

**BEFORE THE THREE MEMBER DUE PROCESS PANEL
EMPOWERED BY THE
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

XXXX XXXXXXXXXXXXXXXXXXXX)
)
 Petitioner/Student,)
)
v.)
)
Grandview C-4 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 February 25-26 and June 3, 2009, issues the following Findings of Fact, Conclusions of Law, Decision and Order:

FINDINGS OF FACT

The Hearing Panel makes the following Findings of Fact:

The Parties

1. XXXX XXXXXXXXXXX ("Petitioner") is the Petitioner in this case. XXXX was born on XXXXXX XX, XXXX, and is the son of XXXX XXXXXXXXXXX and XXXX XXXXXXXXXXX ("Parents"). Parents currently reside at XXXXX XXXXXX, Kansas City, MO XXXXX, which is within the boundaries of the District. (DEX); (Joint Stipulation of Facts #2 hereinafter referred to as "Joint Stip #_") Parents are both college educated persons (Tr. Vol. 1, pp. 104-105; Tr. Vol. 2, pp. 221-222). The primary mode of communication of the Petitioner and the Parents is written and spoken English. (Tr. Vol. 1, p. 104).

2. The Grandview C-4 School District ("the District") is a Missouri Public School District which is organized pursuant to Missouri statutes. The District is located in Jackson County, Missouri and maintains approximately nine (9) educational sites. The District educates approximately four thousand (4,000) students and approximately five hundred (500) special education students. (2008-09 Missouri School Directory; Tr. Vol. 3, p. 105).

3. The Petitioner and his Parents were represented by Daniel J. Pingelton, The Guitar Building, 28 North 8th Street, Suite 402, Columbia, Missouri 65201.

4. The District was represented by Ransom A. Ellis, III, who is with the law firm of Ellis, Ellis, Hammons & Johnson, P.C., 901 St. Louis Street, Suite 600, Springfield, Missouri 65806-2505.

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

Pamela S. Wright	Hearing Chairperson
Fred Davis	Panel Member
Dr. Kim Ratcliffe	Panel Member

6. During all times relevant to this proceeding the following persons were employed by the District and have provided educational services to the Petitioner in connection with this case:

Susan Kirkpatrick	Director of Special Education
Joan Levinson	Special Education Coordinator
Keri Collison	Process Coordinator
Susan Howell	Process Coordinator
Maggie Cummings	Special Education Teacher
Christine Murray	Special Education Teacher
Susan Thomas	ECSE Teacher
Jovana Ross	ECSE Teacher
Amy Bahr	Regular Education Teacher
Marci Brown	School Psychologist
Bart Whaley	School Psychologist
Cheryl Reid	Speech/Language Pathologist
Gloria Littlewood	Speech/Language Pathologist
Kim Sutherland	Speech/Language Pathologist
Jill Reilly	Occupational Therapist
Wanda Quibell	School Counselor
Liz Means	Assistant Principal -- Martin City

Time Line Information and Procedural Background

7. The Parents requested a due process hearing by letter to the Department of Elementary and Secondary Education ("DESE") dated March 3, 2008, which was received by DESE that same day. (DEX 51, pp. 525-536).

8. On March 18, 2008, the District filed its Response to Due Process Complaint with the Hearing Chairperson. (DEX 53, pp. 538-552).

9. The Chairperson had a conference call with the attorneys for the parties on April 3, 2008. They reached an agreement to hold the due process hearing on September 3-5, 2008. The attorneys jointly requested an extension of the time line to September 30, 2008 for the issuance of an opinion. The Chairperson and the attorneys agreed to have another conference call on June 3, 2008 to discuss the status of the case, including the issues to be resolved by the Hearing Panel.

10. On July 16, 2008, Jeffrey A. Sutton with Gibbens, Sutton & Sonntag, counsel for Petitioner, filed a Motion to Withdraw, which was granted by the Chairperson on July 19, 2008.

11. On August 5, 2008, the District filed a Motion for Summary Judgment based on: (a) Student was not entitled to pursue a claim for private school reimbursement because he was never a student of the District nor did he ever receive special education or related services from the District and (b) the enforcement of the two year statute of limitations for any alleged claims arising prior to March 3, 2006.

12. On September 15, 2008, Dan J. Pingelton entered his appearance on behalf of Petitioner and requested the due process hearing be held on December 10-12, 2008, with an extension of the timeline from September 30, 2008 to December 31, 2008.

13. The Chairperson granted the Petitioner's requests (after consulting with the District's counsel) in a detailed Scheduling Order issued on September 16, 2008. The Order set a timetable for filing responses to the pending Motion for Summary Judgment as well as listing the Issues previously agreed upon by the parties.

14. On October 15, 2008, Petitioner filed his Verified Response to the Motion for Summary Judgment, including a sworn statement from Petitioner's Mother that the parents had not received procedural safeguard notices in 2004. As a result, she asserted that the Parents did not know that they could pursue a due process hearing on those matters with which they disagreed; therefore, the exception to the two year statute of limitations applied. The District filed its Reply on October 30, 2008 followed by the Petitioner's Sur-Reply on November 17, 2008.

15. The Chairperson denied the Motion for Summary Judgment on November 22, 2008 and set out the following reasons in the Order: (1) The Circuits were split on the issue of the validity of private tuition reimbursement claims by parents whose children had not previously received special education and related services from a school district ¹ and (2) the record contained two plausible, but contradictory, accounts of an essential fact that prevented granting a summary judgment to enforce the two year statute of limitations.

16. On December 5, 2008, the District sought a continuance of the upcoming hearing dates because of pregnancy complications experienced by one of the District's key witnesses. Petitioner consented to the request. The parties agreed to new hearing dates of February 25-27, 2009, with the timeline being extended to April 1, 2009 as detailed in the Chairperson's First Amended Scheduling Order issued on December 11, 2008.

17. Prior to the February hearing dates, Terry Allee resigned as a member of the Hearing Panel who was replaced by Dr. Kim Radcliffe who was available on February 25 & 26 but not February 27, 2009. The parties agreed to have the 3rd and final day of hearing on April 1, 2009.

¹ The U. S. Supreme Court ruled in favor of parents on that issue in an opinion handed down on June 22, 2009 in *Forest Grove School District v. T. A. ____* U. S. ____.

18. The first two days of hearing occurred on February 25 & 26, 2009. At the close of the 2nd day of hearing, the parties agreed to extend the timeline to June 1, 2009 for the issuance of an opinion after the final day of hearing on April 1, 2009.

19. Shortly before the third day of hearing scheduled for April 1, 2009, the mother of Petitioner's counsel died. The parties agreed to a continuance until June 3, 2009 for the third and final day of hearing, with the timeline extended to August 7, 2009. The opinion is issued within the current timeline.

20. The Petitioner introduced Exhibits A-VV. (Tr. Vol 2, p. 184; 191)² The District objected to all the cover pages to the Petitioner's Exhibits. (Tr. Vol. 2, pages 185-186). The District also objected to Exhibits A, B, E, F, H-R, V, HH, RR-TT, UU and V, all of which were admitted except for VV. (Tr. Vol. 2, pages 188-192).³ The District presented Exhibits 1-57, which were admitted into evidence. (Tr. Vol. 2, p. 150-151).

21. Witnesses for the Petitioner included: Mother, Father and two experts, Darcy Baker and Jennifer Simon, PhD. The District presented the following witnesses: Joan Levinson; Keri Collison; Susan Kirpatrick, all District employees.

The Issues Heard by the Hearing Panel

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

(A) Did the Parents of Petitioner ever enroll him in the District and if not, did the failure to do so make Petitioner ineligible for services pursuant to the IDEA?

(B) Did the District comply with the procedural requirements of IDEA between March 3, 2006, and March 3, 2008? If not, did the violations result in a denial of FAPE to Petitioner?

(C) Were the proposed IEPs dated May 23, 2007, and August 15, 2007, reasonably calculated to provide the Petitioner with FAPE in the Least Restrictive Environment?

(D) In 2004, did the District fail to comply with 34 C.F.R. §300.504(a) dealing with providing procedural safeguards notice to the Petitioner? If so, does this failure invoke an exception to the two year statute of limitations set out in 20 U.S.C. §1415(f)(3)(D)?

(E) Assuming FAPE was not provided or the IEPs were not reasonably calculated to provide educational benefits, what conduct, if any, of Petitioner's Parents materially contributed to the failure to provide FAPE or the development of an adequate IEP? Did

² Because the due process hearing took place over three days, there are three volumes of the official transcript. Citations to the transcript refer to the volume and page number. Petitioner's Exhibits are referred to as PEX and the appropriate letter. The District's Exhibits are referred to as DEX followed by the appropriate number.

³ The court reporter erred on page 192 (of Tr. Vol. 2) when she indicated that BB was refused. The Exhibit not admitted was VV as noted in line 16 on the same page. VV was denied admission because it was not disclosed as per the five day rule. (Tr. Vol. 2, page 177-180; 192)

the District deprive the parents of an opportunity to participate meaningfully in the development and/or implementation of the proposed IEPs?

(F) Is the Kansas City Autism Training Center where Petitioner has attended and/or currently attends considered an appropriate placement under the IDEA?

(G) Did Petitioner's Parents act unreasonably under 20 U.S.C. §14112(a)(10)(C)(iii)(III)?

(H) Did Petitioner's Parents comply with the notice requirements in 20 U.S.C. §1412(a)(10)(C)(iii)(I)(aa)-(bb)? If not, does the safe harbor provision in 20 U.S.C. §1412(a)(10)(C)(iv)(II) apply to this case?

(I) What services (and the amounts therefor), if any, should be reimbursed by the District to the Petitioner's Parents?

BACKGROUND FACTS⁴

Student's Educational History Covering March 1, 2004-August 24, 2006

23. On March 1, 2004, the Petitioner was referred to District's Early Childhood Special Education ("ECSE") Program by the First Steps Program.⁵ (Joint Stip. #3: DEX 1; DEX 50, p. 511). Joan Levinson, the District's Process Coordinator wrote a letter to the Parents describing the referral process. (DEX 1; Tr. Vol. 2, pp. 196). A copy of the Procedural Safeguards was sent with the letter to the Parents. (DEX 1, p. 1; Tr. Vol 2, pp. 196-197).

24. On June 4, 2004, a Transition Meeting was held with Petitioner's Parents, Joan Levinson, Jovana Ross, Jill Reilly, Cheryl Reid, S. Thomas, Dr. Ed Hoffman, Kristy DuBois (First Steps). (Joint Stip #4). The Petitioner's Team received Information Releases. (DEX 2; Tr. Vol. 2, p. 197); a copy of the First Steps Service Plan (DEX 3); and, information from Petitioner's other providers (DEX 3; Tr. Vol. 2, pp. 198-199) and discussed the transition of Petitioner from the First Steps Program to the District's ECSE program. During this meeting, Ms. Levinson provided the Parents with a copy of the Procedural Safeguards, and explained it to them section-by-section. (Tr. Vol. 2, pp. 200-201).

25. On August 9, 2004, Joan Levinson had a telephone conversation with Petitioner's Mother. During that conversation, Petitioner's Mother informed Ms. Levinson that she did not want

⁴ We include more Background Facts than are necessary, especially in view of our holding on the statute of limitations issue. We recognize, however, that this opinion may very well be reviewed in the state or federal courts so a thorough Findings of Fact section may be helpful at the higher level.

⁵ Student started with First Steps program around his second birthday in August 2003. (Tr. Vol. 1, p.40) Student had been referred to First Steps by Edward Hoffman, MD who provided a medical diagnosis of pervasive developmental disorder not otherwise specified ("PPD NOS") but recommended that intervention be directed toward autism spectrum symptomatology. (PEX A, p. 002-004) A Psychological Assessment conducted by Kansas City Regional Center reached essentially the same diagnosis of PPD NOS as Dr. Hoffman. (PEX B, p. 8) In response to a request by Father to obtain health insurance benefits for Petitioner, Dr. Hoffman revised his diagnosis in February 2006 to state that Petitioner has autistic spectrum disorder, a pervasive developmental disorder with impairments in social interaction, communication and restricted repetitive and stereotyped patterns of behavior. (PEX P, p. 083-084)

District services and wanted to continue First Steps services even though Mother knew that his eligibility for First Steps ended on his third birthday in late August 2004. (Tr. Vol. 1, p. 108). Ms. Levinson attempted to set a meeting for Review of Existing Data for August 10, 2004, but Petitioner's Mother continued to indicate she did not want a meeting and wanted Student to continue in the First Steps program. (DEX 50; Tr. Vol. 2, p. 201).

26. On August 20, 2004, Joan Levinson had another telephone conversation with Petitioner's Mother. During this conversation Ms. Levinson set a meeting for Review of Existing Data for August 23, 2004, at 9:00 a.m. (DEX 50; Tr. Vol 2, p. 202). Later that day, Petitioner's Mother brought a Speech/Language report and gave it to Ms. Levinson. (DEX 50; Tr. Vol. 2, p. 202).

27. On August 23, 2004, Ms. Levinson provided Petitioner's Father with a Notification of Meeting form, which confirmed the arrangements that had been made with Petitioner's Mother on August 20, 2004. (DEX 5; Tr. Vol. 2, pp. 202-204). A copy of the Procedural Safeguards was provided with the Notification. (DEX 5, p. 90).

28. On August 23, 2004, the District conducted a Review of Existing Data Meeting concerning the Petitioner. Present at that meeting were Petitioner's Father, Joan Levinson, Susan Thomas, Marci Brown, Jill Reilly, Kim Sutherland and Cheryl Reid. All areas of functioning discussed and Petitioner's Team determined that additional testing was needed. (Joint Stip #5; Tr. Vol. 2, p. 207). During this meeting:

A. A Review of Existing Data Form was prepared (DEX 6) and Ms. Levinson provided Petitioner's Father with a copy of the Procedural Safeguards and again explained it to him. (DEX 50, p. 511; Tr. Vol. 2, pp. 204-205).

B. The District provided Petitioner's Father with a Notice of Action requesting his consent to further testing of Petitioner together with a Description of Areas to be Assessed and Known Tests to be Used. Petitioner's Father provided written consent for the initial evaluation. (DEX 7, pp. 95-99; DEX 50, p. 511; Tr. Vol. 2, pp. 204-206). A copy of the Procedural Safeguards was provided with the Notice of Action. (DEX 7, p. 95).

C. The parties agreed to meet on August 26, 2004, to complete Petitioner's Initial Evaluation. A Notification of Meeting form was prepared and provided to Petitioner's Father by Ms. Levinson. (DEX 8, pp. 100-101; DEX 50, p. 511; Tr. Vol. 2, pp. 207-208). A copy of the Procedural Safeguards was provided with this Notification. (DEX 8, p. 100).

29. On August 26, 2004, the District conducted an Eligibility Staffing Meeting. Present at this meeting were Petitioner's Parents, Joan Levinson, Susan Thomas, Marci Brown, Jill Reilly, Kim Sutherland and Cheryl Reid. (DEX 9, p. 114). During this meeting:

A. The Petitioner's Team reviewed and discussed all of the information they had received from Petitioner's providers, which had been provided to the District by the Parents. (Tr. Vol 1, pp. 113-114).

B. The Petitioner's Team determined that Petitioner was a Young Child with a Developmental Disability ("YCDD") due to significant delays in the following areas: cognition, speech, language, motor and sensory needs. The Evaluation Report noted behavioral issues such as his very short attention span and very distracted in play setting. (DEX 9, pp. 108-109; DEX 50, p. 512; Tr. Vol. 2, p. 208).

C. Petitioner's Parents did not agree or disagree with this educational diagnosis nor did they request an outside evaluation at public expense. (Tr. Vol. 2, p. 209).

30. On August 26, 2004, following the Eligibility Staffing Meeting, the District conducted a meeting to develop an Individualized Education Program ("IEP") for the Petitioner. Present at this meeting were Petitioner's Parents, Joan Levinson, Susan Thomas, Marci Brown, Jill Reilly, Kim Sutherland, Cheryl Reid and Debbie Neugebauer, a regular classroom teacher. (DEX 10, p. 115; DEX 50, p. 512; Tr. Vol. 2, pp. 210-211). During this portion of the meeting:

A. The Team developed an IEP for the Petitioner which provided him seven hundred (700) minutes per week of special education and related services, as compared with four hundred twenty (420) minutes per week of services under the First Steps Program. (Tr. Vol. 2, pp. 211-212).

B. The Team discussed the appropriate placement for the Petitioner and determined that an Early Childhood Special Education Classroom was the appropriate placement for the Petitioner. (DEX 10, p. 128; Tr. Vol. 2, p. 212).

C. Petitioner's Parents were asked to consent to placement of Petitioner in the District program. Petitioner's Parents refused to sign consent for placement of Petitioner. (Tr. Vol. 1, p. 117; Tr. Vol. 2, pp. 212-213).

D. Mother testified that when the meeting started, the IEP had already been drafted. No changes were made. The Parents felt no one was interested in parental concerns. (Tr. Vol. 1, page 46.)

31. The Early Childhood Special Education Classroom was described by Joan Levinson as follows:

". . . it would have been six or eight children, we have a very academic-oriented program, good speech and language is provided in that service, occupational therapy is provided in that service, along with physical therapy, if the child needs that. . . This very much integrated with non-handicapped peers who demonstrate good speech language, social skills, and good integration skills. The children are provided a good means to generalize their learning, both academically, language development is provided in the classroom itself. Our occupational therapists at that time were also going into the classroom working on fine motor, and we had gross motor group activities where they were experiencing good motor activities."

(Tr. Vol. 2, p. 215, lns. 2-17). Several of the children in each ECSE Classroom are non-disabled. Ms. Levinson testified as follows:

"We do a DIAL-3 screening . . . each April, we take students that have average scores, or above average scores, and we have an open house and we . . . give the parents the option that if their child scored in that range of average, that they would be good candidates for our program. Many parents call and say I'd like to have my child participate in the regular education as a peer model, and so we, we select those children that we feel would best be good exhibitors of behavior, social skills."

(Tr. Vol. 2, p. 228, lns. 11-20).

32. The August 26, 2004, IEP meeting, was the last IEP meeting prior to the date Petitioner was enrolled by his Parents in Partners In Excellence, a private school located in Burnsville, Minnesota. During this IEP meeting, the Parents did not state that they intended to enroll Petitioner in a private school at public expense. (Tr. Vol 2, pp. 218-219).

33. On August 27, 2004, Joan Levinson called Petitioner's Father to try to arrange another IEP meeting to discuss Petitioner's IEP. Petitioner's Father stated the Parents did not want to meet with the District. (DEX 50, p. 512; Tr. Vol. 2, pp. 215-216).

34. On September 3, 2004, Joan Levinson sent a letter to Petitioner's Parents. (DEX 11). The following documents were enclosed with the letter:

- A. A copy of Petitioner's Evaluation Report dated August 26, 2004. (DEX 9).
- B. A copy of Petitioner's IEP dated August 26, 2004. (DEX 10).
- C. A copy of a Notice of Action requesting consent for placement of Petitioner in the District's ECSE Program. (DEX 11, pp. 134-135).
- D. A copy of the Procedural Safeguards. (DEX 11, p. 133).

(Tr. Vol. 2, pp. 213-214; 216). The Parents received a copy of the letter. (Tr. Vol. 1, p. 117).

35. On September 7, 2004, Joan Levinson called Petitioner's Parent to attempt to set another meeting to review the proposed IEP and obtain consent for initial placement from the Parents. (DEX 50, p. 512; Tr. Vol. 2, p. 216). A meeting was set for September 24, 2004, at 11:00 a.m. and Ms. Levinson sent out a Notification of Meeting form. (DEX 12, pp. 137-138; DEX 50, p. 512; Tr. Vol. 2, pp. 216-217). The Notification of Meeting form was accompanied by a copy of the Procedural Safeguards. (DEX 12, p. 137; Tr. Vol. 2, p. 217).

36. On September 24, 2004, the Petitioner's Team convened for the scheduled IEP meeting, but Petitioner's Parents did not show up for the meeting. (DEX 50, p. 512; Tr. Vol 2, p. 217).

37. On September 29, 2004, Joan Levinson again called Petitioner's Father to attempt to set another meeting to discuss the proposed IEP and placement. Petitioner's Father told Ms. Levinson that the Parents did not want to meet with the District and asked her not to call again. (DEX 50, p. 512; Tr. Vol. 2, p. 217).⁶

38. On November 1, 2004, Petitioner was enrolled by his Parents in Partners In Excellence, a private school located in Burnsville, Minnesota. (Tr. Vol. 1, p. 118). The District did not learn that Petitioner had been enrolled in Partners in Excellence ("PIE") until February 2005. (Tr. Vol. 2, pp. 217-218).

39. The educational program provided to Petitioner by PIE consisted of a "center-based Behavior Therapy Program that emphasized the use of Verbal Behavior Therapy incorporated into a quality Intensive Early Intervention/Behavior Therapy approach." (PEX D, p. 020). The "treatment services" for Petitioner were provided by Behavior Therapist Practitioners under the supervision of a Qualified Program Supervisor Practitioner. (PEX D, p. 021). There is no evidence on the record that Petitioner received Speech-Language Therapy or Occupational Therapy as a part of the PIE program.

40. Progress at PIE is evaluated using the Assessment of Basic Language and Learning Skills [ABLLS]. Student's Parents were periodically provided with progress assessments, and these were included in reports from the facility. (PEX D, E, G, H, I, J, L, M, O, Q, R). The Mother testified that based on Student's ABLLS reports, he was making progress at the Minnesota school. (Tr. Vol. 1, p. 59:9-11). She testified that they noticed Student's improvements with his mastery of over 100 ABLLS programs while at PIE. (Tr. Vol. 1, p. 64:12-16).

41. On February 24, 2005, approximately five months after the last meeting with the Parents, Joan Levinson received a telephone call from Petitioner's Father who requested that the District meet with him to discuss Petitioner's progress at his private school. (Joint Stip #7). A meeting was set for March 2, 2005, at 8:15 a.m. and Ms. Levinson sent out a Notification of Meeting form. (DEX 13, pp. 139-140; DEX 50, p. 512; Tr. Vol. 2, pp. 218-220). A copy of the Procedural Safeguards was provided with the notice. (DEX 13).

42. On February 28, 2005, the meeting time was changed at the request of the Parent and an amended Notification of Meeting form was sent out to the Parents. (DEX 14, pp. 141-142; Tr. Vol. 2, pp. 220-221). A copy of the Procedural Safeguards was provided with the notice. (DEX 14).

43. On March 2, 2005, a meeting was held to allow Petitioner's Father to share information concerning Petitioner's enrollment at PIE. Present at this meeting were Petitioner's Father, Rand Hodgson (consultant to the Parents), Joan Levinson, Susan Thomas, Jill Reilly, Kim Sutherland, Bart Whaley and Liz Watts. During the meeting, the District again offered to provide the Student with educational services pursuant to the IEP that had been developed and in the ECSE

⁶ Petitioner's Mother testified that the Parents did not sign the consent for placement because "at that time it still didn't seem like necessarily what [Petitioner] needed, so no, we never agreed to that placement." (Tr. Vol. 1, p. 117, Ins. 23-25).

classroom placement which had been recommended in August, 2004. The Parents refused to provide consent for the placement. (Joint Stip #8; Tr. Vol. 2, pp. 221-223). While the Parents rejected the placement proposed by Petitioner's Team, they did not describe their concerns about the IEP that had been prepared for the Petitioner, state that they intended to enroll Petitioner in a private school at public expense or provide the District with a letter indicating that they intended to enroll Petitioner in PIE, or any other private school, at public expense. (Tr. Vol. 2, pp. 221-223).

44. The Petitioner was enrolled in PIE, in Burnsville, Minnesota, continuously from November 1, 2004, through May 29, 2006. (Tr. Vol. 1, p. 118-120; Joint Stip# 9). The Discharge Report from PIE states that Petitioner's Parents "have decided to enroll him in a center-based program in their hometown of Kansas City, Missouri. (PEX N, p. 070).

45. The Petitioner's Parents enrolled the Petitioner in the Kansas City Autism Training Center ("KCATC"), a private school in Prairie Grove, Kansas, on the day after Memorial Day, 2006. (Tr. Vol. 1, pp. 120-121). Memorial Day was May 29, 2006. Petitioner's enrollment at KCATC was a voluntary decision of his Parents (Tr. Vol. 1, p. 124, lns. 2-5) and did not result from the referral or with the consent of the District. (Tr. Vol. 1, p. 124, lns. 6-14). Prior to enrolling Petitioner in the KCATC the Parents did not provide the District with written notice at least ten (10) days before that enrollment, that they were rejecting the proposed placement and intended to enroll Petitioner in a private school at public expense. (Tr. Vol 3, pp. 10-11).

46. Between March 2, 2005, and August 25, 2006, almost one year and six months, the District had no contact with Petitioner or his Parents.

Student's Educational History from August 25, 2006-August 15, 2007

47. On August 25, 2006, Petitioner's Mother left a telephone message for the District's Process Coordinator, Keri Collison. In her message, Petitioner's Mother stated, "we have just moved back to the District." (DEX 50, p. 513; Tr. Vol. 3, p. 8).

48. On August 28, 2006, Keri Collison returned the call to Petitioner's Mother. During this conversation, Petitioner's Mother stated that they moved back to the District in June 2006, that Petitioner was now enrolled in KCATC, and that the Parents wanted to set up a meeting so the Petitioner could transfer to the District. (DEX 50, p. 513; Tr. Vol. 3, p. 9). Ms. Collison reviewed the information she had regarding Petitioner and sent a letter to the Parents confirming the conversation and providing them with a copy of the Procedural Safeguards. (DEX 50, p. 513; Tr. Vol. 3, pp. 9-10).

49. On August 29, 2006, Keri Collison called Petitioner's Mother and informed her that she would send the Parents an enrollment packet and releases to obtain Petitioner's education and provider records. (Joint Stip# 10; DEX 50, p. 513; Tr. Vol. 3, p. 11). The enrollment packet consisted of sworn statements providing student information, including residency, schools attended, discipline history, health history as well as consent to obtain KCATC records. (DEX 18, p. 178-188).

50. On September 14, 2006, Keri Collison called Petitioner's Mother to inquire about the status of the enrollment packet. Petitioner's Mother indicated she had received the packet and was "working on it" and she would get the packet to Ms. Collison. (Joint Stip #11; DEX 50, p. 513, Tr. Vol. 3, pp. 11-12).

51. On October 24, 2006, Keri Collison called Petitioner's home to follow-up on the status of the enrollment packet. Ms. Collison left a voice mail message, but did not receive a return call from the Parent. (DEX 50, p. 513; Tr. Vol. 3, p. 12).

52. Ms. Collison had no contact with Petitioner's Parents between September 14, 2006, and April 3, 2007, nearly six and one-half months. (Tr. Vol. 3, p. 13).

53. On April 3, 2007, Keri Collison received a voice mail message from Petitioner's Mother which indicated that the Parents needed to complete the paperwork for enrollment and set up a meeting in the next couple of weeks. (DEX 50, p. 513; Tr. Vol. 3, p. 12). Ms. Collison called Petitioner's Mother back twice, but could not leave a message because her voice mailbox was full. On the third try, Ms. Collison was able to reach Petitioner's Mother who again stated that the Parents would like to enroll Petitioner in the District. (Joint Stip #12). Petitioner's Mother agreed to get the District a copy of the Student's goals/assessments from the KCATC where he was enrolled. Ms. Collison faxed a release of information form to Petitioner's Mother. (DEX 50, p. 513; Tr. Vol. 3, pp. 12-13).

54. On April 9, 2007, Keri Collison received a facsimile letter from Petitioner's Father, which was dated April 5, 2007, and was faxed to Ms. Collison on Saturday, April 7, 2007. The letter indicates that Petitioner's Parents "will be requesting services" from the District for Petitioner. (Joint Stip #13). He also enclosed a copy of Petitioner's KCATC's Individualized Program Plan for the Year 2006-07.⁷(DEX 16; DEX 17; DEX 50, p. 514; Tr. Vol. 3, pp. 13-15).

55. On April 10, 2007, Keri Collison had a telephone conversation with Petitioner's Mother. During this conversation, Ms. Collison again informed Petitioner's Mother that the Parents must enroll Petitioner in the District and provide residency information before the District can have an IEP meeting with them. Ms. Collison agreed to mail another enrollment packet to the Parents and discussed options for IEP meeting dates. (Joint Stip #14). Ms. Collison informed Petitioner's Mother that she would be faxing a release of information to Petitioner's providers for additional progress notes. (DEX 50, p. 514; Tr. Vol. 3, p. 15).

56. On April 11, 2007, Keri Collison had a telephone conversation with Petitioner's Mother who informed Ms. Collison that the KCATC was a private school in Prairie Grove, Kansas. Petitioner's Mother further indicated that the Parents wanted to enroll Petitioner in the District to determine what services he needed. (DEX 50, p. 514; Tr. Vol. 3, pp. 15-16).

57. On April 16, 2007, Petitioner's Father dropped off a completed enrollment packet to Keri Collison. Ms. Collison checked the information that had been provided, including Petitioner's shot record and determined that information needed to be obtained about a missing Varicella

⁷ Mother testified the IEP developed at KCATC in June 2006 provided a wider variety of skills & goals and dealt with behavior when compared to the IEP offered by the District in 2004. (Tr. Vol 1, p. 70)

shot. (DEX 18; DEX 50, p. 514; Tr. Vol. 3, pp. 16-17). Ms. Collison attempted to call Petitioner's Mother with no success. (DEX 50, p. 514; Tr. Vol. 3, p. 17).

58. On April 17, 2007, Keri Collison had a telephone conversation with Petitioner's Mother concerning the missing Varicella shot. Petitioner's Mother requested a religious exemption form which Ms. Collison obtained and faxed to Petitioner's Father. (DEX 50, p. 515; Tr. Vol. 3, pp. 16-18).

59. On April 17, 2007, Keri Collison also mailed a Notification of Meeting form to the Parents for an IEP meeting to be held on May 4, 2007, at 10:45 a.m. Accompanying this form was a copy of the Procedural Safeguards. (DEX 19; DEX 50, p. 515; Tr. Vol. 3, pp. 18-19).

60. On April 27, 2007, Keri Collison sent letters to Petitioner's providers requesting information regarding services they had provided to him. (DEX 20, Tr. Vol. 3, pp. 19-20). Responses were received from Children's Mercy Hospitals (DEX 22), Premier Therapy Services (DEX 23) and KCATC (DEX 24). (Tr. Vol. 3, pp. 19-20).

61. On May 3, 2007, Keri Collison received a voice-mail message from Petitioner's Father who requested that the District arrange for a telephone conference in case he was unable to physically attend the IEP meeting on May 4, 2007. Ms. Collison arranged for the telephone conference and called Petitioner's Father back to inform him that his request for conference capability could be met. (DEX 50, p. 515; Tr. Vol. 3, p. 19).

May 4, 2007 IEP Meeting

62. On May 4, 2007, an IEP meeting was held to discuss a program of special education and related services for Petitioner. Present at this meeting were Petitioner's Mother, Rand Hodgson (Consultant to the Parents); XXXX XXXXXXXXXX (Petitioner's Grandmother); Jennifer Simon (Director of KCATC); Keri Collison (LEA Representative and Process Coordinator); Susan Howell (Process Coordinator); Jill Reilly (Occupational Therapist); Debbie Neugebauer (Regular Education Teacher); Cheryl Reid (Speech-Language Pathologist); Kim Sutherland (Speech-Language Pathologist); and Maggie Cummings (ECSE Classroom Teacher). (DEX 21, p. 198; DEX 50, p. 515; Tr. Vol. 3, p. 21). During this meeting the following occurred:

A. During the meeting, notes of the meeting were taken by Kim Sutherland. (DEX 31). Immediately following the meeting, Keri Collison prepared her own notes. (DEX 50, p. 515; Tr. Vol. 3, pp. 21-22).⁸

B. Petitioner's Mother indicated that there would be no need for the conference telephone because Petitioner's Father would be unavailable to participate in the meeting due to meetings. (DEX 50, p. 515).

⁸ The District prepared notes contemporaneously with the key IEP meetings, including the May 4, 2007 IEP meeting. We have relied a great deal on those detailed notes to sort out the conflicting testimony from participants who try to recall what was said more than two years ago.

C. Petitioner's Mother signed off on Release Forms to allow the District to share information about Petitioner with Rand Hodgson, Dr. Jennifer Simon and XXXX XXXX. (DEX 25; Tr. Vol. 3, p. 38).

D. The Procedural Safeguards were provided to Petitioner's Mother at the beginning of the meeting. (DEX 31).

E. At the beginning of the meeting, a draft of an IEP was provided to the participants in the meeting by the District's representatives on Petitioner's Team.⁹ (DEX 21; Tr. Vol. 3, pp. 23-24). During the meeting Keri Collison made handwritten notes of the changes to the IEP draft. (Tr. Vol. 3, pp. 24-26). At the conclusion of the meeting, Petitioner's Mother and Dr. Jennifer Simon were provided with a copy of the IEP draft with Ms. Collison's handwritten notations. (DEX 50, p. 515).

F. Petitioner's Team reviewed the first page of an IEP draft and made corrections and amendments where necessary. (DEX 31).

G. Since this was an initial IEP for the Petitioner, the current goal plan from the KCATC was reviewed and discussed. (DEX 24; DEX 31; Tr. Vol. 3, pp. 27-28).

H. The Present Levels of Academic Achievement and Functional Performance was reviewed and discussed. Current information concerning the Petitioner was received from Petitioner's Mother and from Dr. Jennifer Simon and incorporated into the draft. Keri Collison testified that "the majority of the information" that was added to the Present Levels section came from Dr. Simon. (Tr. Vol. 3, p. 26, lns. 13-14). Other additions were made to this section of the IEP to incorporate family concerns, Petitioner's strengths, current level of functioning and information from the outside speech/language evaluation. (DEX 31; DEX 50, p. 515; Tr. Vol. 3, pp. 23-24).

I. Petitioner's Team discussed Extended School Services and agreed that those services should be provided to Petitioner. (DEX 50, p. 515; Tr. Vol. 3, p. 28)

J. Petitioner's Team began discussing the proposed goals and objectives. Changes were made to goals 1 through 3 of the draft. (DEX 31).

(1) With respect to Goal Number 1, Petitioner's Team rewrote the baseline "based on information that had been received immediately before the meeting and information and recommendations that Dr. Jennifer Simon shared at the meeting. (DEX 21, p. 203; Tr. Vol. 3, pp. 28-29). The Benchmarks to Goal Number 1 were also rewritten by Petitioner's IEP Team based on the recommendations of Dr. Simon, Petitioner's Mother, Rand Hodgson and the District's Speech-Language Pathologist. (Tr. Vol. 3, p. 29, lns. 12-18).

⁹ Parents complained that the District presented already written IEPs at beginning of the May 4, 2007 and May 23, 2007 meetings. (Tr. Vol. 1, p. 79; Tr. Vol. 1, 203-204).

(2) With respect to Goal Numbers 2 and 3, Petitioner's Team made changes to the goals and benchmarks based on recommendations made by Dr. Jennifer Simon and Rand Hodgson. (DEX 21, pp. 204-205; Tr. Vol. 3, pp. 29-30).

K. Petitioner's Mother provided the District with a compact disc containing a video of Petitioner on a "normal day" at the KCATC. (DEX 52; Tr. Vol. 3, p. 27)

L. The IEP meeting was adjourned at 12:30 p.m. due to Mr. Hodgson's schedule and the need for the classroom teachers to return to their classes.. (DEX 31 DEX 50, p. 515; Tr. Vol. 3, p. 30). Before concluding the meeting, the parties agreed to resume the meeting on May 16, 2007 at 8:00 a.m. (DEX 50, p. 515; Tr. Vol. 3, pp. 30-32).

63. During the IEP meeting on May 4, 2007, Petitioner's Parents did not ask the District to pay for Petitioner's tuition at KCATC. (Tr. Vol. 3, pp. 86-87).

64. After the IEP meeting on May 4, 2007, Keri Collison sent a Notification of Meeting form for the rescheduled IEP meeting on May 16, 2007, to Petitioner's Parents by electronic mail. (DEX 26; Tr. Vol. 3, pp. 31-33). A copy of the Procedural Safeguards was provided with the Notification. (DEX 26; Tr. Vol. 3, p. 33).

65. On May 15, 2007, the IEP meeting scheduled for May 16, 2007, had to be rescheduled due to the illness of ECSE Classroom Teacher and IEP Team member Maggie Cummings. (DEX 26, p. 256; Tr. Vol. 3, p. 32). Keri Collison called both parents' cell phones and left messages that the May 16, 2007, IEP needed to be cancelled due to Ms. Cummings illness. (DEX 50, p. 516; Tr. Vol. 3, p. 34). Petitioner's Father called Ms. Collison and was angry because the meeting needed to be rescheduled. As a result, Ms. Collison referred Petitioner's Father to Susan Kirkpatrick, the District's Director of Special Education. (DEX 50, p. 516; Tr. Vol. 3, pp. 34-35).

66. On May 15, 2007, Keri Collison received a facsimile from Petitioner's Father which was dated May 14, 2007. (DEX 27; Tr. Vol. 3, p. 33).¹⁰ Ms. Collison took the information and shared it with the District members of Petitioner's IEP Team. (Tr. Vol. 3, p. 34). In addition to that information, the District members of the IEP Team also reviewed Petitioner's Individualized Program Plan from KCATC (DEX 17) and Petitioner's Annual Goals from KCATC (DEX 24) to rework Petitioner's draft IEP prior to the IEP meeting on May 23, 2007. (Tr. Vol. 3, pp. 35-37).

67. On May 16, 2007, Keri Collison had a telephone conversation with Petitioner's Mother and offered dates for the resumption of the IEP meeting. (DEX 50, p. 516; Tr. Vol. 3, pp. 35-36).

68. On May 17, 2007, Keri Collison received a voice mail message from Petitioner's Mother which indicated that the Parents wished to reschedule the IEP Meeting for May 23, 2007. (DEX 50, p. 516; Tr. Vol. 3, pp. 35-36). Ms. Collison returned the call and confirmed that the IEP meeting would be held on May 23, 2007, at 8:00 a.m. (DEX 50, p. 517; Tr. Vol. 3, pp. 35-36).

¹⁰ We note in the Father's faxed letter that he objected to the District's proposed Goal 5—Compliance with School Rules- as being inappropriate and unnecessary because Student was 100% compliant at his current school. For example, he will listen while others speak as well as respond to teachers' instructions. (DEX 27, p. 260). He also requested that the teaching staff be trained in applied behavior analysis. (DEX 27, p. 266).

On May 17, 2007, Keri Collison sent a Notification of Meeting form to Petitioner's Parents for the May 23, 2007, IEP meeting. (DEX 28; DEX 50, p. 516; Tr. Vol. 3, p. 36). The Notification form contained a copy of the Procedural Safeguards. (DEX 50, p. 516).

May 23, 2007 IEP Meeting

69. On May 23, 2007, the resumed IEP meeting was conducted. Present at this meeting were Petitioner's Father, Rand Hodgson; Dr. Jennifer Simon; Susan Kirkpatrick; Keri Collison; Susan Howell; Jill Reilly; Debbie Neugebauer; Cheryl Reid; Kim Sutherland and Maggie Cummings. (DEX 50, p. 517; Tr. Vol. 3, p. 38). During this meeting the following occurred:

A. Petitioner's Mother signed off on Release Forms to allow the District to share information about Petitioner with Rand Hodgson and Dr. Jennifer Simon. (DEX 30; Tr. Vol. 3, pp. 38-39).

B. Keri Collison provided the parties a corrected IEP draft which incorporated the changes that were made during the meeting on May 4, 2007. (Tr. Vol. 3, pp. 39-40).

C. Petitioner's Team started with Goal Number 2. While this goal had been discussed and finalized during the May 4, 2007, IEP meeting, the letter sent by Petitioner's Father on May 15, 2007, (DEX 27) stated concerns about the goal. Goal Number 2 was reworked based on the concerns set forth in the Father's letter. (DEX 21, DEX 31, p. 311; DEX 50; Tr. Vol. 3, p. 40).

D. Petitioner's Team continued through the remainder of the Goals in the draft. The draft goals were reworked, amended and/or deleted based on the letter from Petitioner's Father (DEX 27), discussions during the meeting and information provided by Dr. Jennifer Simon concerning the Student's work at KCATC. (DEX 31; Tr. Vol. 3, pp. 41-43). Petitioner's Father, Dr. Jennifer Simon and the District Team members agreed to the goals and objectives that were discussed. (DEX 50, p. 517; Tr. Vol. 3, pp. 41-43; pp. 111-112).

(1) With respect to Goal Number 3, a speech goal, Petitioner's Team edited the goal by clarifying that Petitioner will answer "what" questions about 30 objects and 15 actions. The Parent and Team agreed to the goal and objectives. (DEX 31, p. 312).

(2) With respect to Goal Number 4, a classroom goal, Petitioner's Team edited objectives 1 and 2. The Parent and Team agreed to the goal and objectives. (DEX 31, p. 312).

(3) With respect to Goal Number 5, a classroom goal, the Parent and Team agreed to the goal and objectives. (DEX 31, p. 312).

(4) With respect to Goal Number 6, an occupational therapy goal, Dr. Jennifer Simon had a question about the size of the shape Petitioner would trace. The

Occupational Therapist on the Team discussed the size and shapes and the Team agreed to amend the Goal consistent with Dr. Simon's comments. The Parent and Team agreed to the goal and objectives. (DEX 31, p. 312).

(5) With respect to Goal Number 7, an occupational therapy goal, Rand Hodgson requested that the baseline be changed and also had questions concerning Petitioner's abilities concerning this goal. The Parent and Team agreed to the goal and objectives. (DEX 31, p. 312).

(6) With respect to Goal Number 8, an occupational therapy goal, the Parent and Team agreed to the goal and objectives. (DEX 31, p. 312).

(7) With respect to Goal Number 9, an occupational therapy goal, the Parent and Team agreed to the goal and objectives. (DEX 31, p. 312).

E. Petitioner's Team discussed and agreed upon Special Considerations and Modifications and Supports. (DEX 31, pp. 312-313; DEX 50, p. 517). Many of the accommodations were requested by the Parent, Dr. Jennifer Simon and/or Rand Hodgson. The Team agreed to the following Modifications and Supports for Petitioner:

(1) Special transportation and Occupational Therapy as a related service. (DEX 29, p. 299; DEX 31, p. 312).

(2) Petitioner will participate in regular physical education with accommodations in Kindergarten. (DEX 29, p. 301; DEX 31, p. 312).

(3) Petitioner will have a one-on-one paraprofessional. (DEX 29, p. 305; DEX 31, p. 313).

(4) Petitioner will have adapted or simplified materials, preferential seating, adjustments for speech issues, use of a study carrel, lower difficulty level or shortened assignments, be given oral prompts and cues and extended time for completion of assignments, be given breaks, use repeated drill and review and be provided frequent eye contact.. (DEX 29, pp. 304-305).

F. Petitioner's Father reported that Petitioner had a history of engaging in aggressive behavior toward other children including biting, pinching, hitting, scratching and spitting. The Team discussed these behaviors and noted that the reports that had been received from KCATC indicated that these behaviors were under control. (DEX 17, p. 177; DEX 31, p. 313; Tr. Vol. 3, pp. 43-45; 112-113). Keri Collison testified as follows concerning this discussion:

"We talked about . . . the present level included information of what his behaviors looked like, had looked like in the past, that those behaviors had decreased, and that, that we would do modifications and accommodations to meet those things, and once . . . [Petitioner] started . . . working on the

goals and in the program, that we would continually assess what his needs were, and whether we needed to write a formal behavior goal, or whether we needed to write a formal behavior plan based on what data we had once he began receiving services." (Tr. Vol. 3, p. 44, lns. 8-18).

In addition to information that had been received from Kansas City Autism Training Center, Petitioner's Team had also reviewed the video provided by the Parent which showed a "typical day" at the KCATC and no inappropriate behaviors were seen on that video. (Tr. Vol. 2; p. 117; Tr. Vol. 3, pp. 45-46).¹¹

G. The Parent's Advocate requested that the District provide 12 to 16 hours of staff training from a Board Certified Behavior Analyst. (DEX 31, p. 313). Susan Kirkpatrick reviewed the goals in the IEP and it was the consensus of Petitioner's IEP Team that the goals could be met with existing District staff. Ms. Kirkpatrick also indicated that if Petitioner's needs changed, the District would always be open to discuss the use of a consultant. (DEX 31, pp. 313-314). The District provided Petitioner's Parents with a Notice of Action concerning the District's refusal to obtain consultant services at the meeting and later by mail. (DEX 35, pp. 327-328; DEX 50, p. 519; Tr. Vol. 3, p. 116-117).

H. Petitioner's Team discussed and agreed on the service minutes for the program of special education in the IEP. It was agreed that in Kindergarten, the Petitioner would receive: 75 minutes a week of language therapy; 75 minutes a week of sound system therapy; 60 minutes a week of occupational therapy; and, 1315 minutes a week of academic and social/emotional education. During the school day, Petitioner would be with "typical" peers during art, music, physical education, lunch and recess. (DEX 29, p. 299; DEX 31, p. 314; DEX 50, p. 517).

I. Petitioner's Team discussed and agreed on the appropriate placement for him. The Team determined that during the extended school year services, the appropriate placement for the Petitioner was an Early Childhood Special Education Setting (DEX 29, p. 302) and during Kindergarten, the appropriate placement was Outside the Regular Class more than 60% of the time. (DEX 29, p. 302; DEX 50, p. 517). Petitioner's Father expressed no concerns or objections concerning the proposed placement. (DEX 31, p. 314; DEX 50, p. 517).

J. Susan Kirkpatrick asked each member of the IEP Team if "there was anything that we had not included in the IEP, if there was anything else we needed to discuss," and if each member of the IEP Team agreed "with the level of service, the goals and objectives and the placement" in the IEP. (Tr. Vol. 3, pp. 115, lns. 4-10). The Father indicated agreement (Tr. Vol. 1, p. 236; Tr. Vol. 3, p. 115); Petitioner's Advocate, Rand Hodgson indicated agreement (Tr. Vol. 3, pp. 49, 115); and Dr. Jennifer Simon indicated agreement. (Tr. Vol. 3, pp. 49, 115). (Tr. Vol. 3, p. 138, lns. 22-25, p. 139, lns. 1-15).

¹¹ The Hearing Panel has also seen the video. We saw no inappropriate behaviors.

K. Susan Kirkpatrick asked Petitioner's Father to provide consent for the placement of Petitioner. A copy of the Notice of Action requesting consent for placement was provided to the Father at the meeting. (Tr. Vol. 3, pp. 116-117). The Father indicated that he would like to have a complete copy of the IEP so he could discuss the matter with Petitioner's Mother before they gave their consent. (DEX 31, p. 314; DEX 50, p. 517; Tr. Vol. 3, p. 117). The District provided the Parent with a Notice of Action requesting consent for placement of Petitioner. (DEX 35, pp. 329-331; Tr. Vol. 3, pp. 113-114).

L. Susan Kirkpatrick reviewed the differences between a public school placement and a decision by the Parent to place the Petitioner in a private school or to home school Petitioner. (DEX 31, p. 315; Tr. Vol. 3, pp. 113-114).

M. The District provided Petitioner's Father with a copy of the Procedural Safeguards, which were left on the table when the Parent left at the end of the meeting. (DEX 50, p. 517).¹²

70. During the IEP meeting on May 23, 2007, Petitioner's Parents did not ask the District to pay for Petitioner's tuition at KCATC. (Tr. Vol. 3, pp. 86-87, 127).

71. During the IEP meeting on May 23, 2007, Petitioner's Father did not inform the IEP Team that the Parents were rejecting the placement proposed by the District, including stating the Parents' concerns about the proposed IEP. (Tr. Vol. 3, p. 127).

72. After the May 23, 2007, IEP meeting adjourned, Petitioner's Father placed a list of forty-eight (48) additional goals (DEX 32) in Keri Collison's school mailbox. (DEX 50, Tr. Vol. 1, pp. 209-210; Tr. Vol. 3, pp. 46-47). Ms. Collison received the additional goals (DEX 32) at approximately 2:30 p.m. that day. (DEX 32, p. 316; Tr. Vol. 3, p. 47). Petitioner's Father testified that he came to the meeting with the additional goals (DEX 32; Tr. Vol. 1, p. 208) that had been prepared by Dr. Jennifer Simon (Tr. Vol. 1, p. 207), but neither he nor Dr. Simon, nor Rand Hodgson, who knew about the additional goals (Tr. Vol. 1, p. 209), presented the additional goals, even when they were asked by Susan Kirkpatrick "if there was anything else they needed to discuss" (Tr. Vol. 3, pp. 115, Ins. 4-10).¹³

73. On May 24, 2007, Petitioner's Mother left a message on Keri Collison's voice mail which asked for the telephone number for the Martin City building so she could make arrangements to visit the ECSE classroom. The telephone number was provided to Petitioner's Mother by Maggie Cummings. (DEX 50, p. 518; Tr. Vol. 3, pp. 47-48). That same day, Petitioner's Father sent email to Keri Collison regarding the Varicella shot form and the additional goals for the IEP had been faxed to her. (DEX 33; DEX 50, p. 518; Tr. Vol. 3, pp. 49-50).

74. On May 25, 2007, Petitioner's Father faxed the religious exemption form for Varicella Immunization to Keri Collison. (DEX 33; DEX 50, p. 518). The Father's communications also

¹² The above Finding of Fact relies on the contemporary notes in DEX 31, which confirm the summary in subparagraphs (A)-(M).

¹³ Father's excuse that he has "never been comfortable with the IEP process, so . . . I did not have the opportunity to present them" (Tr. Vol. 1, p. 208, Ins. 15-17) is not persuasive with the Hearing Panel.

requested that the District consider the 48 additional goals for Petitioner's IEP. Since the school year had ended (Tr. Vol. 3, pp. 48-49), on May 25, 2007, Susan Kirkpatrick wrote the Parents that the District "will be glad to set a meeting date when we return in August." (Joint Stip#15; DEX 34, p. 325).

75. On May 29, 2007, Keri Collison sent a letter to the Parents which contained the following documents:

- A. A copy of Petitioner's May 23, 2007 IEP. (DEX 29, DEX 35, DEX 50, p. 519).
- B. Notice of Action dated May 23, 2007 regarding consent for placement. (DEX 35, pp. 329-331; DEX 50, p. 519).
- C. Notice of Action dated May 23, 2007 regarding refusal to use consultant. (DEX 35, pp. 327-328; DEX 50, p. 519).
- D. A copy of the Procedural Safeguards. (DEX 50, p. 519; Tr. Vol. 3, p. 118).

76. On May 30, 2007, Keri Collison received a letter from Petitioner's Father. (DEX 36; DEX 50, p. 519). This letter was given to Susan Kirkpatrick for response. (Tr. Vol. 3, p. 117).

77. On June 1, 2007, Susan Kirkpatrick sent a letter to the Parents which responded to prior correspondence. (DEX 37; Tr. Vol. 3, pp. 118-119). The letter contained a Notification of Meeting form for an IEP meeting on August 15, 2007, and a copy of the Procedural Safeguards. (DEX 37, p. 339; DEX 38; Tr. Vol. 3, pp. 117-118).

78. On June 12, 2007, Petitioner's Father wrote a letter to Keri Collison which enclosed the additional 48 goals and stated it was "a formal rejection of the Final IEP that was sent on May 29, 2007" and a "rejection of the Initial Placement of the Student at the Special Education summer program at Conn-West Elementary." (Joint Stip #17; DEX 39).

79. On June 19, 2007, Dr. Ralph Teran, the District's Superintendent, responded to the Father's letter. (DEX 40). Dr. Teran's letter enclosed a copy of the letter from Susan Kirkpatrick dated June 1, 2007 and an additional copy of the Notification of Meeting form.

80. On June 25, 2007, Susan Kirkpatrick wrote a letter to Petitioner's Father which enclosed a copy of her June 1, 2007, letter to him. Ms. Kirkpatrick was forced to write this letter because the Parents had refused to claim the June 1, 2007 letter which was sent to them by certified mail. (DEX 41; Tr. Vol. 3, pp. 120-121).

August 15, 2007 IEP Meeting

81. On August 15, 2007, the District conducted an IEP meeting concerning Petitioner. Present at that meeting were: Petitioner's Mother; Dr. Jennifer Simon; Susan Kirkpatrick; Amy Bahr; Maggie Cummings; Christine Murray; Cheryl Reid; Gloria Littlewood; Jill Reilly; Jake Hess; Keri Collison; Wanda Quibell; Liz Means and Susan Howell. (DEX 45; DEX 50, p. 519; Tr. Vol. 3, pp. 52-53, 122). During this meeting the following occurred:

A. Petitioner's Mother signed off on Release Forms to allow the District to share information about Petitioner with Dr. Jennifer Simon. (DEX 44; DEX 45).

B. Petitioner's IEP Team considered the additional 48 goals that had been sent to the District by the Parent. Petitioner's Team added Goal Numbers 10 through 13. (DEX 45; DEX 50, p. 519; Tr. Vol. 3, pp. 56-58; 123-124). These new goals came from the following goals suggested by the Parents:

(1) Goal Number 10 on the August 15, 2007 IEP (DEX 43, p. 415) was derived from the Parent's proposed Language and Communication goals 9 and 10. (DEX 32, p. 317; PEX EE, p. 215; Tr. Vol. 3, pp. 75-76).

(2) Goal Number 11 on the August 15, 2007 IEP (DEX 43, p. 416) was derived from the Parent's proposed Language and Communication goals 13 and 14. (DEX 32, p. 317; PEX EE, p. 215; Tr. Vol. 3, p. 76).

(3) Goal Number 12 on the August 15, 2007 IEP (DEX 43, p. 417) was derived from the Parent's proposed Social Skills goal 25. (DEX 32, p. 318; PEX EE, p. 216; Tr. Vol. 3, p. 76).

(4) Goal Number 13 on the August 15, 2007 IEP (DEX 43, p. 418) was derived from the Parent's proposed Pre-Academic & Academic Skills (Reading and Spelling) goal 39. (DEX 32, p. 319; PEX EE, p. 217; Tr. Vol. 3, p. 76).

C. Petitioner's Mother asked about the additional goals that had been presented. Susan Kirkpatrick again explained that the additional goals were ones that Petitioner's Team had just added, but if there was anything else that had not been addressed, now was the time to bring it forward. Petitioner's Parent did not indicate that there were additional goals that needed to be discussed. (DEX 45; Tr. Vol. 3, pp. 59-61; 123-124).

D. Susan Kirkpatrick asked the entire team if everyone was in agreement with the goals on the IEP and the Student's placement. Everyone at the table, including the Parent and the consultant, agreed that the goals met the needs of the Petitioner and the placement was appropriate. (DEX 45, pp. 428-429; Tr. Vol. 3, p. 60, Ins. 8-12; Tr. Vol. 3, p. 124, Ins. 1-9; Tr. Vol. 3, p. 137, Ins. 12-18; Tr. Vol. 3, p. 138, Ins. 22-25, p. 139, Ins. 1-15).

E. Susan Kirkpatrick reminded Petitioner's Parent that the Petitioner was not enrolled for the regular school year and offered her another enrollment packet. (DEX 45, p. 429; Tr. Vol. 3, p. 124).

F. Petitioner's Team then began the re-evaluation discussion. The Team reviewed the current information it had for the Petitioner, including input from Petitioner's Mother and Dr. Jennifer Simon and determined that Petitioner continued to be a Young Child With a Developmental Disability. (DEX 45, p. 429; Tr. Vol. 3, pp. 54-55, 123).

G. Dr. Jennifer Simon asked again if Petitioner's Team had looked at all of the proposed goals. Mrs. Kirkpatrick reviewed the goals that had been agreed upon by the Team and asked if there were any specific goals or areas that the team had not addressed. Neither Petitioner's Mother nor Dr. Simon expressed that there were additional goals that needed to be added to the IEP. (DEX 45, p. 429; Tr. Vol. 3, pp. 125-126)

H. Susan Kirkpatrick again explained the difference between the rights afforded to parentally placed private school students and public school students. (DEX 45).¹⁴

I. Dr. Jennifer Simon asked whether a behavior plan was needed in Petitioner's IEP. The Team again discussed whether a behavior plan was needed. The information the Team considered included the data on Petitioner's Education Plan at KCATC (DEX 24, p. 251) and Dr. Jennifer Simon's statement that Petitioner's behaviors "were much improved." (Tr. Vol. 2, p. 129, lns. 12-15). The Team determined that the IEP would meet Petitioner's needs and his teachers would observe and keep data concerning his behaviors. If needed, the IEP Team could be reconvened to review the data and determine if further goals needed to be added to the IEP. (DEX 45, pp. 429-430; Tr. Vol. 3, pp. 126).¹⁵

J. Petitioner's Parent was given an enrollment packet for the regular school year and a copy of the Procedural Safeguards. (DEX 45, p. 430; Tr. Vol. 3, pp. 56, 122-123)

82. The August 15, 2007 IEP meeting lasted approximately forty (40) minutes. (Tr. Vol. 3, p. 135).

83. The August 15, 2007 IEP offered the Petitioner the following program of special education and related services:

¹⁴ District Exhibit 45 consists of Meeting Notes which the Hearing Panel found to be of great value in sorting out what transpired at this IEP meeting.

¹⁵ Keri Collison testified that behavior goals were not included in the IEP because:

"when we looked at the data that they gave us, those had decreased, . . . to the frequency of zero, and they had mastery all except on one of those four goals. . . . We generally write goals for meeting new skills, and we don't write goals for kids for things that kids have already mastered. Those would be things we would monitor during a classroom day and working throughout the classroom throughout the day when we're working with the child. We wouldn't necessarily write a goal to maintain a frequency of zero behaviors." (Tr. Vol. 3, p. 78, lns. 4-7, 17-24).

- A. For the remainder of school year 2007-08 -- Specialized instruction in academic skills for 750 minutes per week; specialized instruction in language therapy for 45 minutes per week; specialized instruction in sound system therapy for 45 minutes per week; specialized instruction in Occupational Therapy for 60 minutes per week. (DEX 43, p. 419); and weekly gross motor activities. (DEX 43, p. 421).
- B. For school year 2008-09 -- Specialized instruction in social/emotional and Early Childhood special education for 1315 minutes per week; specialized instruction in language therapy for 75 minutes per week; specialized instruction in sound system therapy for 75 minutes per week; and, specialized instruction in Occupational Therapy for 60 minutes per week. (DEX 43, p. 419).
- C. A placement of outside the regular class more than sixty percent of the time.
- D. Regular education services with non-disabled peers in regular physical education (with accommodations) (DEX 43, p. 421) and during art, music, lunch and recess. (DEX 31, p. 314).
- E. Curb-to-Curb transportation with modifications. (DEX 43, p. 420).
- F. Intensive individualized instruction in highly structured, small group setting. (DEX 43, p. 421).
- G. A one-on-one paraprofessional. (DEX 43, p. 425).
- H. Accommodations such as: adapted or simplified materials; preferential seating; adjustments for speech intelligibility/fluency; a study carrel for independent work; lower difficulty level/shortened assignments; oral cues and prompts; adapted worksheets; extended time for completion of assignments and tests; frequent eye contact/proximity control; and, sensory breaks as needed. (DEX 43, pp. 424-425).

84. During the IEP meeting on August 15, 2007, Petitioner's Mother did not ask the District to pay for Petitioner's tuition at KCATC . (Tr. Vol. 3, pp. 86-87, 127). During the IEP meeting on August 15, 2007, Petitioner's Mother did not inform the IEP Team that the Parents were rejecting the placement proposed by the District, including stating the Parents' concerns about the proposed IEP. (Tr. Vol. 3, p. 127).

85. On August 28, 2007, Keri Collison sent the Parents a letter (DEX 46) which enclosed the following documents:

- A. Petitioner's IEP dated August 15, 2007. (DEX 43; DEX 46, pp. 433-456).
- B. Review of Existing Data Documentation Form dated August 15, 2007. (DEX 42; DEX 46, pp. 457-466).

C. Notice of Action dated May 23, 2007 requesting consent for placement. (DEX 46, pp. 467-469).

D. Procedural Safeguards. (DEX 46, pp. 470-503).

86. On September 19, 2007, Keri Collison received an electronic mail message from Petitioner's Father who stated that the Parents had not received a copy of the IEP which was developed at the August 15, 2007 IEP meeting. Ms. Collison's August 28, 2007, letter was not received by the Parents because they did not claim the letter which was sent by certified mail. (DEX 48, pp. 506-507). Susan Kirkpatrick sent another copy of the information contained in Ms. Collison's August 28, 2007, letter (DEX 46) to the Parents on September 19, 2007. (DEX 48).

Kansas City Autism Training Center

87. The District has never consented to Petitioner being placed at KCATC. (Tr. Vol. 3, p. 110). The District has never referred Petitioner for enrollment at KCATC. (Tr. Vol. 3, p. 110).

88. During the time Petitioner has attended the KCATC:

A. KCATC has been located in Prairie Grove, Kansas (Tr. Vol. 2, p. 72) and is licensed as a "child care" facility by the Kansas Department of Health and Environment. (Tr. Vol. 2, p. 84).

B. Between August, 2006 and December, 2008, Dr. Jennifer Simon was the Director of KCATC. (Tr. Vol. 2, pp. 70-72). Dr. Simon has a Doctorate Degree in Applied Behavioral Psychology from University of Kansas (Tr. Vol. 2, p. 77) but is not licensed to practice psychology, child psychology or behavioral psychology in any state (Tr. Vol. 2, pp. 81-82) and has never been certified or licensed as an Administrator in any public school. (Tr. Vol. 2, p. 82). She is a Board Certified Behavior Analyst. (PEX QQ, p. 438). She authored and published papers in the *Journal of Applied Behavior Analysis*. (PEX QQ, p. 439).

C. Out of ten "teachers" employed during the time Dr. Simon was Director, only two of the "teachers" had teaching certifications issued by the State. (Tr. Vol. 2, pp. 94-95).

D. The students at KCATC were all "on the spectrum" and there were no non-disabled children enrolled there. (Tr. Vol. 1, pp. 175-177). The only time Petitioner was around non-disabled children in his age group was when he received at-home services which included, occasionally, a trip to the park. (Tr. Vol. 1, pp. 175-177).

E. Petitioner received speech-language and occupational therapy services after the school day was over. Those services were "provided separate from KCATC." (Tr. Vol. 1, pp. 183, lns. 23-25, 184, lns. 1-5).

F. Petitioner's Individualized Plan at KCATC did not include a behavior intervention plan. (PEX HH, Tr. Vol. 1, p. 185). His June 13, 2006 IEP had two goals (out of 43) which addressed the following behaviors: (1) inappropriate hand behaviors and (2) eye squinting. (PEX HH, pp. 256-258). The same IEP noted that his maladaptive behaviors i.e., aggression, hand flapping, eye squinting, and spitting) decreased 75.5% within one year. (PEX HH, p. 227). His IEPs were developed on a yearly basis but they were a “growing process” --- would be modified when necessary. (Tr. Vol. 2, p. 73).

Expert Witnesses Called by Petitioner

89. Parents called Darcy Baker who had been employed as case teacher at KCATC from January 7, 2008-January 7, 2009. (Tr. Vol. 1, p. 154). She has Bachelor's and Master's Degrees in Special Education from Pittsburgh State University. (Tr. Vol. 1, p. 155). She testified to concerns about the three IEPs drafted by the District in May and August 2007, especially a lack of a behavior plan. (Tr. Vol. 1, p. 162, 164). We give little weight to her opinion on that issue because all of her experience with the Petitioner occurred 5-8 months after the IEPs in question were drafted. She also conceded the only behaviors that Petitioner had when Darcy Baker worked with him were repetitive hand and finger movements and eye squinting. (Tr. Vol. 1, pp. 185-186). Ms. Baker also testified that KCATC did not address any aggressive behaviors in his IEP. (Tr. Vol. 1, p. 192-193). She admitted in the present levels of performance section in his IEP that inappropriate hand and finger movements and eye squinting are the only behaviors referenced as impeding his ability to learn. (Tr. Vol 1, p. 193-194; PEX HH, p. 256). Ms. Baker also acknowledged that aggressive behaviors are not mentioned in the KCATC IEP. (Tr. Vol. 1, p. 192-193; PEX HH).

90. Parents also produced Dr. Jennifer Simon to testify about her experiences with Petitioner when she was the Director at KCATC, her attendance at the three IEP meetings referenced earlier in these Findings and her opinion regarding the District's proposed IEPs. (Tr. Vol. 2, p. 40).

91. She found the following deficiencies in the three IEPs proposed by the District in May and August 2007:

A. “The Grandview IEP had ten goals on the first District IEP drafted 5/4/07. The revised IEP dated 5/23/07 contained nine goals. The final IEP dated 8/15/07 contained 13 Annual Goals. Even if [Petitioner] had met all goals on the Grandview IEPs, his progress would not qualify as reasonable when compared to his *potential* for development and learning. [Petitioner's] progress at KCATC demonstrates that he is *capable* of learning at a more accelerated rate. Thus, Grandview did not provide [Petitioner] with an *appropriate* program of *accelerated* learning. Instead, they offered an IEP with limited expectations.” (emphasis in the original) (PEX QQ, p. 445)

B. The District's August IEP's 13 goals included: the areas of functional communication (2 goals), language (3 goals), social and imitation instruction (2 goals), cognitive development (2 goals), motor (4 goals). These areas are not included: play skills, daily living skills and behavior reductions. Dr. Simon also expressed concern that

the District's "goals were considered to be achieved when tested by the individual responsible for teaching the goal (i.e., Speech Pathologist, Occupational therapist). Thus, generalization across individuals was not included. (PEX QQ, p. 447).

C. She had great concern that a Behavior Intervention Plan ("BIP") was not included in the IEPs to reduce remaining behaviors. The IEPs failed to contain procedures to monitor behaviors so that they did not interfere with his ability to learn. (PEX QQ, p. 447; Tr. Vol. 2, pp. 32; 40).

92. Dr. Simon conceded that the IEPs at KCATC for Student did not include a separate BIP but addressed behavior issues as goals. (Tr. Vol. 2; 128; 144-145). She also acknowledged that she told the District that Petitioner's behaviors were much improved. (Tr. Vol. 2; p. 129). In fact, his IEP at KCATC showed as of December 2006 and March 2007, he had zero incidents of aggressive behavior and zero incidents of spitting. (DEX, p. 177). The KCATC staff had worked with Student to eliminate these behaviors: scratching; hair pulling; kicking; property destruction. (Tr. Vol. 2; p. 170-171).

93. Dr. Simon testified that his IEPs at KCATC were "pretty much a lesson plan." (Tr. Vol. 2; p.149).

94. Dr. Simon acknowledged that she practices applied behavior analysis but she refused to state that ABA is a methodology. (Tr. Vol. 2; p. 79) She preferred to characterize ABA as "the science of behavior"; "ABA practices what has been proven for effective behavior change." (Tr. Vol. 2; p. 79).

Expenses Incurred by Parents for Private Schools

95. The Father testified that the Parents had incurred \$286,455.00 in out-of-pocket expenses for mileage and tuition from May 2005 to May 2009, including \$144,903.00 for mileage and transportation costs from May 2006 to May 2009 at KCATC. (Tr. Vol. I, p. 214). He also provided a summary that purported to breakdown the various expenses that they had paid. (PEX TT, p. 473). He failed, however, to provide any supporting documentation in terms of invoices, receipts, cancelled checks.¹⁶

CONCLUSIONS OF LAW

The Hearing Panel makes the following Conclusions of Law:

The Parties

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

¹⁶ He attempted to remedy that deficiency by bringing PEX VV that was not admitted because he did not comply with the five day disclosure rule.

2. The Petitioner and his Parents are now and have been during all times material to this proceeding, residents of the District, as defined by Section 167.020 RSMo.

3. 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).

Due Process Complaints and The IDEA's Burden Of Proof

4. The Student filed the due process complaint that initiated this matter on March 3, 2006. The complaint alleges the District violated the IDEA by not developing an IEP that was reasonably calculated to provide FAPE. For the alleged violation, they seek reimbursement for certain tuition and transportation expenses incurred with private schooling. The burden of proof in an administrative hearing arising under the IDEA is properly placed upon the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 537 (2005). Thus, the burden of proof in this case rests with the Petitioner. The U. S. Supreme Court’s reference is to the burden of persuasion, which means that the Student and his Parents lose at the conclusion of the case if the evidence on both sides is evenly balanced. The standard of proof in this administrative proceeding, as in most civil cases, is proof by a preponderance of the evidence. *Tate v. Department of Social Services*, 18 S. W. 3d 3, 8. (Mo. App. E. D. 2000).

The IDEA's Statute Of Limitations

5. The IDEA regulations, 34 C.F.R. § 300.507(a) and 34 C.F.R. § 300.511(e) and (f) establish the IDEA's statute of limitations for the filing of due process complaints by Parents or by the local educational agency. The pertinent regulations state as follows:

"§ 300.507 Filing a due process complaint.

(a) General.

(1) A parent or a public agency may file a due process complaint on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

(2) *The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint*, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in §300.511(f) apply to the timeline in this section.

"§ 300.511 Impartial due process hearing.

(e) Timeline for requesting a hearing. *A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint*, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

(f) Exceptions to the timeline. The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to--

(1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or

(2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent."

[emphasis added].

6. The Federal Register, Vol 71, No. 156, p. 46706 defines what is meant in 34 C.F.R. §300.511(f)(2) by the term "withholding of information from the parent that was required under this part." The Federal Register states:

"These exceptions include situations in which the parent is prevented from filing a due process complaint because the LEA withheld from the parent information that is required to be provided to parents under these regulations, *such as failing to provide prior written notice or a procedural safeguards notice that was not in the parent's native language*, as required by §§ 300.503(c) and 300.504(d), respectively." [emphasis added].

7. The relevant time period in this case is limited to the period beginning on March 3, 2006, and ending on March 3, 2008 for the following reasons:

A. Petitioner's Parents filed their due process complaint on March 3, 2008.

B. There is no evidence on the record that the District made "specific misrepresentations . . . that it had resolved the problem forming the basis of the due process complaint." Petitioner's Parents bear the burden of proof on this issue, *Schaffer ex rel. Schaffer v. Weast, supra*, and have failed to meet that burden.

C. There is no evidence on the record that the District "[withheld] information from the parent that was required under this part to be provided to the parent." The record clearly shows that the District repeatedly provided the Parents with appropriate copies of the Procedural Safeguards Notice beginning with the first communication between the District and Parents on March 1, 2004, and thereafter provided the Procedural Safeguards

Notice at least **twenty-one** additional times. The District also provided an appropriate and timely Notification of Meeting form for each meeting with the Parents. Petitioner's Parents bear the burden of proof on this issue, *Schaffer ex rel. Schaffer v. West, supra*. and have failed to meet that burden. Since there is no "exception" to the IDEA's statute of limitations, all issues that occurred before March 3, 2006, are dismissed.¹⁷

Parentally-Placed Private School Child with a Disability

8. The IDEA regulations define the term "Parentally-Placed Private School Children With Disabilities" as follows:

"§ 300.130 Definition of parentally-placed private school children with disabilities.

Parentally-placed private school children with disabilities means children with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the definition of elementary school in § 300.13 or secondary school in § 300.36, other than children with disabilities covered under §§ 300.145 through 300.147."

9. For the period of March 3, 2006-May 2007, Petitioner was a Parentally-Placed Private School Child With a Disability" as defined by 34 C.F.R. § 300.130.

10. The IDEA regulations, 34 C.F.R. § 300.140 define the extent to which the parents of a Parentally placed private education student with a disability can use the IDEA's due process procedures. This regulation states:

"§ 300.140 Due process complaints and State complaints.

(a) Due process not applicable, except for child finds.

(1) Except as provided in paragraph (b) of this section, the procedures in §§ 300.504 through 300.519 do not apply to complaints that an LEA has failed to meet the requirements of §§ 300.132 through 300.139, including the provision of services indicated on the child's services plan.

(b) Child finds complaints--to be filed with the LEA in which the private school is located.

(1) The procedures in §§ 300.504 through 300.519 apply to complaints that an LEA has failed to meet the child find requirements in § 300.131, including the requirements in §§ 300.300 through 300.311.

¹⁷ There is also an argument that the 2004 IEP was superseded because the focus for a denial of FAPE is the IEP in place or IEP being developed at the time of removal from public school. *Ashland School District v. Parents of Student R. J.*, 2008 WL 4831655 (D. Or. 2008).

(2) Any due process complaint regarding the child find requirements (as described in paragraph (b)(1) of this section) must be filed with the LEA in which the private school is located and a copy must be forwarded to the SEA.

(c) State complaints.

(1) Any complaint that an SEA or LEA has failed to meet the requirements in §§ 300.132 through 300.135 and 300.137 through 300.144 must be filed in accordance with the procedures described in §§ 300.151 through 300.153.

(2) A complaint filed by a private school official under § 300.136(a) must be filed with the SEA in accordance with the procedures in § 300.136(b)."

11. The Federal Register, Vol 71, No. 156, p. 46597 defines what is meant in 34 C.F.R. §300.140 as follows:

"Section 615(a) of the Act specifies that the procedural safeguards of the Act apply with respect to the identification, evaluation, educational placement, or provisions of FAPE to children with disabilities. *The special education and related services provided to parentally-placed private school children with disabilities are independent of the obligation to make FAPE available to these children.*

While there may be legitimate issues regarding the provision of services to a particular parentally-placed private school child with a disability an LEA has agreed to serve, *the due process provisions in section 615 of the Act and §§300.504 through 300.519 do not apply to these disputes, because there is no individual right to these services under the Act. Disputes that arise about these services are properly subject to the State complaint procedures under §§300.151 through 300.153.*" [emphasis added].

12. The State Plan, Regulation VIII, *Private Schools*, page 127, states:

"The due process procedures only apply to complaints that an LEA has failed to meet the child find requirements."

Free Appropriate Public Education

13. The IDEA, its regulations and the *Missouri 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.

14. 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.

15. 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.

16. The IDEA generally requires that a child with a disability 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.

17. If parents believe that the educational program provided for their child fails to meet this standard or if no program is provided for their child whom the parents contend is eligible for special education, 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 (1998). The Parents must file for a due process hearing in a timely fashion. See *e.g. James v. Upper Arlington City School District*, 228 F. 3d 764 (6th Cir. 2000), *cert. denied*, 532 U.S. 995 (2001).

18. The IDEA requires that students with disabilities be educated in the least restrictive environment reflecting a strong preference that disabled students attend regular classes with non-disabled children and a presumption in favor of placement in the public schools. *T. F. v. Special School Dist. of St. Louis County*, 449 F.3d 816 (8th Cir. 2006). The regulations of the IDEA, 34 C.F.R. §300.114(a)(2), define the term "Least Restrictive Environment" as follows:

"(2) Each public agency must ensure that --

(1) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and,

(2) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

19. 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), *cert. denied*, 484 U.S. 847 (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), *cert. denied*, 502 U.S. 1066 (1992).

20. If a school district fails in its obligation to provide a free appropriate public education to a disabled child, the parents may enroll the child in a private school and seek retroactive reimbursement for the cost of the private school from the school district. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U. S. 359, 370 (1985). In determining whether parents are entitled to reimbursement, the Supreme Court has established a two part test: (1) was the IEP proposed by the school district appropriate and (2) was the private placement appropriate to the child's needs. *See Burlington*, 471 U. S. at 370; *see also Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U. S. 7, 12-13 (1993). The Supreme Court has also stated, because the authority to grant reimbursement is discretionary, "equitable considerations [relating to the reasonableness of the action taken by the parents] are relevant in fashioning relief." *Burlington*, 471 U. S. at 374; 20 U. S. C. Section 1412(a)(10)(C)(iii)(III).

21. An IEP is a written statement that includes, *inter alia*, the child's present level of academic achievement and functional performance, the child's special education needs, measurable annual goals, a procedure for progress reports, and any supplemental aids and

services needed. 20 U. S. C. Section 1414 (d)(1)(A); *M. P. v. Independent School District No. 721*, 326 F. 3d 975, 977 n.1 (8th Cir. 2003). It is prepared jointly with school staff and parents, and is reviewed annually. *M.P.*, 326 F.3d at 977, n.1.

22. An IEP does not violate the IDEA (a) if the procedures set forth in the IDEA are followed and (b) the IEP is formulated to enable the child to receive educational benefits. *Rowley, supra.*, 102 S. Ct. at 3034.

23. The *Rowley* standard continues to be applicable, and not a higher standard, for determining FAPE under IDEA. *M. M. ex rel. L.R. v. Special School Dist. No. 1*, 512 F. 3d 455, 461 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 452 (2008).

24. IDEA does not require the inclusion of a BIP at any particular date. 20 U. S. C. Section 1414(d)(3)(B)(i) provides that the IEP team “shall in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavior interventions, strategies, and supports to address that behavior.” (emphasis added). Under this section, a school district must consider whether to implement a BIP when student’s behavior begins to impede learning. *Alex R. v. Forrestville Valley Community Unit School District #221*, 375 F. 3d 603 (7th Cir. 2004), *cert. denied*, 543 U.S. 1009 (2004).

25. A school district is not required to address a student’s inability to generalize across settings to show an educational benefit. Making measurable and adequate gains in the classroom is sufficient under *Rowley*. *Thompson R2-J School District v. Luke P.*, 540 F.3d 1143 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 1356 (2009); *L. G. ex rel. B. G. v. Sch. Bd. of Palm Beach County*, 255 Fed. Appx. 360 (11th Cir. 2007); *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289 (11th Cir. 2001), *cert. denied*, 537 U.S. 815 (2002); *Gonzalez v. Puerto Rico Dept of Educ.*, 254 F.3d 350 (1st Cir. 2001); *San Rafael Elementary Sch. Dist. v. Cal. Special Educ. Hearing Office*, 482 F. Supp.2d 1152 (N. D. Ca. 2007).

26. The District generally complied with the procedural requirements of the IDEA from March 3, 2006-March 3, 2008 and the Hearing Panel finds no violation that resulted in a denial of free appropriate public education to Student.

27. Contrary to the opinions of Parents’ experts, Student’s proposed IEPs developed in May and August 2007 were reasonably calculated to produce FAPE in the Least Restrictive Environment for ESY in the summer of 2007 and for the 2007-2008 school year when Student did not attend school in the District.

28. Because the Parents failed to show beyond a preponderance of evidence that the District did not provide FAPE, we decline to address issues (E) through (I) (set out earlier in the Findings of Fact section) dealing with the appropriateness of the private placement at KCATC and the request for reimbursement. These courts adopted this approach: *C.G. and B.S. v. Five Town Community School District*, 2007 U.S. Dist. LEXIS 10310 at *109 (D. Me. 2007), *aff’d* 2007 WL 1051650 (D.Me.); *W. S. and L. S. v. Rye City School District*, 454 F. Supp. 2d 134, 139 (S. D. N.Y. 2006); *M.C.*

DECISION

The Petitioner alleges in his Due Process Complaint that the District failed to provide free access to public education (“FAPE”) by failing to develop IEPs reasonably calculated to provide educational benefit beginning in August/September 2004 and continuing through the 2007-2008 school years. As a result, the Parents of Petitioner claim that they were forced to place their son at two private schools, Partners in Excellence and the Kansas City Autism Training Center where they allege he made educational progress. They seek an order directing the District to reimburse them for the costs at PIE and KCATC as well as transportation expenses totaling \$286,455.00. (Finding of Fact “FF” # 95).

Statute of Limitations

We address the issues slight out of order by first addressing the statute of limitations. As detailed in our Conclusions of Law #5-7, there is a two year statute of limitations under IDEA, with limited exceptions. The Parents claim an exception for the alleged failure of the District to provide copies of the Procedural Safeguards in 2004. They first raised this exception in Mother’s Verified Response filed in connection with the District’s Motion for Summary Judgment in which the District sought to enforce the two year statute of limitations. (See FF#15). With overwhelming evidence of providing the Procedural Safeguards on **nine** occasions in 2004 (plus **thirteen** times in 2005-2007), the District refuted the position of the Parents.¹⁸ Remarkably, even after being confronted with very solid evidence against the Parents on this issue at the hearing, Mother still maintained that her Verified Response to the Motion for Summary Judgment was accurate i.e., the Parents did not receive procedural safeguards notifying them of

¹⁸ For 2004, see FF#s 2,3,24, 27, 28(A), 28(B), 28(C); 34 & 35. for the period of 2005-2007, see FF#s 41, 42, 48, 59, 62(D), 64, 68, 69 (M), 75 (D), 77, 81 (J) & 85 (D).

due process options in 2004. (Tr. Vol. 3, p. 168-169).¹⁹ The Parents totally failed to carry their burden of proof on the statute of limitations and all allegations prior to March 3, 2006 are dismissed. Thus, the only time frame for our consideration is March 3, 2006-March 3, 2008, which covers two years prior to the date of filing the Due Process Complaint.

Failure to Enroll in District

While Petitioner was never enrolled for a regular school year program, this fact alone does not prevent the Parents from pursuing a claim if the District failed to develop an IEP reasonably calculated to deliver FAPE. *Forest Grove School District v. T. A.* ____ U. S. ____ (2009). We see the failure to enroll as a lack of sincere interest by the Parents to go forward with a public placement. We conclude that the following history shows that Petitioner was a “Parentally-Placed Private School Student with a Disability” as per C.F. R. Section 300.130 from 2004 through at least the 2006-2007 school year:

1. Petitioner originally came to the District through a referral from the First Steps program. From the beginning, Petitioner’s Parents expressed no interest in enrolling Petitioner in the District. During a telephone conversation with Joan Levinson on August 9, 2004, Petitioner's Mother informed Ms. Levinson that she did not want District services and wanted to continue First Steps services. Undeterred, Ms. Levinson worked to set a meeting for Review of Existing Data and the development of a proposed IEP for the Petitioner.
2. On August 26, 2004, an IEP meeting was conducted and an IEP was developed for Petitioner. During the meeting, the Parents: (a) did not consent to the placement of Petitioner in the ECSE Classroom as proposed by Petitioner's IEP Team; (b) did not state their concerns about the educational program contained in the IEP that had been proposed for Petitioner by his IEP Team; and, (c) did not state that they intended to enroll Petitioner in a private school at public expense.
3. Petitioner's Mother testified that after the August 26, 2004, IEP meeting she and Petitioner's Father decided that the proposed educational services were "not enough" for

¹⁹ The inaccurate Verified Response resulted in protracting the proceedings because the Motion for Summary Judgment on the issue of the two year statute of limitations had to be denied. Thus, we spent more time on the 2004-2006 time frame than otherwise would have been necessary. The Parents’ position on this issue at the hearing also undermined their credibility.

Petitioner "or what he needed" (Tr. Vol. 1, p. 47, lns. 17-21) so they started looking online for a private placement for Petitioner. (Tr. Vol. 1, p. 48).

4. On September 24, 2004, the Parents did not show up for a scheduled IEP meeting. On September 29, 2004, Petitioner's Father told Joan Levinson that the Parents did not want to meet again with the District and asked her not to call again.

5. Petitioner's Parents unilaterally enrolled him in PIE, in Burnsville, Minnesota, on November 1, 2004. At the time he was enrolled in PIE, though he was offered special education and related services by the District, Petitioner had never been enrolled or received any educational services from the District.

6. Following the August 26, 2004 IEP meeting, and within ten (10) business days before November 1, 2004, the date Petitioner's Parents enrolled him in PIE the Parents: (a) did not give the District written notice that were refusing to consent to the placement of Petitioner in the ECSE Classroom as proposed by Petitioner's IEP Team; (b) did not give written notice stating their concerns about the educational program contained in the IEP that had been proposed for Petitioner by his IEP Team; and, (c) did not give written notice that they intended to enroll Petitioner in a private school at public expense.

7. Petitioner was consistently enrolled as a student at PIE until May 29, 2006. At that time, Petitioner's Parents decided to take him back to Kansas City and enroll him in KCATC, not the District. At the time Petitioner left the PIE program, the Parents had not communicated with the District since March 2, 2005, or for nearly fifteen (15) months.

8. Prior to enrolling Petitioner in the KCATC the Parents: (a) did not give the District written notice that were refusing to consent to the placement of Petitioner in the ECSE Classroom as proposed by Petitioner's IEP Team; (b) did not give written notice stating their concerns about the educational program contained in the IEP that had been proposed for Petitioner by his IEP Team; and, (c) did not give written notice that they intended to enroll Petitioner in a private school at public expense.

9. The Parents waited until August 25, 2006, nearly three (3) additional months, before they made contact with the District or informed the District that the Petitioner was now back in the District and was now enrolled at KCATC.

10. On August 28, 2006, the Parents informed the District that they wanted to enroll Petitioner in the District. An enrollment packet was immediately sent to them by Keri Collison. The Parents did not return the packet until April 16, 2007, nearly eight months later, and the enrollment paperwork was not completed for another six weeks on May 25, 2007.

11. By the time the May 4, 2007, IEP meeting took place, Petitioner had been continuously and seamlessly enrolled in two private schools for two and one-half (2½) years.

As a Parentally-Placed Private Education Student, Petitioner is not entitled to a free appropriate public education in the District and his due process rights are substantially reduced -- to a determination of whether District failed in its Child Find responsibilities. See C. F. R. Section 300.140; *Foley v. Special School District of St. Louis County*, 153 F.3d 863, 865 (8th Cir. 1998) ; *Jasa v. Millard Public School District No. 17*, 206 F.3d 813, 815 (8th Cir. 2000); *Gary and Sylvia S. v. Manchester School District*, 241 F. Supp.2d 111 (D.N. H. 2003), *aff'd*, 374 F. 3d 15 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 505 (2004). Thus, Petitioner does not have the right to file a due process complaint regarding the 2006-2007 school year.

Alternatively, another basis for denying a claim covering the 2006-2007 school year (plus Extended School Year) is the failure of the Parents to file for due process in a timely fashion. *James v. Upper Arlington City School District*, 228 F.3d 764 (6th Cir. 2000), *cert. denied*, 532 U.S. 995 (2001). (parents waited 7 years to file for due process after removing child from public school); *Warren G. ex rel. Tom G. v. Cumberland County School District*, 190 F.3d 80 (3rd Cir. 1999) (parents delayed sixteen months before filing for due process). The Parents of Petitioner filed for due process on March 3, 2008 seeking to recover, *inter alia*, for tuition and transportation expenses covering the 2006-2007 school year plus ESY. The Court in *James v. Upper Arlington City School District*, 228 F.3d at 769 noted: "Parents are not entitled . . . to delay a request for a due process hearing, incur tuition costs of their own choosing for several years (thus depriving the school district of a chance to fashion a less expensive acceptable alternative), and then ask the school district to fund whatever alternative they have pursued in the interim."

Parents Did Not Prove a Denial of FAPE for the 2007-08 School Year

As noted in our Conclusions of Law, a two part test has evolved for recovery of unilateral private placement expenses: (1) show a denial of FAPE and (2) prove that the private school was the appropriate placement for the child. *See Burlington*, 471 U. S. at 370. Some courts have skipped addressing the first step and denied reimbursement for a failure to prove the second part. *See e.g., Gagliardo v. Arlington Central Sch. Dist.*, 489 F. 3d 105 (2nd Cir. 2007) (Court concluded that deciding whether the IEP provided FAPE was a close one so they decided not to answer it and opted to base their holding on the appropriateness (or lack thereof) of the private school. *Id.* at 112. The better approach is to provide an analysis of the first prong and if the conclusion is that FAPE has not been denied, the second prong is left unaddressed. *See e.g., C.G. and B.S. v. Five Town Community School District*, 2007 U.S. Dist. LEXIS 10310 at *109 (D. Me. 2007), *aff'd* 2007 WL 1051650 (D.Me.); *W. S. and L. S. v. Rye City School District*, 454 F. Supp. 2d 134, 139 (S. D. N.Y. 2006); *M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ.*, 122 F. Supp.2d 289 (D. Conn. 2000).

We first address whether the District complied with the procedural requirements of the IDEA and if not, did a denial of FAPE result. The Parents' complaints consist of the following: (1) a failure to provide procedural safeguards, which we have previously discussed in great detail and (2) a failure to allow parental input by having the IEPs already drafted at the start of IEP meetings in May 2007. (see FF#62).

In *Cerra v. Pawling Central School District*, 427 F. 3d 186 (2nd Cir. 2005), the Court found no procedural violation when the School District presented the mother with a draft copy of the goals and objectives section of the proposed IEP. *Id.* at 190. The Court further cited the following in support of its position:

The U. S. Department of Education has instructed that when a school District ‘bring[s] drafts of some or all of the IEP content to the IEP meeting, [the relevant inquiry is whether there was] a full discussion with the child’s parents, before the child’s IEP is finalized, regarding drafted content and the child’s needs and the services to be provided to meet those needs and the services to be provided to meet those needs.’ 34 C. F. R. Section 300, App. A – Notice of Interpretation, Q. 2.

Id. at 193.

There was no lack of opportunity for parental input afforded to the Parents by the District. One or both Parents attended the May and August IEP meetings accompanied by Rand Hodgson (Consultant to the Parents) and KCATC Director, Dr. Jennifer Simon. (FF# 62, 69 & 83). Suggestions from the Parents and their experts were included in the drafts and the final IEP: the present levels, the goals and objectives as well as modifications and supports. (FF# 62, 69 & 81). The District’s IEP team also reviewed the video supplied by the Parents regarding Petitioner’s typical day at KCATC. (FF#69). The District very patiently reworked the IEP developed at the May 23, 2007 meeting after the Father dropped 48 additional goals into the mailbox of Keri Collison after the meeting ended (and two days before the last day of school). (FF#81).

The District clearly gave the Parents an adequate opportunity to participate in the development of the final IEP dated August 15, 2007. The decision by the IEP team not to accept all the suggestions from Parents and their experts does not mean they were denied the chance to participate and be heard on Petitioner’s education. Professional differences are not to be construed as violations of the IDEA. See *Bradley ex. rel. behalf of Bradley v. Arkansas Dep’t of Education*, 443 F. 3d 965, 974 (8th Cir. 2006); *P. K. v. Bedford Central School District*, 569 F. Supp. 2d 371, 383 (S. D. N. Y. 2008); *O’Dell v. Special School District of St. Louis County*, 503

F. Supp.2d 1206, 1217 (E. D. Mo. 2005)(IDEA's requirement of parental participation does not mean parents have the right "to make unilateral decisions about programs the public funds.")

In sum, we find no evidence of any procedural violations which impeded the Petitioner's right to receive FAPE; significantly impeded the Parent's opportunity to participate in the decision making process regarding the provision of FAPE for the Petitioner; or, caused a deprivation of educational benefits for the Petitioner.

We next consider whether the District complied with IDEA by proposing an IEP that was reasonably calculated to deliver FAPE or stated another way, whether the IEP was designed to confer some educational benefit: the second part of the *Rowley* test. *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, 73 L. Ed.2d 690 (1982). We conclude that the IEPs dated May 23, 2007 and August 15, 2007 were reasonably calculated to provide the Petitioner with FAPE in the Least Restrictive Environment.

The Parents' expert, Dr. Simon criticized the final IEP as follows:

The final IEP dated 8/15/07 contained 13 Annual Goals. Even if [he] had met all goals on the Grandview IEPs, his progress would not qualify as reasonable when compared to his *potential* for development and learning. [Petitioner]'s progress at KCATC demonstrates that he is *capable* of learning at a more accelerated rate. Thus, Grandview did not provide [Petitioner] with an *appropriate* program of *accelerated* learning. Instead, they offered an IEP with limited expectations." (emphasis in the original) (PEX QQ, p. 445)

Assuming *arguendo* that Dr. Simon is correct regarding Petitioner's inability to maximize his potential under the proposed IEP, this level of educational progress is not required under IDEA. Conferring some educational benefit as defined by *Rowley* continues to be the applicable standard, and not a higher standard for determining FAPE under the IDEA. *M. M. ex rel. L. R. v. Special School District No. 1*, 512 F. 3d 455, 461 (8th Cir. 2008).

For the following reasons, we conclude that the IEP dated August 15, 2007²⁰ (and also the IEP dated May 23, 2007) exceeded Rowley's minimum standard of conferring some educational benefit for the following reasons:

1. For the remainder of school year 2007-08 -- Specialized instruction in academic skills for 750 minutes per week; specialized instruction in language therapy for 45 minutes per week; specialized instruction in sound system therapy for 45 minutes per week; specialized instruction in Occupational Therapy for 60 minutes per week and weekly gross motor activities.
2. For school year 2008-09 -- Specialized instruction in social/emotional and Early Childhood special education for 1315 minutes per week; specialized instruction in language therapy for 75 minutes per week; specialized instruction in sound system therapy for 75 minutes per week; and, specialized instruction in Occupational Therapy for 60 minutes per week.
3. The educational placement of Outside the Regular Education Classroom more than 60% of the time was appropriate. The placement was in the least restrictive environment, in that:
 - (a) Petitioner would have been educated in his home school; and,
 - (b) To the maximum extent appropriate, Petitioner would be educated with children who are non-disabled in the regular school year program and in the Extended School Year program.
4. The August 15, 2007 IEP provides a Curb-to-Curb transportation with modifications, Intensive individualized instruction in highly structured, small group setting and a one-on-one paraprofessional.
5. The August 15, 2007 IEP provides accommodations to Petitioner such as: adapted or simplified materials; preferential seating; adjustments for speech intelligibility/fluency; a study carrel for independent work; lower difficulty level/shortened assignments; oral cues and prompts; adapted worksheets; extended time for completion of assignments and tests; frequent eye contact/proximity control; and, sensory breaks as needed.
6. The entirety of the August 15, 2007 IEP was developed by the Petitioner's Team which included Petitioner's Parents and Director of KCATC, Dr. Jennifer Simon. The provisions of the August 15, 2007, IEP added to the proposed May 23, 2007, and were developed largely from input from the Parents and Dr. Jennifer Simon, and were based substantially on the Education Plan used by KCATC for Petitioner.

²⁰ DEX 43.

The Parents and their experts also complained about the failure of the District to incorporate all 48 goals from the KCATC IEP as basis for a lack of FAPE.²¹ KCATC and its former Director, Dr. Simon adhere to the ABA approach to educating children with autism. (FF#94). She declined to concede the obvious---ABA is a methodology. (FF#94). An IEP otherwise appropriate i.e., conferring some educational benefit cannot be rejected over a disagreement regarding methodology. *Gill v. Columbia 93 School District*, 217 F.3d 1027 (8th Cir. 2000) (parents were not entitled to dictate the use of the Lovaas method of instruction for their autistic child); *E. S. v Independent School District, No. 196*, 135 F.3d 566 (8th Cir. 1998) (FAPE not denied because the School District refused to mandate only the use of a certain methodology in the IEP for a dyslexic child); *Petersen v. Hastings Public Schools*, 31 F.3d 705 (8th Cir. 1994)(IEPs of hearing-impaired children upheld even though the particular sign language system was different than the one used by the students at home).

Parents and their experts also expressed a major concern regarding the lack of a formal behavior intervention plan (“BIP”) in either the IEP dated May 23, 2007 or the one dated August 15, 2007. In their Post –Hearing Brief, the Parents treated this issue as an alleged substantive violation rather than a procedural one as generally seen in IDEA cases. See *e.g., School Board of Independent School District No.11 v. Renollett*, 440 F. 3d 1007 (8th Cir. 2006). Either approach results in the same conclusion: the District’s failure to include a BIP with the IEPs did not mean a potential denial of FAPE.

IDEA does not require the inclusion of a BIP at any particular date. 20 U. S. C. Section 1414(d)(3)(B)(1) provides that the IEP team “shall in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavior interventions, strategies, and supports to address that behavior.” Thus, the IDEA

²¹ Dr. Simon conceded KCATC’s extensive IEP is essentially a “lesson plan.” (FF#93).

regulations did not require the inclusion of a BIP in the August 15, 2007 IEP until Petitioner's behavior impeded his own learning or the learning of others at his new school in the District. *Alex R. v. Forrestville Valley Community Unit School District #221*, 375 F. 3d 603 (7th Cir. 2004), *cert. denied*, 543 U.S. 1009 (2004). While it is true there was evidence of aggressive behaviors at KCATC (where there was no separate BIP), these behaviors had not been an issue for some time. (FF#92). Additionally, Petitioner was never in an environment comparable to what he would experience in the District; therefore, the District could not adequately assess whether Petitioner needed a BIP at the time the final IEP was prepared on August 15, 2007.

The District officials indicated that BIPs are typically written a few weeks after a child has entered school so teachers can actually see what behaviors are problematic. (FF#69, 83). We question whether Congress contemplated that IDEA requires a public school system to maximize every IEP for every child in trying to cover for every contingency for that child. See, *e.g.*, *Hartmann v. Loudoun County Board of Education*, 188 F.3d 996 (4th Cir.).

Several courts have sanctioned the approach contemplated by the District to deal with potential behavioral issues. In *Melissa S. v. School District of Pittsburgh*, 183 Fed. Appx. 184 (3rd Cir. 2006), the Court concluded that the Pittsburgh District followed the correct plan handling a new student's behavior. *Id.* at 188. After observing her outbursts early in the school year, the District personnel almost immediately began assessing her behavior. *Id.* When it became clear that that the student's behavior issues went beyond mere problems of adjusting to a new school, the District hired a consultant to look at her behavior, determine the causes and recommend a behavior plan. *Id.* The Court in *W.S. and L. S. v. Rye City School District*, 454 F. Supp.2d 134 (S. D. N. Y. 2006) sanctioned a similar path followed by the School District for a kindergartener with autism transitioning from a private school to a public school. A Functional

Behavioral Assessment was conducted by the District once the student's stereotypical behavior emerged. *Id.* at 141-142.

Conclusion

We unanimously conclude: (a) the IDEA's two year statute of limitations applies and the relevant time period is March 3, 2006 through March 3, 2008; (b) Petitioner was a Parentally-Placed Private School Child with a Disability for the 2006-2007 school year plus ESY services and for whom the District did not have to provide FAPE; (c) the Petitioner's proposed IEP dated August 15, 2007 was reasonably calculated to produce FAPE in the Least Restrictive Environment for the 2007-2008 school year.²²

Because the Parents failed to show beyond a preponderance of evidence that the District failed to provide FAPE, we decline to address issues (E)-(I) (set out earlier in the Findings of Fact section) dealing with the appropriateness of the placement at KCATC and the request for reimbursement.

²² Another basis for denying a claim for the 2007-2008 year is the delay in filing for due process after rejecting the August 15, 2007 IEP and the filing date of March 3, 2008. See *Warren G. ex rel. Tom G. v. Cumberland County School District*, 190 F. 3d 80 (3rd Cir. 1999).

ORDER

The Due Process Complaint filed by the Petitioner is dismissed and judgment is entered against Petitioner and judgment is entered in favor of Grandview C-4 School District.

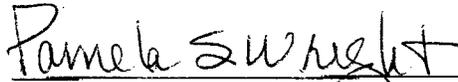
APPEAL PROCEDURE

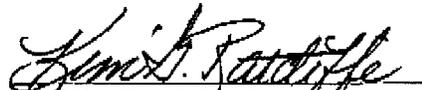
PLEASE TAKE NOTICE that these Findings of Fact, Conclusions of Law, Decision and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter and you have a right to request review of this decision. Specifically, you may request review as follows:

1. Proceedings for review may be instituted by filing a petition in the circuit court of the county of proper venue within forty-five days after the mailing or delivery of the notice of the agency's final decision....
2. The venue of such cases shall, at the option of the plaintiff, be in the circuit court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence...

PLEASE TAKE NOTICE that you also have a right to file a civil action in Federal or State Court pursuant to the IDEA. See 34 C.F.R. §300.512.

Dated this 4th day of August, 2009.


Pamela S. Wright, Chairperson


Dr. Kim Ratcliffe, Panel Member


Fred Davis, Panel Member

CERTIFICATE OF SERVICE

Copies of the foregoing Opinion were mailed via certified mail, receipt requested (and by electronic mail) to the attorneys and via regular US mail to Mr. Davis, Dr. Ratcliffe and Ms. Bruner on this 4th day of August, 2009 to:

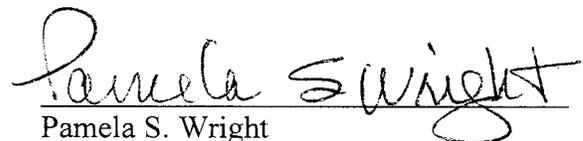
Mr. Daniel J. Pingelton
Pingelton Law Firm
The Guitar Building
28 North 8th Street, Suite 402
Columbia, MO 65201-7708

Mr. Ransom A. Ellis, III
Ellis, Ellis, Hammons & Johnson, PC
The Hammons Tower, Suite 600
901 St. Louis Street
Springfield, MO 65806-2505

Mr. Fred Davis
9345 Ewers Drive
St. Louis, MO 63126

Dr. Kim Ratcliffe
Associate Executive Director,
Education and Training
Missouri School Boards Association
2100 I-70 Drive
Columbia, MO 65203

Ms. Jackie Bruner, Director
Special Education Compliance
Department of Elementary &
Special Education
Post Office Box 480
Jefferson City, MO 65102-0480


Pamela S. Wright