the quality of some of the information provided, *e.g.*, the sections explaining the basis for the District's decisions do not set forth each and every piece of paper relied upon by the District.

However, as the *Smith* decision points out, the Notices of Action are not to be viewed in a vacuum. The Notices of Action are sufficient so long as they, in conjunction with the other available information, give the Parents enough information so that they can reach an informed conclusion about the propriety of a proposed placement.

The Panel concludes that in light of the purpose of the notice requirement, the Notices of Action were sufficient. Alternatively, if they were technically deficient in some respect, the Parents have failed to carry their burden of proving that the deficiencies substantially impaired their ability to participate in the IEP process or otherwise deprived the Student of FAPE. *See B.V. v. Department of Educ., State of Hawaii*, 451 F. Supp. 2d 1113, 1131 (D. Haw. 2005) (where parent placed student at private school knowing that public school district would refuse to fund the private placement, any flaws in the written notice denying the parents' request for funding did not deny the student an educational opportunity).

In District Exhibit 37, the District stated that it was rejecting the Parents' request for 30 hours per week of one on one, because the one on one time anticipated under the Student's June 2005 IEP (two and a half to three hours a day) would be appropriate to meet the goals and objectives on the IEP. In *Smith*, the court reversed a hearing officer's decision that the notice of a refusal to agree to a private placement was deficient, where the only reason stated in the notice was "because an appropriate public placement was available." *Smith*, 800 F.Supp. at 999. In *B.V.,* the parents' request for a private placement was denied with the explanation that the public school "is able to implement your child's IEP and is able to provide a [FAPE]." 451 F. Supp. 2d at 1131. The court found this statement to be sufficient. The District's Notices of Action in this case provided a similarly short, yet legally sufficient, explanation for each of the District's decisions.

In totality, the evidence reflects that between the Notices of Action, the Student's proposed IEP, his evaluation, and the other information known to Mother, she understood the District's decisions, even though she disagreed with them. Indeed, Mother testified that when she received the Notices of Action, she understood what the District was agreeing to do, and what it was refusing to do. (Tr. 14:1359). Her decision to place Student at PBM was based upon something the District refused to do, which further proves that the prior written notice requirement was satisfied.

B. Substantive Compliance

1. The Educational Methodologies Proposed for the Student's IEPs are Legally Appropriate.

As the District's brief points out, the real dispute between the Parents and the District revolves around the Parents' demand that the District commit to providing the Student with a specified number of hours of one-on-one errorless teaching, in a low sensory environment, with positive reinforcement. As discussed below, a school district is not required to commit to a particular methodology in an IEP; it necessarily follows that a school district is not required to commit to a particular prompting strategy (in essence a "sub-methodology") that will be used in educating a disabled child. (The Panel has used the District's brief on this point almost verbatim as it accurately and comprehensively addresses this point.)

IDEA grants parents the right to participate in making certain decisions regarding their child's education. However "parents do not thereby obtain the right to compel a school district to provide a specific educational program or use a specific methodology." *J.P. v. West Clark Comm. Sch.*, 230 F. Supp. 2d 910, 919 (S.D. Ind. 2002); *Lachman v. Illinois St. Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988) ("Rowley and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right under the [statute] to compel a school district to provide

a specific program or employ a specific methodology in providing for the education of their handicapped child"); *Renner v. Board of Educ. of the Pub. Sch. of City of Ann Arbor,* 185 F.3d 635, 645 (6th Cir. 1999) (citing to *Rowley*); *Roland M. v. Concord Sch. Comm.,* 910 F.2d 983, 992 (1st Cir. 1990); *Tucker v. Calloway Cty. Bd. of Educ.,* 136 F.3d 495, 505 (6th Cir. 1998); *Barnett v. Fairfax Co. Sch. Bd.,* 927 F.2d 146, 152 (4th Cir. 1991).

This general rule has been applied regularly in cases involving students with autism. In fact, "the clear weight of case law authority in autism methodology cases favors the District." *Wissahickon Sch. Dist.*, 41 IDELR 22, 3 (Pa. SEA, March 24, 2004), *citing Adam J. v. Keller Indep. Sch. Dist.,* 328 F.3d 804 (5th Cir. 2003); *Burilovich v. Bd. of Educ.*, 208 F.3d 560 (6th Cir. 2000); *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648 (8th Cir. 1999); *Dong v. Bd. of Educ.*, 197 F.3d 793 (6th Cir. 1999); *Adams v. State of Oregon*, 195 F.3d 1141 (9th Cir. 1999); *Renner v. Bd. of Educ.*, 185 F.3d 635 (6th Cir. 1999); *Tyler v. Northwest Indep. Sch. Dist.*, 202 F. Supp. 2d 557 (N.D. Tex. 2002); *J.B. v. Horry Co. Bd. of Educ.*, 36 IDELR 65 (D.S.C. 2001); *C.M. v. Bd. of Pub. Educ.*, 184 F. Supp. 2d 866 (W.D.N.C. 2002); *Pitchford v. Salem-Keizer Sch. Dist. No. 24J*, 155 F. Supp. 2d 1213 (D. Or. 2001); and *Wagner v. Short*, 63 F. Supp. 2d 672 (D. Md. 1999).

This case does not even present the sharp methodological dispute present in many of the above-cited cases; in many autism cases, the dispute revolves around the parent's request that a school district use only applied behavior analysis/discrete trial training ("ABA/DTT") methodologies, whereas the school district wishes to use a different specific methodolology. In this case, the District's methodologies are, according to Dr. Edna Smith, "based largely on the principles of applied behavior analysis." (Tr. 15:1514). (Although applied behavior analysis is

often associated solely with ABA/DTT, it is actually much broader; it is simply the application of the scientific method to behavior in education.)

However, the District also employs, from time to time, additional methodologies in its autism classroom aside from ABA/DTT. The District also uses, among others, incidental teaching, pivotal response training, and TEACCH. (Tr. 15:1514-23). The Parents offered no evidence that any of these methodologies lack a research basis.[13]

The District's approach was referred to by the Parents' counsel throughout the hearing as an "eclectic" approach, and Dr. Smith agreed with that characterization, to the extent it is defined as one that "doesn't use a single program or methodology." (Tr. 15:1625). However, as one federal court has noted, "it is not enough for [the parents] to invoke the word 'eclectic,' as if that were synonymous with 'unsound.' They still have to show that the particular approach used with [the student] was not reasonably calculated to provide him with meaningful educational benefits." *J.P. v. West Clark Comm. Schools*, 230 F. Supp. 2d 910, 935 (S.D. Ind. 2002).

The United States District Court for the Eastern District of Tennessee recently provided an exhaustive analysis of the relative merits of ABA/DTT and an "eclectic" approach, in *Deal v.*

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[13] The Parents have criticized the District's program on the alleged grounds that there is no academic, peer-reviewed research to support the use of multiple methodologies for an individual student. However, this criticism is misplaced, to the extent it is even legally relevant. 20 U.S.C. § 1414(d)(1)(A)(i)(IV) requires only that an IEP include "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research *to the extent practicable*, to be provided to the child…." (Emphasis added.) The italicized portion of this statute demonstrates that the requirement for "peer-reviewed" research is not absolute.
Furthermore, the Panel believes that it would be an unreasonable interpretation of IDEA to hold that a school district may only implement a particular blend of methodologies that has been subject to peer-reviewed research. Although IDEA has been amended several times since *Rowley* was decided, Congress has never felt the need to alter the Supreme Court's opinion that questions of methodology are best left to state and local education authorities. It would run completely counter to the purpose of IDEA for a school district to withhold the use of an accepted methodology that it believes would work for a student, simply because the use of that methodology in conjunction with the use of other accepted methodologies lacked specific research support.
Moreover, such a decision would lead to an impossibly slippery slope. For instance, suppose that an academic researcher presented a paper showing that a group of students made progress when 40% of their day was devoted to ABA/DTT, and 60% of their day was devoted to TEACCH methods. Under the Parents' interpretation, a school district that varied these percentages to meet the needs of an individual child would violate the law, because that particular recipe had not been tested.

Hamilton Co. Dept. of Ed., 46 IDELR 45 (E.D. Tenn., Apr. 3, 2006). In that case, the district court had reversed an ALJ's finding that the school district's "eclectic" program failed to meet the *Rowley* standard for a child with autism, and also reversed the ALJ's conclusion that the school district had committed actionable procedural violations of IDEA.

On appeal, the Sixth Circuit reversed the district court's judgment with respect to a couple of the alleged procedural violations, and further remanded the case for reconsideration of whether the school district's program was substantively appropriate. *Deal v. Hamilton Co. Dept. of Ed.*, 392 F.3d 840 (6th Cir. 2004). The Sixth Circuit instructed the district court to reconsider the case while applying a standard under which educational benefit was to be "gauged in relation to a child's potential." *Id*. at 864, *quoting Polk v. Central Susquehanna Intermed. Unit 16*, 853 F.2d 171, 185 (3d Cir.1988).

On remand, the district court concluded that the school district's "eclectic" approach met even the heightened standard imposed by the Sixth Circuit. *Deal*, 46 IDELR 45. In the process, the district court rejected the notion conveyed by many that the Lovaas study (relied upon by Ms. Royer in her testimony) proves conclusively that ABA/DTT is the most, if not only, effective way to educate children with autism.

The district court in *Deal* relied in large part on *Pitchford v. Salem-Keizer Sch. Dist. No. 24J*, 155 F. Supp. 2d 1213 (D. Ore. 2001). In that case, the court noted that Dr. Lovaas' study involved high functioning children with autism, which skewed the results of his study in favor of the methods used in the study. *Id*. at 1230-31. The *Pitchford* court therefore found that the general applicability of Lovaas' methods "to the broad range of autistic children is not clear." *Id*. at 1230-31.

The *Deal* court also relied on *Z.F. v. South Harrison Cmty. Sch. Corp.*, 2005 WL 2373729 (S.D. Ind. 2005). In that case (which has many similarities to the present case), the parents of an autistic student entering kindergarten insisted that the school district continue implementing the ABA/DTT methods that had been used with the child in a home program for the past three years. The parents criticized the school district's program as "impermissibly eclectic." 2005 WL. 2373729 at 12. School district personnel testified that they would use a variety of methods, including TEACCH and some ABA techniques. They further testified that the specific program for the student would depend upon what the district personnel perceived would benefit him once he began attending the school. *Id.*

The court in *Z.F.* endorsed the school district's approach:

> This kind of flexible and varied approach is consistent with the IDEA's requirement that educational approaches be tailored to a child's individual needs. The IDEA does not specify any particular methodology and does not prohibit the use of multiple methods. The plaintiffs and their advisors clearly believe that an ABA-based program would be of greater benefit to Z.F., but again, that is not the question here. The question is whether the IHO and BSEA erred in finding the program proposed by the school to be in compliance with the IDEA. The district's proposed varied and flexible approach to Z.F.'s education does not, without more, meet the plaintiffs' burden on this question. *Id.*

After discussing in considerable detail *J.P. v. West Clark Comm. Sch.*, *supra*,[14] the *Deal* court analyzed the evidence before it, and concluded that the school district's "eclectic" approach was appropriate, even under the heightened standard imposed by the Sixth Circuit. *Deal,* 46 IDELR 45. The school district identified several accepted methodologies it used in its programs for autistic children, including ABA/DTT, the Picture Exchange Communication System, structured teaching and incidental teaching. It presented evidence of positive outcomes achieved by autistic students who had been educated under those programs, including some who have been able to function in classrooms with non-disabled children. It also demonstrated that it had qualified personnel with expertise in educating children with autism. Based upon this evidence, in conjunction with flaws identified in the continued use of ABA/DTT, the *Deal* court concluded that the school district's "eclectic" approach satisfied the requirements of IDEA.[15]

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[14] Although *Rowley* and the regulations implementing IDEA make clear that questions of educational methodology are left up to local school officials, the court in *J.P. v. West Clark Comm. Schools.*, 230 F. Supp. 2d 910, 936 (S.D. Ind. 2002) articulated a framework for assessing the "soundness" of a school district's approach. According to *West Clark,* an approach is sound if: "(a) the school district can articulate its rationale or explain the specific benefits of using that approach in light of the particular disabilities of the child; (b) the teachers and special educators involved in implementing that approach have the necessary experience and expertise to do so successfully; and (c) there are qualified experts in the educational community who consider the school district's approach to be at least adequate under the circumstances."

This test is not binding on this Panel as it knows of no Eighth Circuit cases that have articulated this standard, but is nonetheless met in this case. District personnel persuasively testified that the District's approach was designed to produce more functional communication from the Student, and to allow him to generalize the skills he learns in a broader array of environments. Between Mindy Weinzerl, JoAnn Higgins, Dr. Edna Smith and Jackie Chatman, the District was going to have highly qualified personnel with decades of experience in educating children with autism involved in the Student's case. Finally, Dr. Edna Smith was unquestionably qualified, based on her experience, to attest to the adequacy of the District's approach, and did so. Moreover, this is not a case where Dr. Smith had a vested interest in upholding a program she designed. Rather, the District had begun employing its comprehensive approach for children with autism in 2003, following a study of programs at other school districts in the Midwest.

[15] The Parents have suggested that an "eclectic" approach is impermissible because it was condemned in at least one other case. However, that case is clearly distinguishable. In *T.H. v. Palatine Cmty. Consol. Sch. Dist.*, 55 F. Supp. 2d 830 (N.D. Ill. 1999), a hearing officer criticized the District's program as a "vague, generalized, non-specific, eclectic, child-led approach to educating autistic children." *Id.* at 836. The district court found that the school district's IEP was not appropriate. However, the school district planned to place the child in a early childhood "cross-categorical" classroom that was not specially designed to meet the needs of autistic students, in contrast to the Graden classroom, which was dedicated to the education of autistic children.

The court in *West Clark* noted that even *Palatine* did not specifically condemn the use of an eclectic approach:

> Of course, neither the *Palatine* court, nor any other court of which this Court is aware, has held in general terms that taking an eclectic approach, i.e., attempting

There is no legal prohibition against the use of an "eclectic" approach, and indeed, if the District's multifaceted, flexible approach is deemed "eclectic", such an approach intuitively seems more appropriate than locking the District into a single method, limited even further by a requirement that it employ a solitary prompting strategy. Forcing the District to use a single strategy or methodology imposes both practical and legal concerns, and could even be to the Student's detriment, as explained by Dr. Smith.[16] The Panel concludes that the District properly refused to commit to an IEP in which the District would have been constrained in its choice of methodologies.

Likewise, there is insufficient evidence presented by the Parents from which the Panel can conclude that the District's educational environment, or reinforcement strategies, would have failed. The Parents insisted that the Student be educated in a "low-sensory" environment. However, the evidence showed that neither MAPS nor Graden is wholly devoid of outside stimuli. While at MAPS, the Student has received one-on-one services in a classroom with windows that allow him to see both outside the building and into the main classroom. He has also received services in the main MAPS classroom, while his brother and another autistic student were present in that room, such that he could hear them as well as music and videos used as reinforcers for them. The testimony showed that he made progress in that environment, and the Panel cannot say with any degree of certainty that the Graden environment is so highly stimulatory that the Student would fail to make progress therein.

> to utilize the best ideas from more than one educational theory, is in and of itself an unsound policy.

West Clark, 230 F. Supp. 2d at 935.

[16] For instance, if the District felt that the method prescribed by the Parents in the IEP was no longer effective, it may be prohibited from attempting another method absent parental consent to the change. As this case unfortunately demonstrates, when parties disagree, it can take substantial time to resolve such a dispute.

Similarly, the Parents' insistence that the Student be given "positive reinforcement" is not an issue from the Panel's perspective. Although the Parents and their witnesses took issue with the details of how they had seen Ms. Weinzerl provide reinforcement to other students, there was no evidence that the reinforcements provided to those students were anything other than positive. It is not the proper role of this Panel to dictate the minutia of how highly qualified professional educators are to carry out their duties.

2. Transition Plan

The IDEA does not require a Transition Plan when the IEP proposes a transition from a private to a public school placement. *Bock v. Santa Cruz City Sch.*, 1996 WL 539715, 5 (N.D. Cal. 1996). IDEA mandates only that transition services be included in "the first IEP to be in effect when the child is 16." 20 U.S.C. §1414(d)(1)(A)(i)(VIII). *See Robert B. v. West Chester Area Sch. Dist.*, 2005 WL 2396968, 8 (E.D. Pa. 2005) ("The IDEA only requires a 'transition plan' for an impending transition from school to post-school (i.e., adult) activities, not for transfers between schools").

Although the IDEA does not require that a transition plan be included in an IEP of a young child such as the Student, the absence of such a plan, or other strategies, in the Student's June 2005 IEP is material to the Panel's decision, in light of the unequivocal testimony of the Student's problematic behavior and its probable impact on his prospective education at Graden.

The District cites the case *Brown v. Bartholomew Consol. Sch. Corp.*, 2005 WL 552194, (S.D. Ind. 2005), *vacated and remanded due to mootness arising during appeal*, 442 F.3d 588 (7th Cir. 2006), in support of its position that a transition plan was not necessary in this case. In *Brown, id.,* the parents alleged that an IEP was inappropriate because it did not contain a transition plan. However, the hearing officer and reviewing court both agreed that where the parents and school district could not even agree upon placement, the school district was not

required to formulate a transition plan. According to the court, "The discussion simply never got far enough to work out a transition plan to a new program that the [parents] adamantly opposed, and which they have succeeded in blocking for the past two and a half years, relying on the "stay-put" provision of the IDEA." *Brown*, 2005 WL 552194 at 7.

The problem with this analysis is that there was evidence that the Student needed a transition plan and no evidence was presented to suggest that he did not. Although it was not probable that Mother was prepared to enroll the Student in the District unless the District agreed to include her proposed methodologies in the IEP, she was not presented with an IEP in 2005 that could give her reason to expect that her son could transition, without serious ramifications, into Graden. Although, subsequently, a transition plan was formulated, this Panel must consider the IEP before it and determine whether it would provide the Student with a FAPE.

The Panel holds that the 2005 IEP was defective partly because it did not include strategies that would have adequately addressed the Student's transition to Graden.

The 2006 IEP did include a transition plan. Although it was a draft for reasons set forth in the findings of fact above, it was a sufficient roadmap to enable the Student to satisfactorily transition to Graden.

3. Behavior Intervention Plan

Of major importance to the Panel is whether the Student's IEPs were inappropriate because they did not include strategies to adequately address the Student's behaviors which could include a written BIP. The Eighth Circuit has ruled that IDEA does not require a written BIP to be included in an IEP. *School Bd. of Independent Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1012 (8th Cir. 2006); *accord Brett S. v. West Chester Area Sch. Dist.*, 2006 WL 680936 at 10-11 (E.D. Pa. 2006); *Robert B. v. West Chester Area Sch. Dist.*, 2005 WL 2396968 at 7.

However, the IDEA does require that "in the case of a child whose behavior impedes the child's learning or that of others, [the IEP team] consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i).

In this case, the Student's IEPs reflect a strong consensus, and the corroborating evidence was irrefutable, that his behaviors interfered with his learning or that of others, which to this Panel's belief did trigger an obligation to write a BIP as a part of the Student's IEPs, or otherwise adequately address his behavior issues in the IEPs.

The case of *Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003) is illuminating on the issue of the need for a behavior intervention plan. In that case, the Court held that a student was denied a FAPE because the district failed to implement a behavior intervention plan. Although in *Clark*, the IEP team had actually agreed to develop a behavior intervention plan, but did not do so on a timely basis, the Court's decision went beyond just the failure of the district to do what it had promised, as it concluded that ". . . because the IEPs did not appropriately address his behavior problem, [student] was denied a free appropriate public education." *Id.*, p. 1028.

As indicated above, in this case, the Student had significant behavior problems that needed to be addressed. The June 2005 IEP did not do so. The June 2006 IEP did.

The Panel concludes that the Student's behavior issues were not adequately addressed in the 2005 IEP, but were addressed adequately in the 2006 IEP by the behavior intervention plan, the expanded goals and objectives, many of which correlated to behavior concerns and safety, and specifically noting his behavior would be addressed in the rendering of his special education services.

The District's inadvertent failure to attach the BIP to the June 2006 IEP does not render it substantively invalid, nor did it substantially deprive the Parents of their ability to participate in the development of the Student's IEP. Instead, it was an inadvertence that did not deprive the Student of any educational benefit. Therefore, it has no bearing on the Panel's decision.

4. Food Expansion

The Parents have also contended that the District's proposed IEPs were inadequate because they did not include a "food expansion plan." For the June 2005 IEP, the District said that this was a "medical issue" that nonetheless would be supported at school. (Dist. Ex. 37). For the June 2006 IEP, the District said that it would review the PBM food expansion plan (Dist. Ex. 69) but did not explicitly agree to implement it.

The only possible basis for arguing that the District was required to develop and implement a food expansion plan is that it is a "related service" that should have been included in the Student's IEP. However, "related services" are defined as "transportation, and such developmental, corrective, and other supportive services (including…medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A). The Parents failed to prove that their proposed food expansion plan falls within this definition.

In *Irving Indep. Sch. Dist. v. Tatro*, 104 S.Ct. 3371 (1984), the Supreme Court construed IDEA's definition of a "related service" to be one "that enables a handicapped child to remain at school during the day." There was no evidence in this case that a food expansion plan was required for the Student to remain at school or otherwise "to benefit from special education."

In fact, according to Ms. Pomeroy, the Student sometimes engaged in aberrant behavior simply to get out of eating a food he did not like, or to access a food he wanted. (Tr. 13:1027).

Changing the Student's food choices was not, therefore, necessary to effect a change in his behavior so that he could access educational services. Rather, it was the other way around – the Parents hoped that changing his behaviors would cause a change in his dietary choices. The Student's feeding problems were a symptom of his behavioral issues, not the cause of them, and that makes a significant difference under IDEA. Merely changing the Student's food choices would not, in and of itself, have affected his ability to benefit from special education.

The Panel is aware of no cases in which a court has required a school district to develop or implement a food expansion plan in the absence of evidence that the plan is needed for a child to attend school. Accordingly, the Panel cannot conclude that the lack of a food expansion plan in the Student's IEPs resulted in a violation of IDEA.

5. Toilet Training

The Parents contend that the Student's IEPs were legally inadequate because they did not include specific goals for toilet training. However, the District presented unrebutted evidence from both Dr. Peterson and Ms. Weinzerl that toilet training was a priority for all children in the classroom and was addressed through the curriculum using strict toileting schedules. In fact, the District even designed a restroom specifically for students in the autism classroom at Graden.

The Parents presented no evidence that the lack of a toilet training goal in the Student's IEP would have actually prevented him from receiving an educational benefit, within the context of the autism classroom at Graden. In fact, of dispositive significance is the fact that during his years at PBM while he was receiving educational benefit, the Student did not become toilet trained.

Parents requested a goal pertaining to toilet training and it was rejected by the District. The law is clear that school districts are not required to include every goal requested by a parent in an IEP. *Gill v. Columbia 93 Sch. Dist.*, 1999 WL 33486649 at 14 (W.D. Mo. 1999) ("Parental

preferences must be taken into consideration in deciding IEP goals and objectives and in making placement decisions, but parental preference alone cannot be the basis for compelling a school district to provide a certain educational plan.")

In an analogous case, *Judith S. v. Board of Ed. of Sch. Dist. No. 200*, 1998 WL 409416 (N.D. Ill. 1998), the court upheld a school district's decision not to include parentally-requested goals relating to the student's auditory processing difficulties and attention deficit disorder. The school had demonstrated that the parents' concerns would be adequately addressed through the school's curriculum, and the parents had failed to explain why it was otherwise necessary to include separate goals or objectives in those areas.

The Panel finds credible the testimony from District personnel regarding toilet training practices in the autism classroom at Graden, and concludes that those practices satisfactorily discharge any related responsibility of the District under IDEA.

C. Propriety of MAPS as a Private Placement

Since the District's 2005 IEP for the Student was not adequate, the issue of whether MAPS was an appropriate placement must be considered for that year.

As stated in the Panel's findings of fact, MAPS was an appropriate placement for the following reasons: 1) The Student made educational progress while he attended MAPS; 2) By agreeing to place the Student at MAPS pursuant to the settlement agreement the parties reached, the District implicitly, if not directly, affirmed the fact that MAPS was an appropriate placement; and 3) The District had placed other students at MAPS; and, 4) completely dispositive of this issue is the fact that the District, on the record, agreed that PBM (MAPS) was appropriate for the Student at the times in question involved in the hearing.

D. CONCLUSION

For the reasons stated above, the Panel finds and concludes that the Parents sustained their burden of proving that the June 2005 IEP for the Student was deficient. With regard to the June 2006 IEP, the Panel finds and concludes that it was substantially and procedurally appropriate to afford the Student a FAPE, and the Parents failed to sustain their burden of proof that the IEP was deficient. Under the leadership of its new Director of Special Services, Jackie Chatman, the District more than cured the defects of the June 2005 IEP.

E. REMEDIES

Having ruled that the June 2005 IEP did not afford the Student a FAPE, we turn to the appropriate remedies. The Parents expended the sum of $3,143.61 during the 2005-2006 school year at MAPS for additional hours for their son. While the Panel considered whether the additional hours they paid for above the 20 hours a week the District paid for were the difference in providing the Student progress at MAPS, since the "normal" school day for a child the age of the Student would be approximately six hours a day, full reimbursement of $3,143.61 is appropriate. With reference to mileage reimbursement, Parents are requesting reimbursement of $2,455.58 which represents standard mileage reimbursement minus what the District has paid. The Student's twin brother also attended MAPS, making the request for full mileage reimbursement for the Student subject to scrutiny. The Panel is not in a position, based upon the record, to attempt to allocate which portion of the mileage expenses cannot be attributable to the Student, and accordingly, holds that mileage reimbursement to the Parents in the sum of $2,455.58 is appropriate. It is the Panel's desire and intent that the Panel considering the brother's due process request gives difference to the full reimbursement being awarded herein if mileage reimbursement becomes an issue.

Having ruled that the June 2006 IEP afforded the Student a FAPE for the 2006-2007 school year, there is no consideration of remedies for that school year.

It was a 3-0 decision in determining that the June 2005 IEP did not afford the Student a FAPE. Two of the three panel members registered their "votes" with the belief that anything short of offering the Parents' 25-30 hours a week of one-on-one services would not have been acceptable to the Parents. Although this was not required, the IEP that was developed for the 2005-2006 school year was not appropriate and the Panel's ruling must be based upon the IEP presented.

It was a 2-1 decision that the June 2006 IEP afforded the Student a FAPE. The dissenting opinion was cast by Marilyn McClure who is expressing reasons for her dissent with this decision.

Appeal Procedure

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

Dated: August 6, 2007

Richard H. Ulrich, Chairperson

Marilyn McClure, Hearing Panel Member

Karen Karns, Hearing Panel Member

CERTIFICATE OF SERVICE

Copies of the foregoing were placed in the U.S. Mail, certified mail, return receipt requested, this 6th day of August, 2007 addressed to:

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Dissenting Opinion
June 2006 Proposed IEP

is a child with significant severe and aggressive behaviors including hitting and running away; the Present Level of Performance sections of the IEP reflect this. My fellow panel members recognized this as well. However, this panel member identifies several deficits in the IEP that was proposed in June 06 that would not have allowed for an appropriate education for the child in the Park Hill program.

In the IEP page titled "Additional Information" (School District exhibit 69), it indicates that a Behavior Plan will be attached to this IEP. Although the mother testified that she saw the proposed behavior plan, it was never formally added to the IEP and was not provided to the mother as part of an IEP. **Neosho R-V School District v. Clark** 315 F.3d 1022 (8th Cir., 2003) . Since this child's behaviors are the central concern of this child, the key component to success of his educational experience is contingent upon an appropriate behavior plan with accurate implementation. This parent was not be able to participate effectively as allowed for in IDEA and could not make an informed decision regarding the viability of the IEP since the IEP that she was to be presented lacked a behavior plan. The proposed IEP was inadequate since it lacked a behavior plan regardless if it was inadvertently omitted.

The proposed IEP lacked individualization for this child. Rand Hodgson, advocate for the parent in IEP meetings, testified that Nancy Michaels, the school district Autism Coach, and Jessica Royer (expert witness), board-certified behavior analyst, both stated in an IEP meeting that workbaskets is not how he (the student) learns. A major component of the proposed program in the autism class at Graden elementary school in the Park Hill School District is "workbaskets". Expert witness, Molly Pomeroy, who holds a Masters Degree in special education with an emphasis in Behavior Disorders, testified that workbaskets are for left to right tracking and meant for independent work of already learned activity/leisure time. Also, the child was successful at PBM in a 1:1 setting, yet Park Hill would not commit in the IEP document to the amount of time he would receive 1:1 instruction if he attended at Graden.

There was a significant amount of testimony by Park Hill witnesses related to allowing the classroom teacher to determine, if not on a daily basis, how the student should be taught. Edna Smith, the autism coach for the Park Hill School District, testified that the techniques employed for a student at a given time at Park Hill are the teacher's understanding of what the student needs and what will work for that student, and can have a plan for what we believe will work.

Here, the burden is placed on a classroom teacher to fully understand the unique needs of a student with a(any) disability and to know to recognize such. The complexity and severity of this student's disability in this panel member's opinion is so extensive that input from professionals in behavior analysis is required in IEP development and at least in the classroom so that the classroom teacher can implement methods appropriate to the student's way of learning.

This is not unlike how a blind student requires the services of a vision specialist; the severity of the disabilities of and his behaviors requires the services of a behavior analyst. Park Hill employed an "autism coach" available to the Graden program for the two school years covered in this case. Park Hill had contracted with a behavior analyst in an earlier year, but not in relation to . Here, due to the severity and pervasiveness of this child's disability, deference should be given to behavior analysts.! Smith's approach penalizes the student when there are delays in determining how to individualize his program pending identification of an appropriate approach.

Smith also testified that if the methods used with the child were written into the IEP that it would "tie the hands" of the professional teacher. The parents wanted the methods listed so that they would know when the student was making progress according to the methods used as related to behavior.

This panel member finds it irrelevant to this proceeding any determination of the "success" of the Park Hill program (Majority Finding 83). This panel had no evidence indicating such from the parents of the children who have attended the program.

The IEP team in June 2006 considered potential placements. Joann Higgins, school district diagnostic consultant who serves as the LEA representative in IEP meetings for incoming students related to Early Childhood, testified that the child needed a transition plan at this point. She also testified that she believed he did not need one the previous year (if he had to entered the Park Hill program for the 05-06 school year). Witnesses from both parties agreed that a plan is necessary ("transition plan") for this student if he were to enter the Park Hill program. She testified that she agreed that the school is obligated to consider potential placements whether or not the school district is asked (about possible placements at specific schools). Also, she testified that at the June 2006 meeting, in which she participated, that the MAPS program at PBM was not considered as a potential placement (Tr.Vol 8, 30). The child was then attending MAPS and making progress. PBM is a Missouri Department of Elementary and Secondary Education approved private placement. This panel member questions the credibility of this witness.

There was testimony about the need for the boy to attend in a program with typical peers. The Present Level of Performance sections of the IEP (June 2006 page 2) state:

has been observed at MAPS to run away from the teachers during transitions. It has been observed that communicates his displeasure through loud and distracting vocalization when given a directive that he does not want to comply with. MAPS reports that will fall to the floor from his chair, bang his head on the floor or hit his legs with his hands when he is mad. Other behaviors purported by MAPS include but are not limited to hitting, kicking, biting, head butting, pinching, grabbing to prevent TV/CD player being turned off, waving arms in the air or stomping while upset (precursor to other aggressive behavior) to peers or adults. is non-verbal and is currently using various modalities of communication (visual communication system, some sign language and vocalizations)."

This panel member believes lacked prerequisite communication skills that would allow him to interact safely with same age peers. These deficits, along with behaviors such that his

attendance in a setting where he might not be in a continuous 1:1 setting would likely present a risk of harm to himself and others. Safety was a concern that the mother expressed repeatedly. IDEA states "Special classes, separate schooling or other removal...occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily" IDEA 1412(a)(5)(A). If he had attended at Graden this child was to access typical children in the building throughout the day putting other children and staff at risk of harm. Even while at PBM, in a very restrictive setting, he had severe behaviors. His attendance at PBM during 2006-07 is appropriate.

The goals and objectives in the 2006 IEP did not adequately address behavior; these goals were not of priority to this child. There were discrepancies among witnesses testimony regarding the child's prerequisite skill level as it relates to the initiation point of the goals. And, in the absence of a behavior plan the goals are unattainable.

In June of 2006, the student was age six years and six months. An appropriate program for a child this age who is typical (a first-grader) would include a full day of programming. Any offer of programming less than that for this child is not an appropriate, public education. The proposed IEP (School District ex. 69) offers 35 hours a week of services.

This student would not have had educational benefit as required by IDEA under the June 2006 IEP developed by Park Hill. Thus, this panel member would provide a remedy to reimburse the parent for expenses related to attendance at PBM in 06-07. I concur with the majority that the placement at PBM in 06-07 was appropriate. Total minutes provided there should have been comparable, at a minimum, to the total minutes offered by Park Hill in its proposed IEP. This panel member would provide a remedy to provide compensatory services for any difference in minutes of services provided.

It is the opinion of this panel member that if the IEP team determines in the near future that the child might enter the Park Hill program, significant preparation would be necessary, including:

development of an IEP that includes participation by a board-certified behavior analyst during the entirety of its development;

training of staff who will work with the boy by a board-certified behavior analyst to the extent a determined level of competency is exhibited in the areas deemed necessary by the BCBA,

an agreed upon approach by the BCBA and his teacher's for learning throughout the day,

all personnel and staff in place by day one of boy's attendance,

the area/environment be evaluated for distractability by a behavior analyst,

time out room available by day one,

positive reinforcements be evaluated by a behavior analyst for appropriateness, if conducted: observations of the boy in outside placement setting be formal (written),

consideration of transportation to be provided by the school district,

careful consideration of the risk involved to the public school, students and staff if the boy is present in the school,

development of a plan to transition the boy to Park Hill that includes a BCBA and allows for exposure to Park hill facilities over an extended period of time prior to full-time attendance

IEP to include a detailed safety plan

a comprehensive behavior plan that includes contingencies for when aggressive behaviors occur, with outcomes other that suspension/expulsion

With this I respectfully dissent,

_____

Marilyn McClure, Panel Member
August 2, 2007

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