BEFORE THE HEARING PANEL
EMPOWERED BY THE
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION

IN THE MATTER OF :	)
	)
	)
	)
Petitioner/Student	)
	)
and	)
	)
SAVANNAH R-III SCHOOL DISTRICT,	)
	)
Respondent/District	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

The Hearing Panel, after conducting the due process hearing in this matter on June 18, 2008, issues the following Findings of Fact, Conclusions of Law, Decision and Order:

I. FINDINGS OF FACT

The Hearing Panel makes the following Findings of Fact:

A. The Parties

1. The Student attends school in the Savannah R-III School District (District"). At all times relevant to this due process proceeding, the Student has lived with his Mother who resides within the boundaries of the District. The primary mode of communication of the Student and Mother is written and spoken English.

2. The District is a Missouri Public School District which is organized pursuant to Missouri statutes. During school year 2007-08 the District operated out of six educational buildings which housed all of its educational programs. During that school year, the District had an enrollment of slightly over two thousand three hundred (2,300) students. (*Missouri School Directory 2007-08.*)

3. The due process hearing in this matter was held on June 18, 2008, at the Administrative Offices of the District in Savannah, Missouri. The hearing was open at the direction of the Student's Mother.

4. The Student and his Mother were not represented in this matter or during the June 18, 2008, due process hearing. The Student and his Parents were present at the due process hearing. During the hearing the Student and his Parents were afforded all rights afforded to them by the IDEA and State Plan, and as set forth in the *Procedural Safeguards for Children and Parents*, including but not limited to the following:

A To be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of students with disabilities;

B. To present evidence and confront, cross-examine, and compel the attendance of witnesses;

C. To prohibit the introduction of any evidence (including all evaluations and recommendations based on the offering party's evaluation) at the hearing that has not been disclosed to that party at least five (5) business days before the hearing.

D. To obtain a written, or at the option of the parents, electronic verbatim record of the hearing at no cost; and,

E. To obtain written or, at the option of the parents, electronic findings of fact and decision at no cost.

5. The District was represented at the hearing by Teri Goldman and Michael D. Hodge, Mickes Goldman, LLC, 555 Maryville University Drive, Suite 240, St. Louis, MO 63141.

6. The Hearing Panel for the due process proceeding was:

Ransom A Ellis, III	Hearing Chairperson
Karen Karns	Panel Member
Rand Hodgson	Panel Member

7. During all times relevant to this proceeding the following persons were employed by the District or were employed by a District contractor and have provided educational services, related services or transportation services to the Student:

Donald Lawrence	Superintendent
Janet Smith	Director of Special Services
Jacque Bull	Director of Special Education
Steve Kellepouris	Principal
Ron Jackson	Assistant Principal
Janet Long	SPED Classroom Teacher
Jeffrey Dunn	SPED Classroom Teacher
Micky Wiebe	SPED Classroom Teacher

Valerie Dahle	SPED Classroom Teacher/Life Skills Teacher
Terry Hopkins	Regular Education Classroom Teacher
Barbara Barsch	Regular Education Classroom Teacher
Ann Hines	Regular Education Classroom Teacher
Tina Dye	Life Skills Teacher
Sara Bruner	Speech-Language Pathologist
Margaret Baker	Speech-Language Pathologist
Amanda Thornton	Speech Implementor
Martha Hendricks	Occupational Therapist
Cynthia Denney	Diagnostician
Christine Barnett	Diagnostician
Nancy Swafford	Transition Provider
Shelly Vertin	Counselor
Debborah Coats	Personal Paraprofessional
Scott Wilkinson	Personal Paraprofessional
Cindy Phillips	Nurse
Paula Larison	Director of Transportation
Cynthia Jimenez	Bus Driver (Laidlaw employee)
Jamie Embrey	Bus Monitor (Laidlaw employee)
Angie Ward	Bus Monitor (Laidlaw employee)
Sarah Sinclair	Behavior Consultant (Partners in Behavioral Milestones, Inc.)

B. Procedural Background

8. The Parent requested a due process hearing by letter to the Department of Elementary and Secondary Education ("DESE") dated March 6, 2008, which was received by DESE that same day. (HP Exhs 1-3).

9. On or about March 14, 2008, Ms. Margaret Strecker notified the Hearing Chairperson (HP Exh 9) and the Hearing Panel Members (HP Exh 9) that they had been selected to serve on the hearing panel for the request for due process filed by the Parent.

10. On March 25, 2008, the District requested an extension of the time lines through July 1, 2008. (HP Exh 11). The Hearing Chairperson extended the time lines to July 1, 2008 by letter dated March 26, 2008. (HP Exh 13).

11. On April 10, 2008, the Hearing Chairperson issued a Notice of Hearing, setting the hearing for June 18-19, 2008. (HP Exh 16).

12. On April 4, 2008, the Hearing Chairperson conducted a Pre-Hearing Telephone Conference with the parties. (HP Exh 15). During this conference the Hearing Chairperson identified the issues to be presented to the Hearing Panel. (HP Exh 15).

13. On April 10, 2008, the Hearing Chairperson issued a Notice of Hearing, setting the hearing for June 18-19, 2008. (HP Exh 16).

14. On June 18, 2008, a hearing in this matter was held in Savannah, Missouri, with all parties in attendance.

15. During the hearing on June 18, 2008, (Tr. p. 368), and by subsequent letter, Counsel for the District requested that the time lines in this case be extended through August 8, 2008. The Hearing Chairperson extended the time lines to August 8, 2008, by letter dated June 30, 2008.

16. The District exchanged exhibits prior to the hearing in compliance with the IDEA Regulations, 34 C.F.R. § 300.512. The Parent did not exchange exhibits or offer exhibits at the due process hearing. During the due process hearing, the following exhibits were received into evidence: District Exhibits ("DEX") D through H; J-K; M-N; P; T-U and BB-CC. (Tr. pp. 36, 44, 251, 265, 279-280, 299, 301, 304-306, 316, 326) and, Hearing Panel Formal Exhibits ("HP") 1 through 16. (Tr. pp. 6-7).

C. Time Line Information

17. On March 25, 2008, the District requested an extension of the time lines through July 1, 2008. (HP Exh 11). The Hearing Chairperson extended the time lines to July 1, 2008, by letter dated March 26, 2008. (HP Exh 13).

18. During the hearing on June 18, 2008, (Tr. p. 368), and by subsequent letter, Counsel for the District requested that the time lines in this case be extended through August 8, 2008. The Hearing Chairperson extended the time lines to August 8, 2008, by letter dated June 30, 2008.

D. The Issues and Proposed Remedy

19. The following issues were presented to the Hearing Panel:

Issue Number 1: Whether the Student required a helmet as a necessary accommodation in order to provide him with a free, appropriate public education.

Issue Number 2: Whether there are appropriate behavior supports and strategies in place to provide the Student with a free, appropriate public education.

The Parent requested the following proposed remedy: Development of an appropriate behavior support plan. (Tr. p. 5; HP Exh 15).

E. Background Facts

20. The Student is educationally diagnosed as Autistic. (DEX BB). The Student has also been medically diagnosed as having Autistic/pervasive developmental disorder accompanied by a history of complex, secondary generalized seizures. (DEX BB; Tr. pp. 36-37). The Student's last full Educational Evaluation indicates that his cognitive area skill levels generally ranged from 24 to 28 months; his language skill levels generally ranged from 24 to 29 months; and, his gross motor, fine motor and social skill levels generally ranged from 30 to 36 months. (DEX BB, F). At the time of the hearing, the Student was sixteen (16) years of age. The Student is six foot one inches in height and weighs two hundred seventy four (274) pounds. (Tr. pp. 103, 156).

21. The Student has a number of heightened sensory needs that affect his ability to benefit from the educational program provided to him by the District. These sensory needs have been used by the District as a part of an overall strategy to reinforce or deter his behaviors. Examples of these sensory reinforcers include allowing the Student to use headphones to listen to music, (Tr. p. 252); use of scents, pine air fresheners and lotions (Tr. pp. 253-254); use of a weighted backpack, (Tr. p. 256); and, allowing the Student to play with a shiny penny, a bit of string, a fragment of a rubber band, Legos or a piece of a puzzle. (Tr. pp. 256-257). The District has also used a "token economy" and a behavior chart as strategies to deter bad behaviors and reward the Student for engaging in good behaviors. (Tr. pp. 259-260). The Student's sensory needs also create hazards for him at school and at home such as his desire to "huff" or smell gasoline. (Tr. pp. 30-31, 113, 254).

22. During school year 2005-06, the Student was an Eighth Grade student in the District. On May 5, 2006, the Student's IEP Team met to discuss his annual IEP and prepare for transition to the District's high school. (Tr. p. 265; DEX U). During this meeting, the Student's Team discussed safety issues that were relevant to the Student, including insuring that he remained away from gasoline and did not engage in any "huffing" behaviors. (DEX U; Tr. pp. 266-267).

23. During school years 2006-07 and 2007-08, the Student's Ninth and Tenth Grade years, he had four classes in the regular education classroom and three classes in the life skills classroom where he learned basic life skills such as cooking, cleaning and vocational skills. (Tr. pp. 271, 274-275).

24. In mid-March, 2007, the Student began exhibiting a head banging behavior on the bus and in the special education classroom. (Tr. pp. 247-248). The Student's Mother was notified (Tr. pp. 247-248) and a meeting was held on March 19, 2007. (DEX T; Tr. pp. 247-248). During this meeting, the Student's Mother reported that the head banging behavior was a recurring behavior that went away when ignored. (DEX T; Tr. p. 248). The Student's Mother also stated that she felt the behavior was caused by the Student being bored. (DEX T; Tr. p. 248). At this meeting, the Student's team discussed strategies to deal with the Student's head banging behaviors, including the use of headphones, joint compressions, a full-time bus monitor, the use of a behavior chart and taking walks with his paraprofessional. (DEX T; Tr. pp. 248, 252).

25. During school year 2007-08, the Student's educational placement was "outside regular class more than 60% of time" delivered in a resource room environment with an additional two hundred twenty five (225) minutes of Speech/Language services each week.

26. In September or October of 2007, the Student was medically evaluated by a neurologist in Minnesota for his seizures. (Tr. pp. 34, 37, 59). Around this time, his physician changed the Student's medications. (Tr. pp. 34-35). During the Student's stay in the hospital in Minnesota, the hospital attempted to have him wear a bicycle-like helmet with no success. (Tr. pp. 59-60, 81).

27. In the Fall of 2007, the Student continued his head banging behavior at home, at school and on the school bus. (Tr. pp. 22, 24, 55, 64-64, 95-96, 174-175, 219-220, 275). The head banging conduct was described by a number of witnesses as follows:

A. The Student's Mother testified that the Student engaged in the head banging behavior at home where he has hit his head on tables, walls, floors or other hard objects from one to ten times and usually for as long as thirty seconds. (Tr. pp. 24-25, 64-65, 73-75). These behaviors occurred about every two weeks. (Tr. p. 26). The Student's Mother testified that she was aware that the Student had engaged in head banging on the school bus on the way to school, (Tr. p. 64) and also knew of at least four instances during the extended school year program in 2008, when the Student engaged in the conduct. (Tr. pp. 29-30). The Student's Mother admitted that she felt the Student could sustain a severe head injury from the head banging conduct. (Tr. p. 25).

B Deborah Coats, the Student's personal paraprofessional, testified that she first observed the Student's head banging behavior in the Fall of 2007. (Tr. p. 103). She further testified that when she observed it, the Student's head banging conduct was normally front to back, with the Student hitting either the front or back of his head on cement walls, his desk, the floor or tables (Tr. pp. 95-96) and the behaviors appeared to occur more frequently at transition times or as an avoidance of the next activity. (Tr. pp. 96-97). Ms. Coats further testified that whenever the Student engaged in the head banging conduct, he usually hit himself very hard and she expected "to see blood" or have the Student "split his head open." (Tr. pp. 97-98). On one occasion, the Student almost hit his head on the corner of a brick wall (Tr. p. 98). Ms. Coats was able to digitally record the Student engaged in the head banging conduct during the Spring of 2008. (DEX CC; Tr. pp. 120-125, 140).

C. Cynthia Jimenez, the District bus driver who regularly transported the Student from home to school, testified that the Student engaged in head banging while on her bus. She testified that she observed the Student hit his head on the bus window, that he hit himself an average of 5 to 6 times on each occasion and that he hit himself so hard she "thought he was going to bust the window." (Tr. pp. 174-175, 181). On at least one occasion, the Student hit his head on the metal crossbar which separates the upper and lower bus windows. (Tr. pp. 175, 207-208).

D. Jaime Embrey, the Bus Monitor on the Student's school bus, testified that she observed the Student bang his head "very hard" on the window of the bus on two different occasions from January through May, 2008. On those occasions, the Student hit his head on the window so hard that Ms. Embrey thought he was going to break the window. (Tr. pp. 219-220).

28. In November, 2007, Janet Long and Debbie Coats notified Janet Smith, the District's Director of Special Services and In-District Autism Specialist (Tr. pp. 229-231), that the Student had begun to engage in "hard" head banging behavior, and requested that she suggest possible strategies to deter the conduct. Initially, Ms. Smith suggested certain strategies including: quicker use of a reinforcer; trying to "talk down" the behavior before it escalated; using a bean bag chair to provide compression and down time; going for walks around the building; riding a stationary bicycle or using other similar pieces of exercise equipment. (Tr. p. 277). The Student's head banging behaviors were also reported to his Parent in the daily log. (Tr. pp. 278-279).

29. On December 6, 2007, the District conducted an IEP meeting at the request of the Student's Mother. The focus of this meeting was the Student's emerging head banging behaviors at school. (Tr. p. 280). Present at this meeting were the Student's Mother, Janet Smith, Sara Bruner, Annette Thornton, Janet Long, Steve Kellepouris, Deborah Coats and Shelly Vertin. (DEX D and P). During this meeting the parties discussed their concerns that the Student's behavior had generally become worse. In particular, the District expressed concern that the Student had recently begun to engage in head banging conduct at school and on the bus. (DEX D). The IEP Team, including the Student's Mother, agreed to the following strategies:

A. Decrease the Student's time on the school bus in the morning by changing his pickup time to the last pickup of the morning, (Tr. pp. 284-285);

B. Try using a different paraprofessional for the Student's current paraprofessional, Debbie Coats until the Winter Break, (Tr. p. 282);

C. Locate a Behaviorist in the Area and obtain a consultation concerning the Student's behavior, (Tr. pp. 281-282);

D. Obtain an Occupational Therapy screening for the Student, (Tr. pp. 281-282);

E. Make sensory-oriented changes to the Student's diet at school;

F. Utilize a Behavior Chart;

G. Try various positive and negative reinforcers to deal with the Student's behavior, (Tr. pp. 285-286).

The parties further determined that they would reconvene the IEP Meeting in January, 2008, to review the effect of the changes on the Student's behavior and discuss further strategies that might need to be implemented. (DEX D and P).

30. Following the meeting on December 6, 2007, Ms. Smith began trying to locate and contract with a behaviorist. This project was delayed by a significant ice storm that hit the Savannah/St. Joseph, Missouri area and left the District without power for more than a week, (Tr. pp. 283-284), and subsequently, by the Christmas break. (Tr. pp. 283-284). Ms. Smith contacted Sarah Sinclair, a Behaviorist with Partners in Behavioral Milestones ("PBM") in Kansas City, who agreed to work with the District. (Tr. pp. 238-239). However, Ms. Sinclair's work with the District was delayed by inclement weather in December and January and by an out-of-town family emergency. (Tr. pp. 238-240).[1]

31. On January 16, 2008, the Student's IEP Team met again to follow-up on the meeting that had taken place on December 6, 2007. Present at this meeting were the Student's Mother, Janet Smith, Sara Bruner, Annette Thornton, Steve Kellepouris, Ron Jackson, Scott Wilkinson and a representative from the Albany Regional Center. (DEX D). The IEP Team determined that there had been no decrease in the Student's head banging behaviors during the period since the December 6, meeting. (DEX D; Tr. pp. 293-294). The District indicated that the Occupational Therapy screening had not been completed due to the Christmas Break, a severe ice storm and the illness of the Occupational Therapist. The Student's Mother indicated her concern that the Student's new personal paraprofessional, Scott Wilkinson, had not been able to stop the Student from engaging in the head banging behavior. The IEP Team determined that it would reconvene in approximately two weeks to perform a further review of the Student's behaviors. (DEX D).

32. Between January 21 and January 28, 2008, an Occupational Therapy Observation was conducted by Martha Hendricks. Her "Consult Summary" was provided to the District on or about February 15, 2008 and concluded as follows:

> "Based upon therapist's previous experience with [the Student], observations during individual time spent with [the Student], classroom observation and consultation with staff (1/21 and 1/28/08), need for OT services is not indicated at this time. Behavioral and sensory strategies are in place and used appropriately by staff, as well as educational activities designed to develop handwriting, keyboarding and eye-hand coordination skills. OT will continue to be available on an informal basis for consultation as needed by staff request."

(DEX N).

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[1] The PBM offices in Kansas City are located approximately eighty three (83) miles from the District's offices in Savannah, Missouri.

33. On February 19, 2008, Sarah Sinclair, the Behavior Consultant from PBM in Kansas City, Missouri, conducted at observation of the Student at the District. The focus of her report, which was not provided to the District until approximately two weeks after the February 27, 2008 meeting with the Student's Parent, (Tr. pp. 298-299), dealt with the Student's classroom behaviors. Ms. Sinclair was, however, unable to observe a naturally occurring head banging incident, but did observe the Student engage in the head banging behavior when the string fragment he carries was taken away from him. While the report contained no conclusion, it states as follows:

> "Information provided by the teacher and the behavior log:
>
> [The Student's] maladaptive behaviors include noncompliance, whining/crying, screaming, perseverating, dropping to the floor and banging his head against hard surfaces.
>
> [The Student] has difficulty with transitions. When [the Student] is asked to transition from one activity to the next or to another room, he begins to whine and cry and sometimes it escalates into head banging. [The Student's] teacher reports that "warnings mean nothing to him."
>
> [The Student] also exhibits behaviors when he is told "No" or does not get what he wants.
>
> [The Student] likes to carry around "shiny pennies" and string. The strategies that the classroom has tried are: transition warnings, threatening to take his pennies away, and threatening to call his step-dad. [The Student's] teacher reports that they have not had success with these strategies.
>
> [The Student's] behavioral episodes last about 10-20 minutes on average."

(DEX M).

34. On February 27, 2008, the Student's IEP Team met again to follow-up on the data that was being collected on the Student's head banging behavior and to again discuss possible solutions for the conduct. "[A]t this point, the head banging behaviors had increased in . . . frequency, duration and intensity to the point that [the District was] no longer comfortable . . . with [the Student] being without a helmet." (Tr. p. 302, lns. 15-19). Present at this meeting were the Parents, Janet Smith, Steve Kellepouris, Ron Jackson, Deborah Coats, Sara Bruner, Janet Long, Barbara Barsch, Shelly Vertin and Brenda Smith, a representative from the Albany Regional Center. (DEX D). The following occurred during this meeting:

> A. The IEP Team received and reviewed the Occupational Therapy "Consult Summary" (DEX N) and noted that the Occupational Therapist determined that direct

Occupational Therapy services were not necessary as the Student's skills were consistent with his cognitive level. (DEX D).

B. The IEP Team discussed the observation that was conducted by Sarah Sinclair of PBM. Janet Smith reported that Ms. Sinclair intended to return to conduct a full day observation of the Student, in part because she was not able to "observe head banging in a naturally occurring environment." (DEX D).

C. The IEP Team discussed the Student's head banging, which had recently occurred on the school bus in the morning and in the school building, where the Student nearly hit his head on two protruding bolts in the gymnasium, which were used to hold up a volleyball net. (DEX D).

D. The District reported that Debbie Coats would be returning to act as the Student's personal paraprofessional. The Student's Mother indicated agreement with this decision. (DEX, D). Ms. Coats returned to work with the Student immediately following the February 27, 2008, meeting. (Tr. p. 311).

E. The District indicated that it would be willing to rearrange its transportation route to drop the Student off first in the afternoon, but the Student's Mother stated she would have to rearrange after school supervision for the Student. (DEX D).

F. The District indicated that due to the Student's head banging behavior, it was recommending that the Student begin wearing a helmet during the school day. The helmet was described to the Parents as being "similar to a bicycle helmet". The Student's Mother objected to this request because she felt it would make the Student look different than his peers. The District stated that the helmet would only be used until they were able to extinguish the Student's head banging behavior. (DEX D; Tr. pp. 302-303).

(DEX D)

35. The Student's IEP Team developed an Addendum to his IEP (DEX J) at the February 27, 2008, meeting. The Addendum added a provision that states: "Wear helmet to prevent head injury," to the program accommodations/modifications page of the IEP. (DEX J). The Parents did not agree with the proposed change to the Student's IEP. (Tr. pp. 302-303). The District also prepared a Notice of Action (DEX K) which was provided to the Parents at the February 27, 2008, IEP meeting. The Notice of Action states in pertinent part:

"<u>Description and Explanation of Action</u> . . . The Savannah R-III School District proposes to change [the Student's] transportation modifications/accommodations, and program modification/accommodations to include [the Student] wearing a helmet to protect him from injury. . . .

Options Considered and Why Rejected . . . The district considered not adding the wearing of a helmet to [the Student's] program modifications/accommodations and transportation modifications/accommodations, but rejected this proposal, as [the Student] continues to engage in head banging which poses a serious risk of injury to himself.

Basis of Action . . . Behavior charting and anecdotal records indicating an increased prevalence and intensity of head banging.

Other Factors Relevant to the Action . . . The district has used a variety of behavioral and instructional strategies in hopes of extinguishing this behavior. A behaviorist has been employed to assist. The wearing of the helmet will continue until the head banging and self-injurious behaviors have been successfully extinguished. The district has previously requested the wearing of a helmet, but agreed to try other strategies first. None of the strategies have yet been effective."

The Parents refused to sign the consent attached to the Notice of Action. (DEX J). The Parents filed this due process complaint prior to the end of the ten (10) period. Therefore, the District has not implemented the use of the helmet with the Student. (Tr. pp. 306-308).

36. On March 4, 2008, Janet Smith had a telephone conversation with the Student's Mother. During this conversation, Ms. Smith stated that the District would be willing to use behavior charts like were used at home and informed the Student's Mother that the PBM Behaviorist would be performing her full day observation on March 24, 2008. (DEX D; Tr. pp. 308-310).

37. On March 5, 2008, Janet Smith, Janet Long and Deborah Coats met with the Student's Mother who demonstrated the home behavior chart. The District agreed that a similar behavior chart would be developed for use at school. The parties also discussed the used of reinforcers that could be used to redirect the Student toward positive behavior. (DEX D; Tr. pp. 308-310). The subsequent use of the behavior charts diminished the Student's head banging behavior for a time, but did not stop it. (Tr. pp. 309-310).

38. On March 6, 2008, the Student's Mother filed this due process complaint with the Missouri Department of Elementary and Secondary Education. ("DESE"). (HP Exh 1).

39. On April 15, 2008, the Student's annual IEP Meeting was conducted. Present at this meeting were the Student, his Parents, Janet Smith, Janet Long, Steve Kellepouris, Ron Jackson, Annette Thornton, Cyntia Denney, Deborah Coats, Nancy Swafford. Shelley Vertin and Teri Goldman, the District'ss Counsel. The Present Level of Academic Achievement and Functional Performance section of the IEP states in pertinent part:

"[The Student's] medications have been changed and/or adjusted. A behavior chart has been implemented to receive stickers with the ultimate goal being Lego's

> at the end of the week. [The Student] continues to engage in head banging both at school and on the school bus. In order to extinguish this behavior, the district has tried several behavioral strategies, such as: variety of sensory activities, different reinforcers, reassigning his personal paraprofessional, etc. Recently the district has contracted with a behaviorist to observe and make recommendations. However, with the behaviorist in the classroom, [the Student] has not exhibited the head banging behaviors. The district will continue to contract with a behaviorist."

(DEX F). In the Transportation Services section of the IEP, the Student's IEP Team stated that '[The Student] will wear helmet on bus to prevent head injury, effective 2/27/08." (DEX F). The Modifications/Accommodations page of the IEP provides that the Student will "Wear helmet to prevent head injury." On that same page, the IEP Team also added the following language:

> "Other: A contracted behaviorist will observe in the classroom, view behavior logs and videotapes of behavior and make recommendations.
>
> Other: The district autism specialist will consult with district staff on an as needed basis for assistance with instructional strategies, sensory diet issues, or behavioral techniques."

(DEX F). The IEP Team also developed a Behavior Intervention Plan ("BIP") which addresses the Student's behavior issues that were identified in his IEP, including his propensity to engage in head banging conduct. The District decided to codify the BIP to "firm up part of the strategies" that had been successful with the Student. (Tr. pp. 316-317). The BIP sets forth "Steps To Be Implemented To Achieve Goals And Objectives:" as follows:

> "1. The district will continue to consult with a behaviorist.
>
> 2. [The Student's] behaviors will be videotaped (both individually and with peers) for the behaviorist and school personnel to utilize. The behaviorist will train the necessary staff in regard to implementing the recommended strategies.
>
> 3. The district and parents will continue to utilize the behavior chart currently being used. Adaptions can be made as necessary with notification provided to parents. Reinforcements will be given to [the Student] according to the plan designed. Changes to the reinforcement system can be made with both teacher and parental consultation.
>
> 4. The district will continue to utilize a sensory diet, similar to the items listed above.

5. Daily notes will be provided to the parents in regard to [the Student's] behavior. The notes will contain positive remarks as well as areas of concern.

6. Parents will continue to consult with [the Student's] physician in regard to [the Student's] need for medication."

(DEX F).[2] The BIP also states that the retained behaviorist will provide training for the District's staff and the District's Autism Specialist will consult with District staff as needed regarding the Student's behaviors. (DEX F).

40. At the conclusion of the April 15, 2008, IEP meeting, the Student's Parents and the District entered into an "Agreement To Override Stayput". (DEX G). The Agreement states in pertinent part:

> "The Savannah R-III School District and [the Parents] agree to override IDEA's stay-put provision to allow for the implementation of [the Student's] annual IEP developed on April 15, 2008 with one exception. [The Student's] parents do not agree to override stay-put to allow for the implementation of a helmet as specified in the "transportation" and the "accommodation and modification" sections of the IEP."

41. During the meeting on April 15, 2008, the Student's Parents provided the District with a letter from Dr. Michael Frost, a Pediatric Neurologist with the Minnesota Epilepsy Group in St. Paul, Minnesota. (DEX H). In his letter, Dr. Frost states that during the Student's hospital stay between September 25, 2007, and October 2, 2007, he "did not tolerate wearing the helmet and became very agitated and uncooperative [and] was unable to tolerate wearing the helmet without agitation." (DEX H; Tr. pp. 314-315). The Student's Parents refused to provide the District with a release that would allow them to review the relevant findings of Dr. Frost regarding the Student or to consult with Dr. Frost to determine the method the hospital attempted to use to have the Student wear the helmet. (Tr. pp. 314-315).

42. Following the April 15, 2008, IEP meeting, the Student's head banging behaviors again escalated in intensity, frequency and duration while he was at school. (Tr. pp. 311-312). There is no evidence as to the cause of this escalation and the Hearing Panel finds that its genesis was not the BIP developed at the April 15, 2008, meeting in that the strategies contained in the BIP had been used successfully with the Student in the past. (Tr. pp. 311-312).

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[2] The Student's Mother agreed that consistent classroom routines, a consistent routine and rules at home and the Student taking his prescribed medications were a necessary part of any behavior plan for the Student. (Tr. pp. 33-35). The Student's Mother also agreed that the strategies listed in the Behavior Plan had been effective in the past with the Student. (Tr. pp. 40-44).

43. On April 17, 2008, the District issued a Notice of Action to the Student's Parents. (DEX E). The Notice of Action proposed to change the Student's IEP and services to include a formalized BIP and a Transition Service Plan. (Tr. pp. 317-318).

44. The Student's Mother objected to the Student wearing a protective helmet during the school day because she does not want him to "stand out" in the hallway or school. (Tr. p. 31, lns. 9-14).

45. If allowed, the District intends to use a bicycle-type helmet with the Student. (Tr. pp. 322-323).

46. In addition to the potential for injury to the Student from his head banging behaviors, the Student has inflicted injuries on District staff, including his teacher Janet Long, during the course of his head banging behavior. On one occasion he pinched Ms. Long leaving a large bruise. On another occasion the Student kicked Ms. Long on the leg. (Tr. p. 323).

47. The Student's behavior, and particularly the Student's head banging behaviors, has impeded his learning during the times he exhibits the behavior.

II. CONCLUSIONS OF LAW

48. The District is a Missouri Public School District which is organized pursuant to Missouri statutes.

49. The Student is now and has been a resident of District, as defined by Section 167.020 RSMo, during all times relevant to this due process proceeding.

50. The IDEA, its regulations and the *State Plan for Special Education* (2007), ("State Plan") set forth the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District in providing special education and related services to students with disabilities.

51. The State Plan was in effect at all material times during this proceeding. The State Plan constitutes regulations of the State of Missouri which further define the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District, in providing special education and related services to students with disabilities.

52. The purpose of the IDEA and its regulations is: (1) "to ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs"; (2) "to ensure that the rights of children with disabilities and their parents are protected"; and, (3) "to assess and ensure the effectiveness of efforts to educate those children." 34 C.F.R. § 300.1.

53. The IDEA requires that a disabled child be provided with access to a "free appropriate public education." ("FAPE") *Board of Education of the Hendrick Hudson Central School District, Board Of Education, Westchester County v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982). The term "free appropriate public education" is defined by 34 C.F.R. § 300.8 as follows:

> "...the term 'free appropriate public education' 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 preschool, elementary school, or secondary school education in the State involved; and,
> (d) Are provided in conformity with an IEP that meets the requirements of §§ 300.340--300.350."

A principal component of the definition of FAPE is that the special education and related services provided to the student with a disability, "meet the standards of the SEA" (State Educational Agency), and "the requirements of this part". 34 C.F.R. Part 300.

54. If parents believe that the educational program provided for their child fails to meet this standard, they may obtain a state administrative due process hearing. 34 C.F.R. § 300.506; *Thompson v. Board of the Special School District No. 1*, 144 F.3d 574, 578 (8th Cir. 1998); *Fort Zumwalt School District v. Clynes,* 119 F.3d 607, 610 (8th Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed 2d 1090 (1998). The right to file a request for a due process hearing is also available to the Local Educational Agency ("LEA"), which in this case is the District.

55. The IDEA is designed to enable children with disabilities to have access to a free appropriate public education which is designed to meet their particular needs. *O'Toole by O'Toole v. Olathe District Schools Unified School District No. 233,* 144 F.3d 692, 698 (10th Cir. 1998). The 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, supra.,*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, supra.*, 102 S.Ct. 3034, 3049; *Fort Zumwalt School District v. Clynes*, *supra.*119 F.3d 607, 612; and *A.W. v. Northwest R-1 School District*, 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. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); that is "absolutely [the] best", *Tucker v. Calloway County Board of Education,* 136 F.3d 495, 505 (6th Cir. 1998); that will provide "superior results," *Fort Zumwalt School District v. Clynes*, *supra.* 119 F.3d 607, 613; or, that will provide the placement the parents prefer. *Blackmon v. School District of Springfield, R-12*, 198 F. 3d 648, (8th Cir. 1999); *E.S., supra.* 135 F.3d 566, 569. See also: *Tucker, supra.*, 136 F.3d 495, 505; and *Board of*

Education of Community Consolidated School District No. 21 v. Illinois State Board of Education, 938 F. 2d 712, 716-17 (7th Cir. 1991).

56. Article IX § 2(a) of the Missouri Constitution states in pertinent part that "[t]he supervision of instruction in the public schools shall be vested in a state board of education. . . ." The State Board of Education for the State of Missouri is the "State Educational Agency" ("SEA") for the State of Missouri, as that term is defined in the IDEA, 20 U.S.C. § 1401(28).

57. The Student is now, and has been at all times relevant to this proceeding, a "child with a disability" as that term is defined by the IDEA, its regulations (34 C.F.R. § 300.8) and the State Plan (Regulation I -- General Provisions).

58. To the extent that it is required by the facts in this case and the issues presented to the Hearing Panel, during all times relevant to this proceeding, the District's actions with respect to the Student and his Parents have met the procedural requirements of the IDEA and State Plan. To the extent that a question arises with respect to any procedural due process requirement relevant to the Current Request, there is no competent evidence on the record that any such alleged procedural inadequacy impeded the Student's right to FAPE; significantly impeded the Parents' opportunity to participate in the decision making process regarding the provision of FAPE for the Student; or, caused a deprivation of educational benefits for the Student.

59. The burden of proof in an administrative due process hearing pursuant to the IDEA is placed on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528 (2005). Here the Parent filed the due process complaint and she therefore bears the burden of proof.

60. The IDEA Regulations, 34 C.F.R. § 300.324(a)(2)(i) place the following requirements on a Student's IEP Team when they develop the Student's IEP:

> "*Consideration of special factors.* The IEP Team must –
>
> . . .
>
> (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports; and other strategies, to address that behavior; . . ."

61. The State Plan, Regulation IV – FAPE/IEP/LRE, page 45 provides the following State regulation regarding the development of a behavior intervention plan:

> "The IEP Team must also:
>
> A. In the case of a child whose behavior impedes his or her learning or that of others, consider the use of positive behavioral interventions and supports and

other strategies to address that behavior (for children for whom a Behavior Intervention Plan is developed, the Plan must be included in the IEP); . . . "

62. The Behavior Intervention Plan prepared by the District on April 15, 2008, meets the requirements of the IDEA and State Plan.

63. The Student's Parent has failed to meet the burden of proof placed on her to show that the District's proposal to have the Student wear a helmet at school is not a necessary accommodation in order to provide the Student with a free, appropriate public education.

64. At this time, the Student needs to wear an appropriate helmet while at school, on the school bus or at school activities in that the wearing of the helmet is a necessary accommodation in order to provide the Student with a free, appropriate public education.

65. The Student's Parent has failed to meet the burden of proof place on her to show that during the relevant time period, the District did not have appropriate behavior supports and strategies in place to provide the Student with a free, appropriate public education.

66. The behavior supports and strategies that were in place during the time the Student engaged in the head-banging behavior were appropriate in order to provide the Student with a free, appropriate public education. The behavior supports and strategies had worked for the Student in the past and there was no reason for the District to believe that these behavior supports and strategies would not work for the Student.

III. DECISION

67. **Issue Number 1:** Whether the Student required a helmet as a necessary accommodation in order to provide him with a free, appropriate public education.

Decision on Issue No. 1:

The Student has a profound educational disability. Since March, 2007, and to the time of the hearing, the Student's disability has caused him to engage in a recurrent and dangerous head-banging behavior during which the Student hits his head on any available surface, from glass to concrete to brick or steel, from desk tops to floors to walls or windows. The head-banging behavior is preceded at times by noises (like clenched teeth breathing), but at other times the behavior occurs with no precursor conduct. Likewise, with or without the precursor behaviors, at times the behavior is predictable, but at other times it is not.

The Student is very large. At the time of the hearing the Student was six feet one inches tall and weighed two hundred seventy four pounds. An uninformed observer might believe that the Student was a prototypical high school football defensive tackle if

he was seen walking down the street or in the school hallway. Normally, the Student's size is not a problem because he attends well to the educational program that has been provided by the District. However, the Student's size and strength is a factor when it viewed in the context of his recurrent, self-injurious, head-banging behaviors.

The testimony in the hearing revealed that the Student's head-banging behavior is of such severity that the District's educational and transportation staff truly believed that he was going to severely injure himself. As such, when these behaviors occur, they impede the Student's ability to meaningfully access his program of special education and related services and further, the behaviors cause him a real potential for suffering serious injury.

It is the unanimous opinion of the Hearing Panel that, based on the record, it is appropriate for the Student to be required to wear a helmet as a necessary accommodation in order to provide him with a free, appropriate public education and to protect him from serious injury which could be caused by his self-injurious head-banging behavior. In this regard, it is the decision of the Hearing Panel that: (a) the District should select a helmet that it believes is appropriate and will protect the Student's head from his self-injurious head-banging behavior; (b) the District should determine the times when the helmet should be worn, which may include all times that the Student is in the care of the District; (c) the District, in its best educational judgment, should determine the method of introducing the helmet to the Student; and, (d) the helmet should be worn until the Student's head-banging behaviors are extinguished or there are other reasonable and prudent reasons to discontinue the use of the helmet in the opinion of the District.

68. **Issue Number 2:** Whether there are appropriate behavior supports and strategies in place to provide the Student with a free, appropriate public education.

Decision on Issue No. 2:

The Student's educational disability causes him to have a number of heightened sensory needs that, at times, impede his ability to benefit from the educational program provided to him by the District. During the last three school years, the relevant period for this due process proceeding, the District has developed a number of behavior supports and strategies to deal with the Student's educational disabilities including: allowing the Student to use headphones to listen to music; the use of scents, pine air fresheners and lotions; the use of a weighted backpack; and, allowing the Student to play with a shiny penny, a bit of string, a fragment of a rubber band, Legos or a piece of a puzzle. The District has also used a "token economy" and a behavior chart as further strategies to deter bad behaviors and reward the Student for engaging in good behaviors.

In March, 2007, the District first observed the Student engaging in head-banging behaviors. The Student continued this behavior into school year 2007-08. In November,

2007, the behaviors because serious enough that the Student's Special Education classroom teacher and personal paraprofessional contacted Judy Smith, the District's Director of Special Services and Autism Specialist. Ms. Smith suggested a number of strategies including: quicker use of a reinforcer; trying to "talk down" the behavior before it escalated; using a bean bag chair to provide compression and down time; going for walks around the building; riding a stationary bicycle or using other similar pieces of exercise equipment.

When the suggested strategies failed to stop the Student's head-banging behavior, an IEP meeting was held on December 6, 2007 to focus on the Student's emerging head banging behaviors at school and develop additional behavior supports and strategies to deal with the Student's head-banging behavior. During this meeting, the Student's IEP Team, including his Mother, agreed to the following strategies: (a) decrease the Student's time on the school bus in the morning by changing his pickup time to the last pickup of the morning; (b) try using a different paraprofessional for the Student's current paraprofessional, Debbie Coats until the Winter Break; (c) locate a Behaviorist in the Area and obtain a consultation concerning the Student's behavior; (d) obtain an Occupational Therapy screening for the Student; (e) make sensory-oriented changes to the Student's diet at school; (f) utilize a Behavior Chart; and, (g) try various positive and negative reinforcers to deal with the Student's behavior.

The District followed through on these behavior supports and strategies, though some took longer than others. For example, relatively soon after the December 6, 2007, meeting, the District had: changed the Student's bus route so he was the last child picked up; changed his personal paraprofessional; made changes to his diet at school; began using a behavior chart and tried various positive and negative reinforcers with the Student in the classroom. The positive and negative reinforcers discussed at this meeting were the same ones that had been successful with the Student during the last few years. Inclement weather and the Christmas break slowed the District's progress on obtaining an Occupational Therapy screening (which did not occur until January 28, 2008) and obtaining a consultation from a Behaviorist (which did not occur until February 19, 2008).

On January 16, 2008, the Student's IEP Team met again to follow-up on the meeting that had taken place on December 6, 2007. During this meeting the Student's Team determined that there had been no decrease in the Student's head banging behaviors during the period since the December 6, meeting. The Student's Team further determined that the change in the Student's personal paraprofessional had not caused the head-banging behavior to abate.

On February 27, 2008, the Student's IEP Team met again to follow-up on the data that was being collected on the Student's head banging behavior and to discuss possible solutions for the conduct. At this meeting it was recognized that the head banging

behaviors had increased in frequency, duration and intensity to the point that the District was no longer comfortable with the Student being without a helmet. During this meeting the Student's Team: (a) reviewed the Occupational Therapy "Consult Summary" that determined that direct Occupational Therapy services were not necessary; (b) discussed the observation by the Behaviorist, Sarah Sinclair of PBM; (c) discussed the Student's head banging, which had recently occurred on the school bus in the morning and in the school building, where the Student nearly hit his head on two protruding bolts in the gymnasium, which were used to hold up a volleyball net; (d) agreed that Debbie Coats should return as the Student's personal paraprofessional; (e) discussed a further modification of the transportation route to drop the Student off first in the afternoon; and, (f) discussed the District's conclusion that the Student should wear a helmet during the school day to insure that he was not injured by his head-banging behaviors.

On February 27, 2008, the Student's IEP Team developed an Addendum to his IEP which added a provision to the Student's IEP that states: "Wear helmet to prevent head injury," to the program accommodations/modifications page of the IEP. The Parents did not agree with the proposed change to the Student's IEP and refused to give consent for the use of the helmet and filed this due process proceeding prior to the end of the ten day period.

Following the filing of the due process complaint, on April 15, 2008, the Student's annual IEP Meeting was conducted. During this meeting, the Student's IEP Team inserted language which required the Student to wear the helmet on the school bus and at school to prevent possible head injury. The Parent continued to refuse to agree to this strategy. The Student's Team also developed a Behavior Intervention Plan which addressed the Student's behavior issues that were identified in his IEP, including his propensity to engage in head banging conduct. The Behavior Intervention Plan sets forth "Steps To Be Implemented To Achieve Goals And Objectives:" as follows:

"1. The district will continue to consult with a behaviorist.

2. [The Student's] behaviors will be videotaped (both individually and with peers) for the behaviorist and school personnel to utilize. The behaviorist will train the necessary staff in regard to implementing the recommended strategies.

3. The district and parents will continue to utilize the behavior chart currently being used. Adaptions can be made as necessary with notification provided to parents. Reinforcements will be given to [the Student] according to the plan designed. Changes to the reinforcement system can be made with both teacher and parental consultation.

4. The district will continue to utilize a sensory diet, similar to the items listed above.

5. Daily notes will be provided to the parents in regard to [the Student's] behavior. The notes will contain positive remarks as well as areas of concern.

6. Parents will continue to consult with [the Student's] physician in regard to [the Student's] need for medication."

It is the unanimous opinion of the Hearing Panel that the behavior supports and strategies used (and offered but rejected by the Parents) by the District for the Student were appropriate and were reasonably calculated to assist the Student to benefit from his program of special education and related services. It is noted however, that even though there were behavior supports and strategies used, the evidence is clear they did not effectively reduce the Student's head-banging behaviors. Indeed, the Student's head-banging behaviors increased.

At the time of the due process hearing, the Behavior Intervention Plan had not been fully implemented, in part, because it was developed at the end of the school year, and in part because the Student was not present for approximately the last week of the regular school year. The behavior supports and strategies used by the District meet the requirements of the IDEA and State Plan and are reasonably calculated to assist the Student to be able to receive a free, appropriate public education.

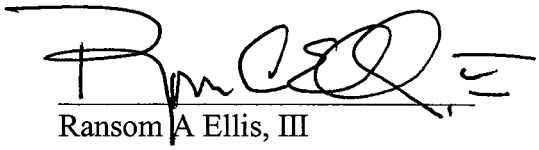
At the time the due process complaint was filed by the Student's Mother, the Behavior Intervention Plan had not been written. As noted above, on April 15, 2008, the Student's IEP Team finalized a Behavior Intervention Plan for the Student. Because the Parent has refused to allow the District to try a protective helmet with the Student and the Behavior Intervention Plan has not been fully implemented, the Hearing Panel believes that it is important for the District to continue to update and improve the BIP as needed and follow through on the implementation of the Behavior Intervention Plan, including for example, the use a qualified Behaviorist, in conjunction with the use of an appropriate helmet and the other behavior supports and strategies in order to extinguish the Student's self-injurious head-banging behavior.

IV. ORDER

69. The Parent's due process complaint dated March 6, 2008, is dismissed.

V. APPEAL PROCEDURE

PLEASE TAKE NOTICE that these Findings of Fact, Conclusions of Law, Decision and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter and you have a right to request review of this decision pursuant to Section 162.962 RSMo. Specifically, you may request review by filing a petition in a state or federal court of competent jurisdiction within forty-five days after the receipt of this final decision. Your right to appeal this final decision is also set forth in the Regulations to the IDEA, 34 C.F.R. §300.512, and in the Procedural Safeguards which were provided to you at the beginning of this matter.



Ransom A Ellis, III
Hearing Chairperson

Dated: August 8, 2008

Karen Karns

Karen Karns
Hearing Panel Member

Dated: August 2, 2008

Rand Hodgson
Hearing Panel Member

Dated: August 7, 2008

AB Per Amanda Ct.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon each party to this action, to-wit:

Ms. Kandi Sprake
105 W. Benton
Savannah, MO 64485

Ms. Teri B. Goldman
Michael D. Hodge
Mickes Goldman, LLC
555 Maryville University Drive
Suite 240
St. Louis, MO 63141

Ms. Karen Karns
1208 Hampton Drive
PO Box 2292
Platte City, MO

Mr. Rand Hodgson
10204 S. Outer Belt Road
Oak Grove, MO 64075

Ms. Margaret Strecker
Special Education Legal Services
Department of Elementary and
Secondary Education
Post Office Box 480
Jefferson City, MO 65102-0480

by depositing same in the United States mail at Springfield, Missouri, postage prepaid, duly addressed to said parties on this 6th day of August, 2008.

Ransom A Ellis, III
Hearing Chairperson