BEFORE THE THREE-PERSON DUE PROCESS HEARING PANEL EMPOWERED BY THE MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION PURSUANT TO SECTION 162.961 R.S.Mo.

_____, STUDENT,	**)**
by and through _____,	**)**
PARENTS,	**)**
	)
Petitioner,	**)**
v.	**)**
	)
CAMERON R-I SCHOOL DISTRICT,	**)**
	)
Respondent.	**)**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

PROCEDURAL HISTORY AND STATEMENT OF ISSUES

A. Procedural History

This matter comes before the three-person due process hearing panel convened by the Missouri Department of Elementary and Secondary Education ("MDESE") pursuant to Section 162.961 R.S.Mo., on the request for due process filed by the parents of Student ("Parents" or "Petitioners") on behalf of their son (hereinafter "Student"), a student who at the time the complaint was filed, was enrolled in the Cameron R-I School District as a special education student ("School District" or "District" or "Respondent"). The request for due process ("Complaint") was received by MDESE on March 25, 2009. Respondent exhibit R-61 at page 1183 (hereinafter R for Respondent, P for Petitioner or HP for Hearing Panel, followed by a dash and then exhibit number and then at page number if applicable). The panel convened by MDESE consists of panel members Dr. George Wilson and Victoria Teson and Chairperson Janet Davis Baker. The Parents are represented by Stephen Walker. The Respondent District is represented by Teri B. Goldman and Alefia E. Mithaiwala with Mickes Goldman O'Toole, LLC. A resolution meeting was conducted on April 6, 2009. R-61 at 1200-06; Hearing Transcript at page 34 (hereinafter "TR" followed by colon and then page number).

The Respondent challenged the sufficiency of the Complaint, R-61 at p. 1191, and the Panel Chairperson found the Complaint insufficient on April 9, 2009. R-61 at p. 1214. An amended Complaint was filed on April 27, 2009 (R-61 at 1220). The School District challenged the sufficiency of the amended Complaint (R-61 at 1223) and the parties through counsel indicated that if the resolution session had not been waived that they would agree that the hearing could proceed and there would be no error regarding whether it had been held or waived. TR:35.

A six-day hearing was held in this matter on April 7-9, 2010, and April 12-14, 2010.[1] Prior to the hearing the Chairperson issued an Order dated April 5, 2010 (HP-1) limited each party to 16 hours to present its case in chief. The hearing was closed at the Petitioners' request. TR:15.

The following exhibits were admitted:

Petitioners' Volume 1 **excepting** pages 1-61 through 1-64; 1-65 through 1-67; 1-1-283 through 1-285; 1-452; 1-463 through 1-476.
Petitioners' Volume 2 **excepting** pages 2-124; 2-131 through 2-134; 2-146 through 2-150; 2-211 through 2-213; 2-252 through 2-253; 2-267 through 2-269; 2-293 through 2-294; 2-324 through 2-326; 2-331(a) and 2-331(b); 2-350 through 2-351.
Petitioners' Volume 3, pages 3-1 through 3-54; 3-62 through 3-63; Exhibits 84-101.

Respondent's Volumes 1, 2 and 3 – Exhibits 1-61.

Petitioners presented the following witnesses during their case-in-chief: Carlena Leeper, Marcia Smith, Mother, Jessica Royer and Father. The District presented the following witnesses in its case-in-chief: Carlena Leeper and Janene Snyder. The Petitioners recalled Mother on rebuttal.

B. Time-Line Information

The initial deadline for issuance of the hearing panel's decision after the filing of the amended Complaint was July 11, 2009. There was a joint request for an extension of time for the hearing panel's decision through December 31, 2009, which the Chairperson granted. After the first days scheduled for hearing, there was a joint request made for an extension of time for the hearing panel's decision through June 30, 2010, which the Chairperson granted. At the conclusion of the hearing dates a request was made by the School District to extend the hearing panel's decision deadline through August 16, 2010 to which the Parents objected and which the Chairperson granted. A request was made by the School District to extend the hearing panel's decision deadline through September 20, 2010 to which the Parents objected and which the Chairperson granted. The School District made a request to extend the hearing panel's decision through October 31, 2010, to which the Parents were not opposed and which was granted by the Chairperson. The parties jointly requested an extension of the hearing panel's decision deadline through November 24, 2010, which was granted by the Chairperson. The School District requested an extension of the hearing panel's decision through December 15, 2010, to which no opposition was received and which was granted by the Chairperson.

C. Statement of Issues

The issues to be determined by the panel and upon which evidence was presented at the hearing were stated by Parents in their Amended Complaint and explained during the hearing (TR:38-48) and concern the sufficiency of Individualized Education Plans (IEPs) developed by School

[1] The Panel initially convened on November 16-17, 2009, to take evidence but the Parties voluntarily engaged in informal mediation that was not successful.

District for Student dating from March 27, 2007 through September, 2009. The Parents set forth the issues in their Proposed Findings of Fact and Conclusions of Law as follows:

1. Were the IEPs at issue reasonably calculated to provide a Free Appropriate Public Education (FAPE) when (1) the IEPs failed to include measurable goals and objectives; (2) the IEPs failed to adequately address stereotypical behaviors that impeded the Student's learning; (3) the IEPs failed to be research based, or alternatively, based upon reliable assessments and/or accurate anecdotal observations; and (4) the IEPs and/or their implementation failed to afford the Student meaningful educational progress?

2. Was the Parents' opportunity to participate in the IEP process seriously hampered sufficient to deny Student a Free Appropriate Public Education?

The Amended Complaint contended that the Respondent did not fairly consider Parents' request or treat Parents as "equal partners in the IEP process and educational decision making." Further, that the "IEP wasn't reasonably calculated to provide meaningful educational Benefit and did not include suggestions [Parents] offered." Parents give as examples that they "couldn't tell where an objective was starting" and "levels that were given in the IEP did not appear to be accurate based on the developmental evaluation given by the district and observations and evaluations done by [Parents] and sources outside of the school district." The Parents specifically raise the issue of the School District's denial of a full-time paraprofessional for Student as a denial of FAPE and a request that was not fairly considered.

Parents also complain about the Behavior Intervention Plan (BIP) and give examples of how it was not working for Student and how it was not being properly implemented by the Respondent. The Parents contend that the examples are "(1) errors in implementation and (2) unilateral and inappropriate changes to the plan were implemented without notice to [Parents] or the behaviorist." Parents allege inadequate staff training in the behavior area.

The requested relief included reimbursement for Student's placement at Partners in Behavioral Milestones (PBM), a private school as well as related educational expenses, and continued placement of Student at PBM at the School District's expense. As an alternative to continued placement at PBM, Parents suggest that the School District be required to create an appropriate IEP which would include, among other things, the recommendations of the behavior expert, continued monitoring of the program by the expert and sufficient training for School District staff.

In answering both the original Complaint and the amended Complaint, the Respondent acknowledges that the Student is a child with a disability (autism) but denies that it is not providing FAPE. The Respondent denies that Student is currently entitled to FAPE from the School District as Parents unilaterally moved Student to a private school, which he attended at the time of the hearing. The School District further denied that Parents were entitled to reimbursement of educational and related expenses and that Student was entitled to continued placement at PBM. R-61 at 1195 and 1223. The School District provides a detailed paragraph-by-paragraph response to the Parents' allegations in the amended Complaint and overall denies the Parents' allegations regarding a denial of FAPE.

There is a two year statute of limitations under the IDEA for due process complaints which runs from the time the parent or public agency (District), "knew or should have known about the alleged action that forms the basis of the due process complaint." 34 C.F.R. § 300.511(e). This deadline has exceptions, however, if the parent was prevented from filing a complaint because the public agency made specific misrepresentations that it had resolved the problem forming the basis of the complaint or that the public agency withheld information from the parent that was required to be provided to the parent. 34 C.F.R. § 300.511(f). There are no allegations by Parents of any exceptions to the two year statute and thus, the review by this panel is limited to allegations of IDEA violations dating back two years from the date of the original Complaint. While an analysis of IDEA violations only goes back two years, testimony and evidence relating to the Student prior to that time was taken for relevant background and context.

FINDINGS OF FACT

1. During all times material to this due process proceeding, Student resided with his Parents within the boundaries of the Cameron R-1 District, located in Cameron, Missouri. TR:987, R-1 at 1. The District is a public school district organized under the laws of Missouri. The District has one elementary school building, Parkview Elementary. TR:1715, 1717.

2. Student's date of birth is May 22, 1999. At the time of the testimony at the due process hearing during the 2009-10 school year, Student was 9 years old and not enrolled in or attending Respondent's schools, but, per his mother's testimony, was receiving some in-home instruction and some services through Partners in Behavioral Mielstones. TR:828-29.

3. Student is a student with a disability for purposes of the IDEA and his educational diagnosis is autism. TR:204, 444-45, 679. Student's autism has been characterized as moderate to severe. TR:204, 445, 679. Student's autism impacts him academically as well as socially. TR:680, 847. Student's communication skills also are limited and these deficits impact his ability to learn. TR:680-1, 846. Student's autism affects his fine motor skills and he also has sensory issues. TR:846, 848.

4. On or about March 7, 2002, and March 14, 2002, Student was evaluated by Children's Mercy Hospital's Developmental Diagnostic Team in Kansas City, Missouri.[2] TR:669; R-1 at 4-14. While the evaluation characterized Student's intelligence quotient (IQ) as falling in the range of mild mental retardation, the evaluator's impressions were that Student has more ability than the scores suggest and believed that he fit within the criteria of autism. R-1 at 10. As a result of the Children's Mercy evaluation, Student qualified for services in the District through the District's Early Childhood Program. TR:669.

[2] Prior to Student's evaluation at Children's Mercy Hospital, Student was receiving speech/language therapy, occupational therapy, and specialized instruction services from Missouri First Steps, an organization which offers coordinated services and assistance to young children with special needs. TR:673; Ex. R-9 at 185. Student began receiving services from Missouri First Steps when he was 22 months old. TR:673. Student continued to receive services from Missouri First Steps until he started attending the District in the fall of 2002. TR:673. Student's primary care physician as well as one of the providers from Missouri First Steps, recommended that Student be evaluated for IDEA eligibility. Ex. R-1 at 4.

5. On or about May 17, 2002, the School District convened Student's IEP team and prepared his first District IEP. R-1 at 16. Mother attended and participated in that meeting. Parents acknowledged receipt of procedural safeguards from the School District from 2002 through the dates of the hearing which informed them of their rights under the IDEA. TR:672.[3]

6. On or about October 11, 2002, Audrey Guffey, the District's Director of Special Services, sent the Parents a notification of meeting scheduling an IEP meeting on October 18, 2002, to review and revise Student's IEP. R-1 at 39. The meeting occurred as scheduled and the Parents attended and participated. R-1 at 41. Student continued to receive IEP services through the District's Early Childhood Program for the 2002-03 school year. TR:63, 673, 676.

7. On or about May 2, 2003, the District convened Student's IEP team to review and revise his IEP and Parents were in attendance and participated. R-2 at 52-53. Mother testified during the hearing that this IEP referenced "baseline" and stated there was improvement in fine visual motor skills and expressive language. TR:694-95; R-2 at 57. Mother defined baseline as "a starting point, where the starting point is for that particular IEP for that particular goal." TR:693-94. Mother acknowledged that she didn't know what the IDEA required with respect to an IEP containing baseline information as she had defined it and further that she did not know if the District had exceeded the IDEA requirements by including this information. TR:694-5. The IEP included goals and objectives within the goals in specified areas of Student's needs. R-2 at 57 *et seq.* The IEP provided for Student to receive 530 minutes of special education per week as well as 60 minutes of occupational therapy and 90 minutes of language therapy per week. R-2 at 61.

8. On or about July 24, 2003, the District convened Student's IEP team to review and revise his IEP and Parents were in attendance and participated. R-4 at 70. That IEP provided for Student to receive 530 minutes of special education instruction per week for the 2003-04 school year as well as 60 minutes of occupational therapy per week, 90 minutes of language therapy per week, and 30 minutes of physical therapy per week. R-4 at 92. The IEP included goals and objectives within the goals in specified areas of Student's needs. R-4 at 70 *et seq*. The IEP contained hand-written annotations of progress on the goals as well as pages identified as progress reports in certain areas. R-4 at 73-90. A progress report was also included from the District's Speech Language Pathologist, Jan Turner, indicating progress during Student's attendance during the District's extended school year services (ESY) program for summer of 2003. R-4 at 109. During the 2003-04 school year, Student continued to receive IEP services through the District's Early Childhood Program. TR:676.

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[3] Subsequently to the development of the first IEP, Parents corresponded with the School District by letter dated August 17, 2002 and advised that they were going to try a special gluten free diet with Student and requested the District's adherence to this diet. The District did comply. TR:688; R-1 at 35. Mother testified she had tried other regimens and strategies, besides Student's gluten free diet, which she believed would help alleviate some of the symptoms of his autism, for instance vitamins and supplements and equine therapy. TR:689. Mother testified that while the vitamin regimen typically did not have a negative impact on Student's behaviors, she admitted it was possible for Student to become sick at school and vomit in the morning as a result. TR:689, 717-18; Ex. R-10 at 211. An August 10, 2005 IEP reflects that because of the possibility of vomiting, Parents asked that Student remain in the nurse's office for a half hour at the beginning of school each day. TR:718; R-10 at 211.

9. On or about April 2, 2004, the District convened Student's IEP team to review and revise his IEP. R-7 at 128. Parents were in attendance and participated in the meeting. R-7 at 129. The IEP team set Student's placement for the following 2004-05 school year, his kindergarten year, at outside the regular education classroom for more than 60 percent of the time and Mother testified that she believed this to be an appropriate placement for Student at the time. R-7 at 139; TR:704. Mother testified she believed this was an appropriate placement for Student at the time. TR:704. During the meeting, the IEP team discussed Student's Present Level Educational Performance (PLEP). R-7 at 131. The IEP under the PLEP section noted that Student made progress in his gross motor skills which Mother at hearing acknowledged. TR:700; R-7 at 131. Other improvements were noted an acknowledged, including Student's ability to safely descend stairs, turn taking skills and remaining in his seat for longer periods of time in order to attend to lessons, and putting together words to formulate longer sentences. TR:700-01; R-7 at 130-31. The IEP included goals and objectives within the goals in specified areas of Student's needs. R-7 at 128 *et seq.* This IEP provided for Student to receive 1025 minutes of special education instruction per week for the 2004-05 school year, as well as 60 minutes of adaptive physical education per week, 90 minutes of speech language services per week, 60 minutes of occupational therapy per week, and 30 minutes of physical therapy per week. R-7 at 136-37. There is a section in the IEP where specific parental concerns were noted. R-7 at 132. The District provided the Parents with a notice of action regarding the changes in Student's placement on May 19, 2004. R-8 at 165.[4]

10. Prior to Student's kindergarten year, Parents consulted with a PBM behavior specialist, Dan Matthews, who informed the Parents that PBM was developing a school called Milestones Academy. TR:710. Parents requested that District officials work collaboratively with Mr. Matthews to address behavior issues, which was done in the Student's home. TR:711.

11. During his kindergarten year, Student's special education teacher was Carlena Leeper, who held the position of kindergarten special education teacher prior to assuming her current role. TR:51, 199. Prior to this time, Ms. Leeper served as a tutor for Student during the time he was in the District's pre-school special education program. TR:197. Ms. Leeper is currently the District's Special Education Coordinator and had been so for three years at the time of the hearing. TR:49. Ms. Leeper testified as to her qualifications in working with special needs children. Ms. Leeper is certified by DESE to teach K-12 Visuals Arts and Cross-Categorical Special Education. Ms. Leeper also holds a Master's Degree in Elementary Administration. She testified that she received specific training in multiple intelligences, brain research and cooperative learning and has received training for strategies in working with autistic children. She identified herself as a regional consultant or advisor for students with "RPM" through the Hale Center in Austin, Texas, which she defined as "rapid prompting communication", a methodology which is a "specific type of communication process to assist students that are on the autism spectrum." TR:196.

[4] This particular notice of action contains a signature line for the recipient to acknowledge receipt of the notice as well as a copy of the District's procedural safeguards. Mother signed this line. R-8 at 165.

12. Student's speech language pathologist (SLP) during his kindergarten year was Ms. Turner.[5] Mother testified that she was pleased with Ms. Turner's work with Student and never requested a different speech language pathologist. TR:698. During the hearing, Mother testified that, in her opinion, Student made progress behaviorally, socially, and academically during his kindergarten year. TR:701.

13. On or about March 10, 2005, Student's IEP team met to discuss Student's triennial evaluation. R-9 at 185-209. Parents were in attendance and participated in the meeting. R-9 at 209. The School District's 2005 reevaluation noted that in addition to the services Student was receiving from the District, he also was receiving parent-provided outside language therapy, occupational therapy, hippotherapy, and therapeutic listening. R-9 at 186. The reevaluation report noted Student's weaknesses in communication, academics, fine motor, social skills, behavior and gross motor skills but noted strengths in the areas of computer skills and ability to memorize facts and visual information. R-9 at 208. The report further noted that Student has a good sense of humor and strong desire to interact with peers and that he has adjusted to kindergarten and is becoming more independent. Report recommendations include the development of goals, objectives/benchmarks which address these needs. *Id.*

14. On or about March 31, 2005, the District convened Student's IEP team to review and revise his IEP. R-10 at 210. Parents were in attendance and participated in the IEP meeting. R-10 at 214. The IEP noted Student's positive gains in peer interaction. R-10 at 225. The IEP also indicated that Student could read the kindergarten high-frequency sight words, color words, and number words through the number ten. R-10 at 225. Student was noted as having been able to identify all the letters in the alphabet that were required by the curriculum as well as being able to form phonetic sounds with 80 percent accuracy. *Id.* The IEP also stated that Student's scissor skills and spontaneous language ability had increased. R-10 at 225. The IEP included goals and objectives within the goals in specified areas of Student's needs. R-10 at 226 *et seq.* Specific parental concerns were stated within the IEP. R-10 at 225. The IEP provided for a placement of outside the regular education classroom for more than 60 percent of the time. Ex. R-10 at 231. A notice of action was sent by the School District on the proposed placement, dated March 31, 2005. R-10 at 251.

15. On or about June 29, 2005, Minnie Bray, Student's private and parent-provided SLP, conducted an observation in Student's classroom at Parents' request and with School District approval.[6] TR:718-19. Ms. Bray noted as part of her observation report, that there were some "very positive strategies being used by the regular classroom teacher and paraprofessional." TR:718-19; R-10 at 217-18. Ms. Bray noted the positive effects of giving Student visual cues and allowing him to use Play-Doh as a fidget toy. R-10 at 218. Ms. Bray

[5] Ms. Turner served as Student's School District SLP for four years. TR:698.

[6] Mother testified that Ms. Bray worked with Student for three or four years, twice weekly (Ms. Bray's Speech-Language Therapy Note dated August 10, 2005 at R-10 at 215 states she has been providing supplemental speech language therapy for Student for 60 minutes two times per week since August 2004) until September of 2008 with a break for her maternity leave. TR:718-19, 729, 1885. In addition to working with him on his speech skills, Ms. Bray also worked with Student on behaviors. TR:720. Mother testified that, in spite of Student's behaviors, Student made progress with Ms. Bray. TR:720-21. The Speech-Language Therapy Note recognizes continued behavioral concerns but nevertheless, steady improvement in language abilities. R-10 at 216.

also noted Student's teacher would use "first/then" language which helped Student understand and predict the events of the day. R-10 at 218.

16. On or about July 1, 2005, Ms. Turner provided Parents with a progress report which stated Student had experienced "profound" progress in his language skills. TR:722-23; R-10 at 256. Ms. Turner in her report noted Student had progressed in taking turns while communicating, listening to others and applying what was requested of him. R-10 at 256. The report noted further that Student had progressed with regard to his emotional responses and his expressive vocabulary. Ex R-10 at 256.[7]

17. During the 2005-06 school year, Student was enrolled in the District and received IEP services as a first grader. TR:677. His special education teacher for his first grade year was Ms. Janene Snyder. TR:717. Ms. Snyder has a certification to teach special education, which is considered "cross-categorical" entitling her to teach students with any disability. Ms. Snyder also has her Master's Degree in Special Education. TR:1716. Ms. Snyder has attended various workshops on teaching children with autism. TR:1745. Over the course of the 2005-06 school year, Ms. Snyder sent progress reports to Parents regarding Student. TR:726; R-10A at 258-271. Mother wrote a letter to Ms. Snyder dated August 29, 2005, which acknowledged receipt of Ms. Snyder's progress reports and indicated satisfaction with the school year thus far, advised of the Parents' work with Student at home and made suggestions for a calming activity in the afternoon. TR:724; R-10A at 259.

18. On September 22, 2005, Ms. Snyder sent a note to Parents advising that Student had a hard day and was difficult through much of the day. R-10A at 261. Since Student had not been so hard to deal with since summer school, Ms. Snyder expressed a concern from Mrs. Long[8] that he was sick. Mother wrote Ms. Snyder a note following up on Student's difficult behavior and explained that it may have been related to her "moving around some vitamins" for Student and that may not have agreed with him and further expressing appreciation for the communication and patience with the situation.[9] R-10A at 262.

19. On or about March 20, 2006, the District convened Student's IEP team to review and revise his IEP that was being developed for the remainder of the current and the following school year, Student's second grade year. TR:751-52; R-13 at 300. Parents were in attendance and participated in the meeting. R-13 at 301. The IEP noted Student had continued to show independence in all areas of his academic and social environment. TR:736; Ex. R-13 at 302. Additionally, he was exiting the bus without assistance and was going into Ms. Snyder's room independently. TR:736; R-13 at 303. The IEP also noted Student's reading fluency and comprehension were at a 1.1 grade level. R-13 at 303. Mother testified that, during this period

[7] Ms. Turner stated in the report: "I wish that you could step in my shoes for a moment and see him from my perspective, having not been with him for a year, because it's often difficult to see change when you are with somebody on a daily basis. I would love for you to see the changes as I see them!" R-10 at 256.

[8] Mrs. Cindy Long was Student's regular education teacher this school year. TR:717.

[9] There are other examples in the record of Ms. Snyder's progress reports to Parents and Mother's communication in return acknowledging both the reports and the progress Mother is observing as well as Mother's suggestions on ways to motivate Student. R-10A at 263, 266.

of time, Student made meaningful progress and that she was happy with Student's progress during this period of time. TR:736-37. Parental concerns and input were noted. R-13 at 302-03. The IEP included goals and objectives within the goals in specified areas of Student's needs. R-13 at 306 *et seq.* The IEP team determined Student's placement for the following year would be outside the regular education classroom 21 to 60 percent of the time. TR:753; R-13 at 319. Specifically, Student was to receive 300 minutes in specialized instruction in math per week, 300 minutes of specialized instruction in reading per week, 150 minutes in specialized instruction in written expression per week, 60 minutes of adaptive physical education per week, 30 minutes of language consultation per month, 90 minutes of language therapy per week, 60 minutes of occupational therapy per week, and 8 minutes per month of physical therapy consultation. Ex. R-13 at 317. Student also received 10 minutes of skill level maintenance on a daily basis. R-13 at 317. This IEP placement was a reduction of time in special education from the prior IEP, which provided for placement outside the regular education classroom for more than 60 percent of the time. TR:753-56; R-14 at 377. This was done to provide the least restrictive programming for Student. R-14 at 377. Mother testified at the hearing that she wanted the reduction of time in special education at the time as she believed he was working at the same level as his first grade peers. TR:756. The District provided Parents with a notice of action regarding Student's change in placement on March 20, 2006. R-14 at 377.

20. During the 2006-07 school year, Student was enrolled in the District and received IEP services as a second grader. TR:677. Student's special education teacher was Vicki Trevisanut and his regular education teacher was Tracy Smart. TR:752, VII:1451. During Student's second grade year, Ms. Leeper tutored him after school. TR:198-99, 752. Ms. Leeper testified she believed Student Benefitted from those tutoring sessions. TR:197. During Student's second grade year, Ms. Turner continued to work with Student as his SLP. TR:752.

21. Progress reports were sent home to Parents indicating progress on certain IEP goals. Linda Morris, the District's occupational therapist, sent a first quarter progress report dated October 18, 2006 to the Parents indicating Student's cutting skills had greatly improved during the course of the year and that Student had made progress in copying geometric patterns and tying his own shoes. R-13 at 337. A second quarter occupational therapy report dated December 21, 2006 was prepared by Ms. Morris, indicating Student's continued progress with cutting, copying geometric patterns, and tying his own shoes. R-13 at 364. Ms. Morris prepared a third quarter occupational therapy report dated March 12, 2007 which noted that Student had made progress toward his goals, but needed a lot of encouragement to write during occupational therapy sessions. R-13 at 368.

22. On or about October 25, 2006, the District sent home an annotated IEP showing progress toward goals in speech. R-13 at 361-63. Progress was noted in pragmatic skills. R-13 at 363. A second quarter annotated IEP dated January 11, 2007 showed additional progress and some "excellent work" on appropriate utterances. R-13 at 365-67. The report noted that Student if motivated can successfully carry out 3-step directions in the speech room setting and was then expressing his feelings with words and not relying on icons to help convey his feelings as he had previously. R-13 at 365-66. Additionally, the report noted Student had a good grasp of adjectives and adverbs. R-13 at 366.

23. The District sent out a Notification of Meeting dated March 13, 2007 to Parents with Ms. Trevisanut's signature for the purpose of reviewing and revising Student's IEP at an IEP meeting to be held on March 19, 2007. R- 21 at 400. The District also issued a written Notice of Action dated March 14, 2007 signed by Heidi Lyman, Physical Therapist, proposing to dismiss Student from the eight minutes of monthly physical therapy monitor services due to his having met his physical therapy goals. TR:762-63; R-21 at 401. Mother agreed with that Student's goals had been met in this area. TR:762-63.

24. On or about March 19, 2007, the District convened Student's IEP team to review and revise his IEP. R-21 at 403. Mother was in attendance and participated in the meeting. R-21 at 404. She was able to express concerns and request changes to the IEP. TR:784. The Present Levels section of the IEP stated that Student had progressed in many areas since the prior IEP and continued to become more independent. R-21 at 406-07. The IEP also stated that Student appeared to be cheerful and happy at school unless he had an unexpected change in his schedule. R-21 at 406-07. In a section referenced "Update 03/19/07" the IEP stated that Student was able to read and comprehend on a 1.4 grade level and his comprehension was higher than his ability to read. R-21 at 407. When books were read to Student that were on the second grade reading level, he was able to successfully take comprehension tests. *Id.* The IEP further noted that Student responded well to positive behavior management and was willing to sit in a "safe seat." R-21 at 407. The IEP further noted that Student's gross motor skills had improved and he was safe and functional throughout the school environment including the stairs, hallways, playground area and the cafeteria. R-21 at 407. The IEP included goals and objectives within the goals in specified areas of Student's needs. R-21 at 409 *et seq.* This IEP provided for Student to receive special education services 21 to 60 percent of the time outside the regular classroom. R-21 at 424. Specifically, Student was to receive 300 minutes of specialized instruction in math per week, 300 minutes of specialized instruction in reading per week, 150 minutes of specialized instruction in written expression per week, 30 minutes of language consultation per month, 90 minutes of language therapy per week, 60 minutes of occupational therapy per week, and 10 minutes of skill level maintenance per day. R-21 at 422. The IEP, on Alternate Form I included various modifications/accommodations to assist him at school. R-21 at 431. Ms. Leeper testified that during the IEP meeting, the IEP team recommended extended school year services.[10] TR:1486. Ms. Leeper testified that it was her belief Student needed to attend ESY services because Student had a tendency to regress when he was not in consistent programming. *Id.* Mother concurred with Ms. Leeper's assessment that Student required ESY services to avoid regression. TR:678. It was necessary to have more than one IEP meeting to finalize Student's IEP, which was atypical for other students but typical for Student, according to Ms. Leeper's testimony. TR:784, 1452.

25. On or about April 17, 2007, the District reconvened Student's IEP team to further discuss and finalize Student's March 19, 2007, IEP. R-21 at 433. Parents were in attendance and participated in the meeting. R-21 at 434. The IEP contained much of the present level information as in the March 19, 2007 IEP but also included an update for March/April 2007 in the area of Speech/Language. R-21 at 472. The IEP contained baseline data regarding Student's

[10] Student attended ESY services for the following years: 2003, 2004, 2005, 2006, 2007 and, in the summer of 2008, Student received only attended ESY services to receive occupational therapy and speech/language services. TR:678, 1486.

IEP goals. R-21 at 475-489. The IEP included goals and objectives within the goals in specified areas of Student's needs and further indicated how progress toward the goal would be measured.[11] *Id.* The IEP noted Student exhibited behaviors which impeded his learning and contained a behavior intervention plan ("BIP"). R-21 at 439, 466-67. The IEP stated that Student would exhibit behaviors when he was involved in unstructured activities or unfamiliar situations and that Student had been trained in the "take two" behavioral system.[12] Ms. Leeper testified to her belief that the April 17, 2007 IEP was reasonably calculated to provide Student with Benefit given his autism and the BIP which had been drafted and attached to the IEP was appropriate for Student given his behaviors at the time. TR:1453-54. Ms. Leeper also testified that Parents did not disagree with the finalized IEP and that she believed "everything was resolved between the draft and the final copy." TR:1454. Mother testified that she did not write any letters or e-mails to the District stating she disagreed with any aspect of the April 17, 2007 IEP, including the BIP or the use of the RPM method, nor did she take any action to file for a due process hearing. TR:806-07. She did recall having verbal communication with Audrey Gentry, the District's special education director at the time about the baselines for the IEP goals and was told that the District would generate those and get back to Parents. TR:807.

26. Ms. Snyder also testified at hearing with respect to the goals in the April 2007 IEP. Specifically, she testified that some of the goals she was responsible for implementing were too difficult for Student but were agreed upon by the IEP team. TR:1739. She did express these concerns to Mother (TR:1741) but continued to work on these goals. TR:1741-44. According to Ms. Snyder's testimony, there was much concern on the part of Parents about Student remaining on grade level. TR:1734. However, Student was not able to stay on pace with his non-disabled peers because of his autism. TR:1728-29.

27. On or about May 1, 2007, the District reviewed the data which had been collected regarding Student's behaviors over the two week period from April 12–27, 2007 as required by the BIP in the IEP. R-23 at 552. Marcia Smith, the District's autism consultant, helped draft the document, entitled "Behavior Improvement Plan" (BIP) and dated May 1, 2007, which summarized the District's findings. TR:535. Ms. Smith has a Bachelor of Science Degree in elementary education and a Master's Degree in mental handicaps. TR:443. She also has certification in Mental Handicaps and Severe Handicaps. TR:443. Ms. Smith also is certified by Project Access as an in-district autism consultant. TR:443. Ms. Smith testified she has received autism training for over twenty years. TR:443. Ms. Smith also has attended various classes and

[11] At the request of Mother, Ms. Turner provided information on Student's baseline and draft IEP goals to the private SLP, Minnie Bray. Ms. Bray developed objectives for certain goals regarding compliance, turn-taking and social language and other goals and provided them to the Parents and District. R-21 at 503-04. These in turn appear to have been incorporated into the final IEP. For example see R-21 at 478 (Goals 6.1 and 7.1), 479 (Goal 8.1).

[12] The BIP stated baseline behaviors would be documented over a two week period from April 13, 2007 to April 27, 2007 and that that all staff working with Student would receive training in the "take two" method. R-21 at 467. According to Marcia Smith, the District's autism consultant, Take Two was something that was used outside of school by the Parent and was used because Student was familiar with it. TR:475. When a student was involved in an inappropriate behavior, the student would be told to sit down and count to ten until calm and ready to comply. This exercise would be repeated until the student was calm and ready to comply. According to Ms. Smith, it would not have been used at school unless requested by Parents because this was something the school was unfamiliar with. TR:475. At one point, take two was a strategy used at Milestones Academy. TR:1292.

workshops for behavior management and functional behavior assessments. TR:444. This BIP referred to Student attempting to change the subject as an avoidance technique during instruction time and Student talking continuously when traveling to PE and library and trying to talk to Mrs. Smart in the hall so he won't have to enter the gym or the library. R-23 at 552. Ms. Smith considered these references to be antecedents and functions of the behavior information. TR:535. The BIP provided strategies for District staff to follow with Student including ignoring off-subject talking and instructing peers to ignore off-subject talking, and the use of tokens for Student to earn for compliant behavior that could be used to earn time for preferred activities. R-23 at 552. The BIP further noted Student exhibited noncompliant behaviors during unstructured activities, for instance in the hall after lunch and during restroom breaks. *Id.* To address these behaviors, Ms. Smart was advised to use a red/green sign to indicate to Student when he could ask a question or have a turn in a group activity. *Id.* The BIP further noted Student was less compliant during structured activities when the level of difficulty was higher but more compliant when completing "hands-on" tasks. *Id.* The BIP required an additional two weeks of data collection and a subsequent meeting on May 17, 2007.[13] R-21 at 553.

28. On or about May 16, 2007, Ms. Morris sent home Student's fourth quarter progress report for occupational therapy which noted his progress in goals for that area. Ex. R-21 at 521-22.

29. During the 2007-08 school year, Student was enrolled in the District as a third grader. TR:677. During his third grade year, Ms. Snyder was once again his special education teacher. TR:1502. Student was in Ms. Snyder's special education classroom for 750 minutes per week during his third grade year. TR:1720. Mother testified she was happy to have Ms. Snyder as Student's teacher for his third grade year because it meant Student would not have to go through a transition period of getting to know Ms. Snyder. TR:724. Student's regular education teacher during the year was Abbey Hussey. TR:1723.

30. On or about September 4, 2007, the District sent Parents a notice of action proposing to remove Student from adaptive physical education as Student had met all of his goals. R-27 at 561. Mother signed the Notice of Action checking the box to indicate that she would like the proposed action to be carried out without any waiting period. Ex. R-27 at 562.

31. On or about September 17, 2007, Marcia Smith prepared a new BIP based upon behaviors observed by Ms. Snyder during September 11-14, 2007. R-29 at 567; TR:462. To chart Student's on and off-task behaviors, Ms. Snyder used a timer set to ring every minute and then record her observations. Ex. R-29 at 567. Ms. Smith conducted her own observations and received input from others that was considered in generating the BIP. TR:331, 462. The BIP stated as that the antecedents to Student's behaviors were the presentation of new information in the resource room and being asked to complete non-preferred tasks in the resource room. R-29 at 567. The observed off-task behaviors included screaming, biting his thumb, and pointing his

[13] While there was no testimony on this meeting, there is a District exhibit, R-24, which is a handwritten account of a meeting between Mother and Ms. Turner that does not set out observed behaviors but has a notation about a "para" – paraprofessional - and managing behaviors and consistent structure as well as a reference to a "Behavior Consultant – when school starts." R-24 at 554.

finger in Ms. Snyder's face. R-29 at 567. The BIP set out the strategies to address the behaviors. R-29 at 567.

32. During the 2007-08 school year, the Parents requested that the District bring in an outside autism consultant in an effort to address Student's behaviors. TR:203, 470. The District agreed to the request and employed Angie Gentry in that capacity. TR:470. The Parents received the notice of action to employ an outside individual to observe and consult with the District regarding behavioral programming for Student on November 8, 2007. R-33 at 585. On November 8, 2007, Ms. Gentry observed Student and subsequently prepared a report of her observations which included recommendations for the District to consider. TR:470; R-32 at 572-80. Ms. Gentry returned on November 28, 2007 to conduct a second observation of Student. R-32 at 581-84.

33. On December 10, 2007, Student's IEP team revised and implemented a new behavior plan. R-35 at 591-92. The steps to be implemented to achieve goals and objectives described putting in place "a concrete behavior intervention system." R-35 at 592. A row of five pictures of footballs would be given to Student. TR:1772. Ms. Snyder would set a timer for a specific amount of time and if Student was compliant for that period, Ms. Snyder would move the footballs up. TR:1772; R-35 at 592. Once Student moved all five footballs up, he could choose a preferred task. TR:1772-73; R-35 at 592. If Student showed an innaprorate behavior, the timer would stop and the footballs would be removed to the bottom of the chart and Student would have to start over.[14] TR:1773; R-35 at 592. Ms. Snyder believed taking the footballs down decreased Student's behaviors. TR:1775. According to Ms. Gentry, the footballs were not supposed to be taken away but because Ms. Snyder was experiencing success, Ms. Gentry said that if it was working to continue it. TR:1776. The Parents agreed this would be a useful interim plan. TR:814; R-35 at 592. On or about December 22, 2007, Mother sent Ms. Stephanie Briscoe, the Parents' advocate, an e-mail noting she had agreed to move forward with the behavior plan as revised as they continued to pursue a paraprofessional on Student's behalf. TR:991-92; P-33 at 377.

34. On December 17, 2007, Ms. Snyder sent the Parents a written notification of meeting indicating the IEP team would hold a meeting to review and revise Student's IEP. R-36 at 597.

35. On December 20, 2007, the District convened Student's IEP team to review and revise his IEP. R-37 at 599; TR:1455. Parents and Ms. Briscoe were in attendance and were allowed to have input and participate in the IEP meeting. TR:817-18; R-37 at 602. The meeting was scheduled as a result of Ms. Gentry's observations and recommendations and for the purpose of modifying Student's behavior plan. TR:1455-56. During the meeting, the team changed Student's placement and placed Student in the regular education classroom for 50 percent of his school day. TR:478; R-37 at 626. Under this IEP, the team proposed for Student to receive 300 minutes of specialized instruction in math per week, 300 minutes of specialized instruction in reading per week, 150 minutes of specialized instruction in written expression per

[14] Jessica Royer, who testified for Petitioners, stated that this type of "taking away" something valuable to the child strategy can be successful. TR:1197-99.

week, 30 minutes of language consultation per month, 90 minutes of language therapy per week, 60 minutes of occupational therapy per week, and 10 minutes of skill level maintenance per day. R-37 at 626. The IEP also included a variety of modifications/accommodations. R-37 at 634. A behavior intervention plan was a part of the IEP. R-27 at 635-36. The IEP team also updated Student's present level of performance. TR:1458; R-27 at 604. The present level noted that Student now was able to read guided reading books on a second grade level in the District's regular reading curriculum. TR:1458-60; R-27 at 604.

36. According to Ms. Leeper, the goals in the December 2007 IEP were appropriate and represented an appropriate measurable expectation of what Student could accomplish in light of his autism. TR:1461. She testified that the behavior plan also was appropriate given the information available to the IEP team at the time and that Parents did not express any disagreement with the behavior plan as written. TR:1461. Neither did Parents express any disagreement with the IEP or request a change in placement at the meeting. TR:1462. Ms. Briscoe, Parents' advocate, did not express any disagreement with the IEP. TR:1462. Mother testified that neither Parents nor Ms. Briscoe requested other changes to this IEP as it was discussed and developed but they would have stated that they didn't see any baselines. TR:819-820.

37. Ms. Snyder testified about the December 2007 IEP. In her opinion, while she believed that the majority of the goals in the December 2007 IEP were appropriate, one of the reading goals that the Parents requested represented a higher skill that Student was not yet ready to learn. TR:1756-58. Although Ms. Snyder worked on that skill with Student, the goal was too difficult and Student exhibited behaviors when she worked on the goal. TR:1758-59.

38. In spite of the difficulty of the one goal, Ms. Snyder testified that Student made progress on the December 2007 IEP goals according to the review of the quarterly progress reports she prepared during Student's third grade year. TR:1759-60; R-37 at 638-42. Mother acknowledged that the progress reports showed Student made progress. TR:837-38.

39. Ms. Snyder sent the Parents a progress report dated February 25, 2008, noting she had seen a vast improvement in Student's academics. TR:982; R-55 at 878. On May12, 2008, Ms. Snyder sent the Parents a progress report that stated Student was a non-reader at the beginning of the year and now was able to read eight sentences. TR:984; R-55 at 887. Mother did not write Ms. Snyder on either of these occasions to state she disagreed with this assessment.[15] TR:982, 984.

40. By letter of January 2, 2008, Parents requested permission from Ms. Leeper to videotape Student's individual class time during the first six weeks of 2008. R-39 at 699. In a separate letter, Parents also requested that Ms. Gentry be allowed to conduct further observations. TR:242; R-39 at 700.

[15] Mother testified that she would not hesitate to contact the District if she felt the reported progress was inaccurate. TR:698.

41. On or about January 9, 2008, Ms. Leeper sent Parents a notice of action denying both of their requests. R-39 at 701. The notice stated that the School District would deny videotaping because of District confidentiality policy regarding videotaping of students and that the videotaping was not necessary in order to provide Student with FAPE. The notice also stated that additional observations were not necessary due to the District's responsibility to record data over a period of time to determine the effectiveness of the behavior plan.

42. During Student's third grade year, Ms. Snyder sent the Parents weekly to monthly progress reports regarding Student's academics and behavior. R-55 at 863-87. On or about January 23, 2008, Mother sent Ms. Snyder an e-mail requesting weekly progress reports. R-55 at 876.

43. On February 10, 2008, Ms. Snyder e-mailed Mother to inform her about Student progressing some on the behavior plan. P-42 at 439; TR:995. Mother never corresponded to indicate that she disagreed with Ms. Snyder's assessment. TR:995-96.

44. Mother testified that she observed Student on February 13, 2008, while in Ms. Hussey's regular education classroom. P-42 at 447; TR:996. During that observation, Mother saw Student interacting with other students and noted that he did a good job of taking turns. P-42 at 447; TR:997. Mother also testified that during the observation, Student displayed no behavior issues and earned the necessary footballs for free time. P-42 at 447; TR:997. In the notes that Mother took, she wrote that when the teacher warned Student about behavior that might result in the loss of a football, he complied with the teacher's directive. P-42 at 447; TR:997. Mother also documented the teacher's positive comments about Student's behavior plan and the progress that the teacher had observed that year. P-42 at 447; TR:999.

45. Ms. Smith sent a notice of meeting dated February 20, 2008 to the Parents scheduling a team meeting for March 4, 2008, to review and revise Student's IEP if applicable. R-38 at 657. Ms. Leeper testified that the purpose of the meeting was to review the results of Student's evaluation and review and revise the IEP if need be. TR:1462, 1659-60. The meeting did occur on March 4, 2008 and Parents attended and participated. TR:1462; R-38 at 698.

46. There was no report of the evaluations presented at the meeting; Ms. Leeper testified that the actual report is not put in writing until after the meeting with the Parents. TR:1463. Ms. Leeper did state that the Parents had an opportunity to hear and see all testing results "at length." TR:1463. Parents had an opportunity to ask questions about the evaluation during the meeting. TR:1464. As part of that evaluation, the District administered multiple assessments, including the Gilliam Autism Rating Scale, a reading inventory and adaptive behavior scales. R-38 at 673-95; TR: 446-47. After review of the results, Student's multidisciplinary team concluded that he continued to be eligible under the IDEA as a child with autism. R-38 at 696. The District either sent or gave a copy of the final evaluation report to the Parents on March 25, 2008, after the meeting. TR:1463; R-38 at 698. Because of the length of the meeting discussing the evaluation results, possible changes to the IEP were not discussed at that time although typically the IEP is at addressed after the evaluation is reviewed. TR:1470, 1661.

47. On March 17, 2008, Parents (either Mother or Father or both, the document does not specify) requested while in Ms. Leeper's office that the District provide Student with a full-time, one-on-one ("1:1") paraprofessional, a request which is noted as "ongoing throughout this school year." R-40 at 714.

48. On or about March 28, 2008, Ms. Snyder sent the Parents written notification for an IEP meeting for April 4, 2008 for the purpose of review and revising the IEP and to address questions related to the IEP. Ex. R-41 at 718.

49. On April 4, 2008, the IEP team convened and one of the purposes was to discuss Parents request for the 1:1 paraprofessional. TR:1469-70; R-40 at 714. Father attended and participated. Ex. R-40 at 714-17; TR:1472. During the meeting, the team utilized and completed a paraprofessional worksheet to analyze Student's need for a paraprofessional. TR:1470. The team concluded that Student did not require a full-time, 1:1 paraprofessional. R-40 at 714-17. The team did agree that Student needed paraprofessional assistance but not for the full day. R-40 at 716-17. Father disagreed with this determination. TR:1472.

50. On or about April 4, 2008, the District provided the Parents with a notification for an additional IEP meeting for the purpose of review and revising the IEP scheduled for April 7, 2008. R-41 at 720.

51. On or about April 7, 2008, the meeting took place and Parents were in attendance and participated. R-41 at 724. The IEP present level noted that Student had improved behaviorally and in other areas. R-41 at 726; TR:540-41. The Parents express their concern that the team focus on behavior modification strategies and reducing behaviors which affected growth academically and socially. R-41 at 726-27. The IEP documented that Parents continued to express a desire for a "complete functional behavior assessments" to identify stressors. R-41 at 727. The most recent evaluation reports were included. R-41 at 727-30. The IEP included goals and objectives within the goals in specified areas of Student's needs and further indicated how progress toward the goal would be measured. R-41 at 731-756. Ms. Leeper testified that those goals were based on Student's day-to-day performance. TR:1466.

52. The April 7, 2008 IEP provided for Student to receive 300 minutes per week of specialized instruction in math; 300 minutes per week of specialized instruction in reading; 150 minutes per week of specialized instruction in writing; 60 minutes per week of occupational therapy; 7 minutes per week of language consultation; 90 minutes per week of language therapy; and 10 minutes per day of skill maintenance. R-41 at 756-57. The IEP also included various modifications and accommodations to assist Student at school. R-41 at 768. According to Ms. Leeper, the behavior plan that the team developed in December 2007 was to be a part of this IEP. TR:1474; R-41 at 767. The IEP also provided for Student to receive paraprofessional support in reading, spelling, math, regular classroom language and lunch. R-41 at 757. The IEP also provided for Student to receive such support during transitions and at the end of the day and it would continue to be adjusted according to need. *Id.*[16] Ms. Leeper testified that this IEP,

[16] Ms. Snyder testified that Student had access to classroom paraprofessionals in her classroom who were available to work with him during his third grade year, including in the regular education classroom. TR:1721-22.

including the December 2007 behavior plan, was appropriate for Student at that time. TR:1474. However at the end of this meeting Ms. Leeper did not consider this IEP to be a final IEP but still in draft form, subject to additional changes brought up at the meetings as well as from subsequent correspondence with the Parents. TR:1475-1481.

53. According to Ms. Leeper, Mother wanted information in the IEP beyond what the School District would consider to be baseline information. TR:1477. Ms. Leeper testified that in her opinion, Parents did not have an understanding of what baseline meant and that the District went above and beyond the IDEA requirements to include baseline information in Student's IEP. TR:1477, 1481. Ms. Leeper testified that the team worked through the Parents' comments and tried to come to a compromise. TR:1478-79. For instance, reading goals were adjusted per Parent request. TR:1480, 1764. The District sent the Parents a final copy of the April 2008 IEP on or about April 25, 2008. TR:1475. Ms. Leeper estimated that the team in total met for probably between three and three and a half hours in total developing this IEP, which was not the typical amount of time it takes to develop IEPs. TR:1485-86.

54. During the April 2008 IEP meetings, Mother testified that she did not request that the team change Student's special education minutes or placement, including into placement at Milestones Academy. TR:852.

55. On or about April 24, 2008, Ms. Gentry again observed Student at school. R-43 at 87-93. She noted that staff had implemented many of her prior recommendations including more 1:1 instruction. R-43 at 790; TR:853, 1636. As a result, she observed fewer behaviors. R-43 at 790; TR:853. In her written report, Ms. Gentry further noted that staff was diligent about recording target behaviors. R-43 at 790. In her report, Ms. Gentry stated, "[o]verall, I feel [Student's] multidisciplinary team has made great strides in improving [Student's] educational program." R-43 at 792; TR:855. Although Mother testified did not agree with Ms. Gentry's observations and findings, she did not inform the District of that disagreement. TR:854-55.

56. At hearing, Ms. Leeper testified about the District's implementation of Ms. Gentry's recommendations. TR:1491. The District moved Student's classroom and others so that Student's special education classroom was larger in size. TR:1492-93. Further, the District reassigned a paraprofessional to work with Student. TR:1491-92. In addition, the District allowed Student to use a dry erase board in lieu of paper and pencil and used a visual schedule. TR:1491-93. Staff also began implementing a concrete behavior system that required documentation of Student's behaviors every two minutes. TR:1492-93. According to Ms. Leeper, each of these adopted strategies led to improvement in Student's behaviors. TR:1493.

57. On or about April 28, 2008, the District provided the Parents with a notice of action refusing their request that Student have a full-time, 1:1 paraprofessional. R-44 at 794.

58. During the spring of 2008, the District put strategies in place to assist Student with extended school year services that were to be provided at the District's middle school. TR:1486-87. Those strategies included providing an ESY teacher and therapists that had previously worked with Student so he would be working with familiar persons. TR:1486-88.

59. On or about May 12, 2008, Mother e-mailed Ms. Leeper and Ms. Snyder and asked whether Student should be retained in third grade to boost his academics. R-44A at 796. Mother had requested grade retention almost on an annual basis. TR:1498-99. On or about May 12, 2008, Ms. Leeper responded and indicated that, in her opinion, retention would not be beneficial for Student as Student had a successful year, noting that the prior year did not show as much progress as had been anticipated, "but that is not the case as of now." R-44A at 797; TR:1498. Mother never responded back to Ms. Leeper's correspondence. TR:967.

60. On or about May 16, 2008, the District provided Parents with Student's year-end report card. P-64 at 238. He received passing grades in each of his classes and was promoted to the fourth grade for the 2008-09 school year.

61. In May 2008, Minnie Bray, Student's parent-provided private speech therapist, ceased working with Student when she had a baby. TR:718. At around that same time, Parents hired Ann Winder to provide Student with home tutoring. TR:749.[17]

62. On or about August 8, 2008, the Parents corresponded with the District's Superintendent, Dr. Ronald White. R-45 at 798. In that letter, the Parents stated that they were putting the District on notice that they were withdrawing Student from the District because they did not believe that the District was providing Student with FAPE. R-45 at 798. The letter also stated that the Parents might seek reimbursement for costs of educating Student. The Parents in that letter did not request that the District reconvene Student's IEP team to modify his IEP nor did the Parents request that the IEP team change Student's placement. TR:857, 972. After the August 2008 letter to Dr. White, the Student did not return to school in the District. R-45 at 801.

63. On or about September 5, 2008 and in response to the Parents' August 2008 letter to Dr. White, Ms. Leeper sent the Parents a notification for an IEP meeting to review and revise Student's IEP. R-46 at 802.

64. On September 17, 2008, Mother came to Parkview Elementary School in the School District and re-enrolled Student in the District for 4th grade, according to e-mail correspondence from Angie Bray, School District employee, to Ms. Leeper. R-45 at 801. The note reflects that Angie Bray asked Mother if Student had been in attendance at another school, in order to obtain that school's records. R-45 at 801. Mother informed the Ms. Bray that Student had not attended any other school during the time that he was not enrolled in the Cameron District. According to the e-mail account from Ms. Bray, when she asked Mother when Student would begin attending, Mother informed the District that Student would not attend until his IEP was "fixed." Ex. R-45 at 801. Student did not return to public school in the School District after that time. TR:745; 863.

65. On or about September 19, 2008, the District convened an IEP meeting to discuss the Parents' concerns with Student's IEP. R-46 at 804-06. Mother attended and participated. TR:859; R-46 at 807. Among the other participants were: Ms. Angie Gentry; Ms. Leeper; Rand

[17] Mother testified that Ms. Winder is the parent of a child with autism who home-schooled her own child for a period of time and who had some unspecified degrees or credentials in education. TR:750.

Hodgson, the Parents' advocate; Clayton Lovett, identified as a behavior consultant with PBM; and Jessica Royer, identified as an Independent Behavior Consultant. R-46 at 804; TR:860. During the meeting, Mother did not ask for changes to Student's IEP nor did she request a change in placement to Milestones Academy. TR:860, 1493. At the conclusion of the meeting, Mr. Hodgson and Mother stated that they were not expecting the District to take any actions at that time, other than "just offer services and open doors." R-46 at 806; TR:863.

66. Parents attempted to place Student at Milestones Academy in September 2008, but Milestones did not have a space for him at the time. TR:861; R-46A at 810.

67. Mother wrote Ms. Leeper an e-mail dated October 3, 2008, and informed her that Student had been enrolled at Milestones and invited Ms. Leeper to observe Student at there. R-46A at 810. Ms. Leeper declined in a return e-mail but welcomed Student's reenrollment. R-46A at 810.

68. Student attended Milestones from the fall of 2008 through approximately April 2009. TR:745. His special education teacher was Jamie Wilson and his ABA (applied behavior analysis) implementer was Anna Neises. TR:929.

69. Mother testified that there were two IEPs for Student at Milestones; one dated on December 19, 2008, and another dated February 13, 2009. P-89 at 113; P-90 at 130; TR:926. According to Mother, the difference in the two IEPs was that the later one added a speech-language goal. TR:951.

70. During the time that Student attended Milestones, the Parents were paid to transport Student to and from there along with another student from a different school district. TR:869-70. Parents received credit towards Student's Milestones tuition by transporting that other student. TR:871, 1436 .

71. On or about December 5, 2008, the Parents requested that Student's IEP team reconvene to update Student's present level of performance in the event he was to return to the District. R-47 at 811.

72. On or about December 9, 2008, Ms. Leeper responded to the Parents' request and informed them that, although Parents completed the reenrollment paperwork for Student to reenroll in September, Student had not returned to the District and the District was not obligated to convene his IEP team. R-47 at 811. In the letter Ms. Leeper also informed the Parents that Student was now considered as a private school student for purposes of the IDEA and was authorized to receive special education services only from the public school district where Milestones Academy was located, which was not the School District. A notice of action refusing the Parents' request to reconvene Student's IEP team was enclosed in the letter. R-47 at 812.

73. On or about February 10, 2009, the District sent the Parents a notification for a team meeting to discuss Student's situation. R-48 at 816. Mother precipitated the meeting by contacting Ms. Leeper to advise her of the success of the Milestones' program for Student and

Mother's belief that the program could be successfully adapted to the public school environment. TR:650-52.

74. On February 23, 2009, Student's IEP team convened; Parents, Mr. Hodgson and Ms. Royer attended. TR:653; R-48 at 818-21. During the meeting, District's legal counsel informed the Parents that, because Student was attending a private school located outside District boundaries, he no longer was considered an IEP student in the District. TR:863-65. Rather, as a private school student, Student had become a "service plan" student. TR:863-65. At the meeting, the District also informed the Parents that the document identified as the Milestones IEP could not serve as a transfer IEP for Student. R-46 at 819. Based on the Milestones information, Ms. Leeper informed the team that it appeared that Student had regressed since he had ceased attending the District. R-46 at 818; TR:866. When District representatives asked if the Parents were asking the team to change Student's placement to Milestones, Mr. Hodgson responded, "I don't know." R-46 at 820. The Parents did not request a change of placement to Milestones at the meeting. TR:1493. Ms. Leeper testified that she explained to the Parents at this meeting that Student would have to be observed back in the School District before a new IEP could be developed but the Parents were not willing to do so. She stated that she did not see Student as able to come back to the District at the point he left off in May of 2008. TR:1508.

75. From September 2008 through February 2009, Student apparently did not receive any speech-language therapy under the Milestones' IEPs, even though, according to Mother, such services were "absolutely necessary" for Student. TR:944.

76. On or about March 1, 2009, Father sent a letter to Dr. White and stated that the Parents were asking the District to adopt the IEP currently in place for Students at Milestones along with the current behavior plan, accommodations, modifications and related goals contained therein and requested that the District provide a notice of action in response. R-49 at 824-25. The Father expressed concerns that the District's current plan would be putting Student in the same situation that he was in before, under the April 2008 IEP for at least 4-6 weeks until the staff could evaluate Student's present levels, but this was not an appropriate IEP for Student. Father's letter concludes with a request that the School District provide services for Student at Milestones Academy.

77. During the period of March 9-10, 2009, Ms. Leeper observed Student at Milestones. R-50 at 827-29. As a result of that observation, Ms. Leeper developed a concern about the level at which Milestones was working with Student academically. TR:1503-04. Based on what she saw, Milestones worked with Student at a lower level academically than where he had been at the District. TR:1504, 1509. She further was concerned that Student was working solely with a 1:1 paraprofessional and had no social interaction with peers. TR:706-07, 1503. She also noted concern about Milestones from a behavioral perspective; for instance, she was concerned about the amount of time Student spent in Milestones' safe room. TR:1505.[18] Ms. Leeper expressed concern about Student's ability to transition back to the School District and thought that, as a result of the regression he appeared to have experienced since he left in

[18] Mother testified that Student inappropriate or challenging behaviors were not eliminated at Milestones. TR:1035. Jessica Royer confirmed instances of aggressive behaviors continuing at Milestones but Ms. Royer testified that Milestones' data supported the conclusion that Student's behaviors overall improved there. TR:1201-05, 1225-27.

May 2008, he would have to spend more time in the special education environment. TR:1508-09. Ms. Leeper testified that the District was more than willing to work with Parents to transition Student back to the District, but believed that the District would need to be allowed to see where Student was functioning so that transition could happen. TR:1509-10.

78. On March 10, 2009, Ms. Leeper and Dr. White jointly sent a letter to the Parents and informed them that Father's March 1, 2009 letter contained inaccuracies. R-51 at 830-31. In that letter, they stated that the District had no obligation to prepare a new IEP or provide special education services to Student because the Parents had placed him at a private school. They stated that the District had no obligation to accept the Milestones "IEP" as a transfer IEP and further that the District had no obligation to provide a notice of action in response to their request for one regarding implementation of the Milestones' IEP in the School District or placement at Milestones as the School District had no legal responsibility for Student's education at this time. The letter goes on further to state that the Parents had the obligation to make a request to the School District for a change in Student's placement to Milestones prior to the Parents' unilateral placement. R-51 at 831.

79. Parents sent Dr. White a letter dated March 17, 2009 to clarify their March 1 letter. R-51 at 833-34. The letter stated that they had reenrolled Student but that they did not agree that Student should attend the School District for 4-6 weeks before a new IEP was developed as when Student was pulled from the District the IEP was not working. Parents stated that Student had a 1:1 paraprofessional at Milestones to implement his behavior intervention plan and that they were unwilling to return him to the same program he had left at the District without any known changes to his programming. R-51 at 834.

80. On March 23, 2009, Dr. White sent a letter to Parents and reiterated the District's positions. R-51 at 836-37. He stated again that, because Student was attending Milestones, the District had no obligation to reconvene his IEP team or to consider a change of placement. He also stated that the team had not refused to consider outside information in the development of Student's IEP but that the District's staff would need to consider how Student functioned in the School District environment to determine if the outside information was accurate for Student in that setting. Dr. White stated: "As you are aware, children function differently in different environments and the public school system may be significantly different from the home schooling and private schooling settings in which you have placed [Student]." R-51 at 836.

81. Sometime during April 2009, the Student ceased attending Milestones Academy. TR:1201, 1205.

82. Ms. Leeper testified that she reviewed Student's education records. TR:199-200. She testified that Student made progress during his time in the District and, more specifically, progressed with respect to the April 2007, December 2007 and April 2008 IEPs and she saw data that supported this assessment of progress as well as through her observations of Student. TR:202, 238, 1488-89. At the time Parents requested a full-time paraprofessional in March 2008, Student was being instructed using the District's general third grade curriculum and was achieving at close to grade level in some areas when in the third grade. TR:238.

83. Ms. Leeper testified that the District included baseline data in Student's IEPs even though not legally required to do so. TR:1481. In the District, the IEP team does not document everything the team discusses at a particular meeting nor is a new IEP drafted every time a team meets. TR:312. If the team does not believe that the IEP requires modification, the team is not required to make changes even if a meeting occurs. TR:313.

84. Ms. Leeper testified that Student was able to progress on his IEP goals in spite of the behaviors that he exhibited and did make progress with respect to his behaviors. TR:202. She believed that Student's behaviors increased from March 2007 through May 2008 as a result of the greater academic challenges that were placed on him. TR:1490. When that occurred, the District charted those behaviors on a daily basis and employed Ms. Gentry to assist in the modification of his behavior plan. TR:1489. Ms. Smith also assisted Student's teachers with behavioral strategies. *Id*. Student progressed academically during that third grade year even when those behaviors surfaced and the District's data showed that the behaviors improved during that time. TR:1491.

85. Ms. Leeper testified that Ms. Gentry was employed as a result of the Parents' request that the District bring in an outside person to assist with Student's behaviors. TR:203. Although the District had qualified staff in that area, Ms. Gentry's consultation provided a valuable resource to the District. Ms. Leeper believed Parents were pleased as well as they asked for repeat visits.[19] TR:203, 242; R-39 at 700. The Parents never requested to change Student's educational placement as a result of his behaviors. TR:202-03. The Parents wanted Student in the regular classroom even more than the 51% of the time that his IEP provided. TR:1482. However, in Ms. Leeper's opinion, Student's educational placement was appropriate at the 51% in regular education level and Student benefited from being in the regular education classroom. TR:1483.

86. According to Ms. Leeper, the District refused the Parents' request for 1:1 paraprofessional because Student was receiving such support in all the settings in which such support was needed. TR:204-05.[20] A 1:1 paraprofessional would have hindered Student's ability to generalize with different persons and in different settings and "become more of a crutch for [Student] than a benefit." TR:204-05. She believed that Student was sometimes able to be in regular education settings without paraprofessional support and Student had some grade improvement in the regular education setting even without paraprofessional support. TR:309.

87. During Student's kindergarten year, Mother would frequently question Ms. Leeper about the grade level expectations for the class and how Student was performing in relation to his peers. TR:1467-68. In Ms. Leeper's opinion, Mother wanted the District to push

[19] The repeat visits must have been for Angie Gentry with school personnel as Mother testified that she never met Ms. Gentry while Student was in attendance in the School District. Mother met Ms. Gentry in September 2008 after Student had been pulled from school to discuss behavior issues. TR:582-83.

[20] Father acknowledged that Student received 1:1 paraprofessional assistance at various times while in attendance in the School District. TR:1426.

Student to grade level performance. TR:1467.[21] In response to Mother's desires regarding grade level expectations, Student's IEP team attempted to write an IEP that was most appropriate for Student while continuing to challenge him at higher levels. Ms. Leeper acknowledged that this "was tough with some concepts but we did the best that we could there." TR:1468-69.

88. Ms. Leeper testified that children with Student's level of autism are "very inconsistent with their ability to perform within standardized assessments." TR:1464-65. As a result, Ms. Leeper stated that it would be a mistake "to set aside the day-to-day performance and simply go with a one shot in time standardized assessment."[22] TR:1465.

89. Ms. Smith was a second grade special education teacher in the District and was in her second year in that position at the time of her testimony. TR:324. Prior to teaching second grade, Ms. Smith served as a diagnostician and autism consultant for the district. TR:324, 444, 463. Prior to working as an autism consultant, Ms. Smith was a fourth grade special education teacher. TR:325. At the time of hearing, Ms. Smith had been employed in the district for twenty years. TR:325.

90. Ms. Smith has a bachelor's degree in elementary education and a master's degree in mental handicaps. She is certified to teach students with mental handicaps and severe handicaps. She also is certified by Process Access as an in-district autism consultant. Ms. Smith has received training in the areas of autism, behavior management and functional behavioral assessment. TR:443-44.

91. Ms. Smith testified that through the IEP and through her day-to-day contact with Student, she observed his academic progress. TR:463. During his third grade year, Student was instructed with the same general education curriculum as his non-disabled third grade peers. TR:463. Ms. Smith worked with approximately 15-20 autistic students during school year 2007-08 and the majority was not working on grade level material compared to their non-disabled peers. TR:463, 464-65. Ms. Smith believed the use of the grade level general education curriculum was appropriate for Student that year noting that sometimes it was necessary to modify or reduce the curriculum. TR:466-67.

92. During Student's second and third grade years, Ms. Smith heard Parents express during and outside IEP meetings that they wanted Student to spend more time in the regular education environment. TR:475-76. They also expressed that they wanted greater academic demands placed on Student and wanted to see him functioning at grade level. TR:477. Ms. Smith did not believe that grade level expectations were reasonable and that the greater academic demands increased behaviors. TR:476-77. While in hindsight she personally thought Student

[21] In contrast, Mother testified that she did not tell the District that she wanted Student at grade level except for the first grade year. TR:681-82, 706. However, she acknowledged that she not ask the District to reduce Student's regular education time during those years nor did she ask the District to write less challenging IEP goals. TR:706.

[22] Mother agreed that standardized assessments do not give an accurate picture of Student. TR:679. Parents' expert witness, Jessica Royer, similarly agreed that it is not appropriate to determine present levels of performance of an autistic child solely based upon a standardized test. TR:1195.

should have been in more special education services than approximately 50% of the time, the team considered the opinion of the Parents in the IEP placement decision. TR:478-79.

93. Although Ms. Smith never observed Student physically aggressing towards his peers, she did observe him, at times "lash out" at Ms. Snyder. TR:471. She never observed Student destroy property and did not see him as an "eloper", meaning that he would be a runner and leave the premises. TR:471. She testified that during Student's second and third grade years, his teachers could have addressed the behaviors that he exhibited without a formal behavior plan and the teachers did use strategies to address behaviors that were not specifically included in a behavior plan. TR:474. The fact that no changes were made in the behavior plan between December 20, 2007 and April 2008 would reflect the belief that the behavior plan was working. TR:539. According to Ms. Smith, the IDEA does not require an IEP to have a behavior plan unless the student has experienced extensive suspensions from school. TR:484-85.

94. During the hearing, Mother acknowledged that either she or Father participated in all of Student's team meetings since 2002 and they received copies of the IDEA's procedural safeguards from 2002 to the present. TR:672. Father likewise confirmed his attendance during his testimony. TR:1407. When she attended, she was allowed to have input and ask questions as well as express concerns and request changes to IEPs. TR:783-84. She testified that she would not have hesitated to write to the District if she disagreed with the District's descriptions of Student's progress. TR:691.

95. Student received special education services from the Cameron District from the fall of 2002 until May 2008 when the Parents withdrew him from the District. TR:677. However, she wanted Student to again attend the District. TR:835. In addition to Student missing his peers at the District, she believes that Student would benefit from the speech and occupational and could benefit from the teaching curriculum in the District's environment. TR:841.

96. During her testimony, Mother acknowledged that Student had progressed in various areas while attending the District, in both academic and non-academic areas. When Student first began attending the District's early childhood program, he was not toilet trained; after he began attending, he became trained. TR:683. Student learned to spell his name and state his phone number while attending the District. TR:692-93. Student began interacting more with his peers and his vocabulary increased. TR:693. He also participated in singing and began using words not previously used, progress Mother considered to be meaningful . TR:697. In addition, Mother acknowledged that Student progressed in the communication area from 2002 through May 2008. TR:699.

97. At the time of hearing, Mother was providing home-schooling to Student. TR:668, 828-29. Per Mother, she provides 3-4 hours per day of academic instruction as part of that program. TR:829. For an additional 2-3 hours, she and Student go to the park, play football, watch television and/or play on the computer. TR:829. At the time of hearing, Student was not receiving speech-language or occupational therapy but was receiving horse therapy for an hour per week at parental expense. TR:830.

98. Mother does not have a degree in teaching but she testified that a board certified behavior analyst (BCBA) and other Milestones staff provided her with the training to become an implementer of Student's home program. TR:668. Per her testimony, that training was ongoing through one-on-one consultation since April 2009 but she had only received two presentations and no formal training, classroom or otherwise. TR:668-69.

99. Mother testified that Student's home program consisted of math, reading, sentence structure, spelling and social studies. TR:828-29. She further testified that she worked with Student on staying on-task. TR:828. Mother works with Student on independent reading using the Edmark reading system. TR:828-29, 832. With respect to math, Mother was not using a formal curriculum. TR:842-43. When Mother worked with Student on reading, she would prompt him but expect him to at some point know the word. TR:782. However, Mother was concerned about the prompting that she observed being done with District teachers with Student during her observations. TR:783.

100. During Mother's instruction, Student had very minimal thumb biting behaviors, and very little screaming. TR:827, 840. Mother acknowledged that Student is more likely to display behaviors when the instruction places greater academic challenges before him. TR:1033.

101. At the time of her testimony, Student was reading at a first grade, four month level. TR:737. She stated she knew that was Student's reading level because he was tested by Dr. Lynn Suderman prior to hearing. TR:737-38. Dr. Suderman made the determination based upon a standardized test administered to Student and did not gather daily data on performance. TR:738, 923. Mother did not inform Dr. Suderman that Student had not been in public school since May 2008 when she took Student for testing or that Student attended Milestones from May 2008 to April 2009. TR:745. Dr. Suderman was not called to testify nor was the report with the results of the testing tendered into evidence because according to Mother, because the report was not received in time to comply with the IDEA's five day disclosure rule.[23]

102. Mother testified as to her understanding of the meaning of "baseline", as that being "the point from which you were determining where his progress should start from" and what she would like included in an IEP as baseline information. TR:918-21. Mother testified that she didn't know from what point Student started from on each IEP so that when the School District used a percentage of improvement, Parents did not know where Student was improving from. TR:559. Mother testified that she could not replicate the progress the School District was reporting with Student at home. TR:878-79. She testified that Parents requested baseline information from the School District in March and April 2007, but it was never provided. TR:559-560. Mother believed the baseline information was important because without it progress could not be determined. TR:880, 881. Mother testified that Milestones provided baseline information. TR:879-80.

103. Mother testified as to her concerns about Student's behaviors. According to Mother, by March 2007 it was the consensus of the IEP team that Student's behaviors had

[23] The IDEA allows a party to a due process hearing to prohibit the introduction of evidence at the hearing that has not been disclosed to that party at least five days before the hearing. 34 C.F.R. § 300.512(a)(3).

become increasingly more problematic and she believed his behaviors became more problematic over his years at the School District. TR:874. Mother testified that the behaviors impeded Student's learning and were the same as they were when the 2006-07 school year began. TR:561. Mother advised that the teachers reported that Student's behaviors included disruption in the hallways, excessive talking, staying out of line, anxiousness, and chewing on his thumb. TR:562. Mother testified that Parents expressed their concerns about the need for behavior modification strategies in the March and April 2007 IEP meetings and that the District committed to have Marcia Smith conduct a functional behavioral assessment. TR:562-63.

104. Mother testified about Student's behaviors in the fall of 2007. According to Mother, Student's behaviors were "horrible." TR:574. Student was engaging in self-stimulating behaviors, was anxious and falling down, as well as screaming things at teachers. TR:574-75. Mother testified that she never saw any data from the School District indicating that there had been progress in behavior from December 2007 through April of 2008. If the School District's behavior plans had been working, the frequency and duration of noncompliance or behavior issues would have been reduced. TR:588-89.

105. Mother testified as to improvements in Student's behavior as a result of the Milestones program which worked on the basis of positive reinforcers. TR:1049-50. Mother believed that the services provided by Milestones were reasonable and necessary and that Student obtained educational benefit from the program provided by Milestones. TR:662. In April 2009, the Parents could no longer afford to continue to send Student to Milestones and a home based program was reinstituted under the supervision of Jessica Royer as well as another Milestones' implementer. TR:662-63.

106. Mother testified as to the expenses incurred by Parents at Milestones reflected in Parents' exhibits 2-378 through 2-402K. TR:665-67. She believed that the expenses were reasonable and necessary. The out-of-pocket expenses totaled approximately $40,000.00. TR:1074.

106. The Parents received some Missouri Senate Bill 40 funding with respect to the private, parent-provided services they arranged for Student. TR:716. Per Mother, that legislation was not providing funding for any of the educational activities the Parents were providing for Student at the time of hearing. TR:716.

107. Jessica Royer testified as a paid expert witness for Parents. TR:1141. She has a master's degree in behavioral analysis and is a board certified behavior analyst ("BCBA"). TR:1091, 1139. She has been a BCBA for "15, 18 years." TR:1092. Ms. Royer acknoweldged that she does not have a degree in special education, is not certified to teach special education and does not have teacher's certification from the State of Missouri. TR:1139-40. Ms. Royer also is a consultant for Project Access, but has not consulted on behalf of that group for eight years. TR:1093, 1141. Ms. Royer testified that her experience with autistic children included providing home teaching programs, school programs, behavioral programs and conducted functional behavioral analysis among other services for probably 1,500 students and attendance at "hundreds and hundreds" of IEP meetings. TR:1094-95. She also testified that she had

consulted with "hundreds" of school districts in and out of the State of Missouri but was only currently consulting one Missouri school district. TR:1095, 1146.

108. Ms. Royer and her husband own and operate PBM of which Milestones is a part and she has been with Milestones for five years. TR:1137. All of the children at Milestones are disabled. TR:1150. Ms. Royer testified that other than "a couple" of students who came to Milestones because they were tough learners, all have behavioral issues. TR:1150-51. Ms. Royer did not know if the staff who worked with Student at Milestones were certified to teach in the State of Missouri. TR:1256. Milestones has at least two supervisory staff with Missouri teaching certification. TR:1257. She did not know whether the implementers assigned to Student at Milestones received any training to teach academic curriculum. TR:1256. She herself had taken coursework in early childhood education. She did not have committed to memory the qualifications for the Milestones' implementers. TR:1257.

109. Ms. Royer testified generally as to her opinion of the value of applied behavior analysis (ABA) as an educational strategy for the use with autistic children. TR:1100-1101. She characterized ABA as "the only rigorously researched, validated set of strategies, principles [sic] for children with autism." TR:1100. She testified that she knew of a couple of studies that were related to younger children where an eclectic approach is not appropriate, but knew of none personally for children of Student's age. TR:1101. She further gave the opinion that for a program to be reasonable for an autistic child, the research behind the program must be taken into account. Ms. Royer employs ABA in the programs she provides to schools and in Milestones. TR:1100.

110. Ms. Royer first became involved with Student in May or June 2008 when the Parents requested that she set up an academic program for him for the summer of 2008. TR:1101-02. Per her testimony, it became obvious to her after one or two sessions with Student that he would need a behavioral program to help him stay on task. TR:1102-03. According to Ms. Royer, Student exhibited "escape-motivated" behaviors and would engage off-task verbal and self-stimulatory behaviors. He also would run away from her and not respond to questions. TR:1103-04. Because she had to spend so much time on Student's behaviors, Ms. Royer was unable to spend any time with him on academics. TR:1104.

111. Ms. Royer's opinion, the District's April 2008 IEP was not reasonably calculated to provide Student with educational benefit and it did not appear to include baseline information. TR:1106-07. She also believed that the present levels of functioning included in the IEP were inconsistent with the triennial evaluation that took place in March 2008. TR:1107. According to Ms. Royer, the triennial evaluation described a child functioning at a kindergarten and pre-academic level in some skill sets while the IEP is written for a third grade level in many situations, which to her was like "they're describing two different kids." TR:1107-08. The Milestones' data was more consistent with the data in the triennial evaluation. TR:1108.

112. Ms. Royer testified that she was unaware whether the IDEA required the inclusion of baseline data in an IEP. TR:1189. To her, baseline meant "particular specific levels of either a skill or a behavior so that when you make changes to that skill or behavior you know what you've done so you can measure progress." TR:1189-90. She testified that she thought the

Milestones' IEP contained what she defined as baselines (TR:1190) although she acknowledged that there was no baseline data relating to behaviors. TR:1165). She was not the "driving force" behind creating Student's IEP at Milestones but she participated in the process. TR:1133. She testified that the Milestone' IEP in her opinion was reasonably calculated to provide Student with some educational benefit. TR:1133. She did not know why Milestones waited to prepare an IEP for Student until December 2008 when he began attending there in September 2008. TR:1165.

113. She also testified that in her opinion, the School District's December 2007 behavior plan did not adequately address Student's behaviors because targeted behaviors were not defined and it called for the use of negative reinforcers. TR:1112, 1116-18. She would not have used the taking away a football approach with Student. TR:1241. While a taking away approach can sometimes be effective, she did not believe the District's data supported the effectiveness of that strategy with Student. TR:1198-1200. She testified that she did not know whether the IDEA even required the District to write a behavior plan for Student and did not know when IDEA required a behavior plan and if it did, what it would have to contain. TR:1195-96. She also testified that the behavior plan that Milestones personnel developed after conducting a functional behavior assessment of Student resulted in a "marked" decrease in his behaviors and in fact that "his inappropriate behavior went to zero." TR:1129. Ms. Royer in reviewing the Milestones' data did acknowledge that Student continue to exhibit aggression. TR:1167; P-3-162. The incidents would increase with family stressors and greater academic challenges. TR:1168-69. The behavior plan would spell out different strategies to use for the increase in stressors. TR:1170. She further acknowledged that, after attending Milestones for six months, Student still had recorded instances of non-compliance. TR:1202-03. On the presumed last day Student attended Milestones on April 8, 2009 (there was no more data in the record after this date), staff recorded 32 instances of self-injurious behavior and on the next-to-the last day, a statement "lost count." TR:1205-06, P-3-85. Ms. Royer characterized this as not being the norm. TR:1205.

114. Ms. Royer did not provide direct services to Student after he began attending Milestones in the fall of 2008 through April of 2009; however she provided weekly consultation of about 2 hours regarding his program. TR:1258. Although Ms. Royer was not involved in direct provision of services to Student while he was at Milestones, Ms. Royer testified that Student made educational gains while there. TR:1133.

115. All of the Milestones' services were provided 1:1 in Student's cubicle. There were no nondisabled peers in his classroom. TR:707-08. He did not have social interaction with any nondisabled peers. TR:707. There is no group instruction as in a regular classroom setting. TR:1286.

116. Ms. Royer believed that the Milestones' behavior plan could be successfully implemented in the public school setting and that there was no need to wait 6-8 weeks in the public school setting before implementing the plan. TR:1131-32.

117. Janene Snyder first became involved with Student when she was his first grade special education teacher and then served as Student's third grade special education teacher. TR:1717. She spent 750 minutes per week with Student in his third grade year, with 150

minutes instructing in written expression, 300 minutes in math and 300 minutes in reading. TR:1720.

118. Ms. Snyder testified that she believed it was appropriate to reduce Student's special education placement from 61% of the time in first grade to 50% in third grade. TR:1727. Her opinion was based on the progress she observed from the beginning to the end of the first grade year, that "it wasn't a leap to think that he would be reduced in the number of minutes by the time he got to third grade." TR:1727. In first grade Student was doing "a fantastic job working on the grade level materials that we gave him." *Id*.

119. During Student's first grade year, the Parents expressed that they wanted Student to maintain a first grade level education even with his autism. TR:1731. During Student's third grade year, the Parents expressed that they wanted Student at grade level with respect to academics. TR:1731. In Ms. Snyder's opinion, it was more important to the Parents to have Student working on grade level work than getting the materials he was currently working with into long-term memory before moving on. Getting the work into long-term memory was more important to Ms. Snyder. TR:1734.

120. Student continued to progress in third grade while being instructed in the regular third grade curriculum for math and reading although it was not at the same pace as his nondisabled peers. TR:1728. The third grade curriculum becomes more difficult and challenging for all students. TR:1731-32. Ms. Snyder was able to work 1:1 with Student during the third grade year. TR:1719.

DISCUSSION AND DECISION RATIONALE

The party seeking relief in a due process hearing has the burden of proof. *Schaeffer v. Weast*, 546 U.S.49 (2005); *Stringer v. St. James R-I School District.*, 446 F.3d 799 (8th Cir. 2006); *West Platte R-II School. District v. Wilson*, 439 F.3d 782 (8th Cir. 2006). Petitioners must sustain their burden of proof by a preponderance of the evidence, the standard applicable to most civil proceedings and the standard utilized by reviewing courts of hearing panel decisions. *Blackmon v. Springfield R-XII School Dist.*, 198 F.3d 648, 654 (8th Cir. 1999); 20 U.S.C. § 1415(i)(2)(B); *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990) (finding Student has the burden of proving by a preponderance of the evidence that a complained of IEP was inadequate; citing *Tatro v. State of Texas*, 703 F.2d 823, 830 (5th Cir.), *aff'd in part and rev'd in part sub nom., Irving Independent School District v. Tatro*, 468 U.S. 883 (1984)).

The IDEA requires that all children with disabilities as defined by the statute receive a free appropriate public education (FAPE) designed to meet their unique needs. 20 U.S.C. § 1412(a)(1)(A); 20 U.S.C. § 1401(9). The regulations implementing IDEA at 34 C.F.R. Part 300 define a child with a disability as a child:

> evaluated in accordance with §§ 300.304 through 300.311 as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance . . ., an orthopedic impairment, autism, traumatic brain injury, an

> other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

34 C.F.R. § 300.8(a)(1). The regulations specifically state that even if a child has one of the listed disabilities "but only needs a related service and not special education, the child is not a child with a disability under this part." 34 C.F.R. § 300.8(a)(2)(i).

"Special education" is defined by the IDEA as "specially designed instruction." 20 U.S.C. 1401(29). "Specially designed instruction" is defined as "adapting, as appropriate to the needs of an eligible child. . . the content, methodology, or delivery of instruction – (i) [t]o address the unique needs of the child that result from the child's disability; and (ii) [t]o ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." 34 C.F.R. § 300.39(b)(3).

GENERAL LEGAL PRINCIPALS OF FAPE, LRE AND PRIVATE SCHOOL PLACEMENT

Under the IDEA, all children with disabilities as defined by the statute are entitled to a free appropriate public education ("FAPE") in the least restrictive environment ("LRE") appropriate to allow that child to receive educational benefit. 20 U.S.C. §§ 1412(a)(1)(5). In addition to the federal statute and its implementing regulations at 34 CFR Part 300, Missouri has adopted a plan ("State Plan") setting forth requirements imposed upon school districts for the provision of FAPE.

Under the Supreme Court test established by *Board of Education v. Rowley*, 458 U.S. 176, 203 (1982), FAPE consists of educational instruction specifically designed to meet the unique needs of the handicapped child, and related services as are necessary to permit the child to benefit from the instruction. FAPE is not required to maximize the potential of each child; however, it must be sufficient to confer educational benefit. *Id.* at 200. The *Rowley* standard is satisfied by providing meaningful access to educational opportunities for the disabled child. *Id.* at 192. The *Rowley* court determined that the IDEA requires school districts to provide a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.* at 201. The Supreme Court found Congress' intent in passing the IDEA was "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.* at 192.

The extent of educational benefit to be provided to the handicapped child is not defined by *Rowley*; the Supreme Court required an analysis of the unique needs of the handicapped child to carry out the congressional purpose of access to a free appropriate public education. *Id.* at 188. However the Supreme Court found implicit in this purpose, the "requirement that the education to which access is provided be sufficient to confer ***some*** educational benefit upon the handicapped child." *Id.* at 200 (emphasis added). Federal courts interpreting *Rowley* have held that *Rowley* does not require a school district "to either maximize a student's potential or provide the best possible education at public expense." *Fort Zumwalt School District v. Clynes*, 119 F.3d

607, 612 (8th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998). A school district is not required 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) or one that is "absolutely best" (*Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6th Cir. 1998) or one that will provide "superior results" (*Ft. Zumwalt*, 119 F3d at 613). However, the *Rowley* requirement of consideration of the unique needs of the handicapped child does require consideration of the child's capacity to learn. *Nein v. Greater Clark County School Corporation*, 95 F.Supp.2d 961, 973 (S.D. Ind. 2000). The requirement of "some educational benefit" requires more than a "trivial" benefit but not a maximization of the potential of a handicapped child. *N.J. v. Northwest R-1 School District*, 2005 U.S. Dist. LEXIS 24673, 22 (E.D. Mo. 2005).

To achieve its goals, the IDEA "establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree." *Honig v. Doe*, 484 U.S. 305, 308 (1988). The primary vehicle for carrying out the IDEA's goals in the provision of FAPE is the Individualized Education Program ("IEP"). 20 U.S.C. §§ 1414(d), 1401(8). An IEP must be in effect at the beginning of the school year for each child with a disability who has been deemed eligible for services. 34 CFR § 300.323. An IEP is a written document containing, among other things:

> (1) A statement of the child's present levels of academic achievement and functional performance, including
>
> (i) How the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); …
>
> (2)
>
> (i) A statement of measurable annual goals, including academic and functional goals designed to
>
> (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
>
> (B) Meet each of the child's other educational needs that result from the child's disability…
>
> (3) A description of
>
> (i) How the child's progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
>
> (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
>
> (4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child
>
> (i) To advance appropriately toward attaining the annual goals;

> (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
>
> (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;
>
> (5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section; ….

20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320; Regulation IV of Missouri State Plan.

Under *Rowley*, there are two components to the FAPE analysis, one procedural and the other substantive. An educational program can be set aside for failure to provide FAPE on procedural grounds under three circumstances: (1) where the procedural inadequacies have "compromised the pupil's right to an appropriate education"; (2) when the district's conduct has "seriously hampered the parents' opportunity to participate in the formulation process"; or (3) when the procedural failure has resulted in "a deprivation of educational benefits." *Independent School District No. 283 v. S.D.*, 88 F.3d at 556. Where this type of harm is found, the substantive question of whether the IEP provided FAPE is not addressed by the hearing panel. *W.B. v. Target Range School District*, 960 F.2d 1479, 1485 (9th Cir. 1991). Assuming no denial of FAPE on procedural grounds, the analysis turns to the substance of whether the IEP provides FAPE as defined by the *Rowley* standard.

Under the *Rowley* standard, the ultimate question for a court under the IDEA is "whether a proposed IEP is adequate and appropriate for a particular child at a given point in time." *Rowley*, 458 U.S. at 200; *Town of Burlington v. Dept. of Education*, 736 F.2d 773, 788 (1st Cir. 1984), *aff'd* 471 U.S. 359 (1985). An IEP is not required to maximize the educational benefit to a child or to provide each and every service and accommodation that could conceivably be of some educational benefit. *Rowley*, 458 U.S. at 200; *Gill v. Columbia 93 School District*, 217 F.3d 1027, 1035-36 (8th Cir. 2000). Although parental preferences must be taken into consideration in deciding IEP goals and objectives and making placement decisions, the IDEA "does not require a school district to provide a child with the specific educational placement that her parents prefer." *Blackmon*, 198 F.3d at 658; *T.F. v. Special School District*, 449 F.3d 816, 821 (8th Cir. 2006). The issue is whether the school district's placement is appropriate, "not whether another placement would also be appropriate, or even better for that matter." *Heather S. v. Wisconsin*, 125 F.3d 1045, 1057 (7th Cir. 1997).

In addition to the FAPE requirement, there is a "strong congressional preference" under the IDEA for educating students in the least restrictive environment. *Rowley*, 458 U.S. at 202; *Carl D. v. Special School District of St. Louis County*, 21 F.Supp.2d 1042, 1058 (E.D. Mo. 1998). The IDEA regulations embody the LRE concept:

> Each public agency must ensure that-
>
> (i) 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 non-disabled; and

> (ii) 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.

34 CFR § 300.114.

The *Rowley* court acknowledged that regular classroom environments are not suitable for the education of many handicapped children. "Mainstreaming" in the regular classroom environment is required "to the greatest extent appropriate," considering the needs of the child. *Beth B. v. Van Clay*, 282 F.3d 493, 498 (7th Cir.), *cert. denied*, 537 U.S. 948 (2002) (quoting 20 U.S.C. § 1412(5). The statutory language reflecting a mainstreaming preference has also been determined to reflect a "presumption in favor of the [student's] placement in the public schools. *Blackmon*, 198 F.3d at 661; *Independent School District No. 283 v. S.D.*, 88 F.3d 556, 561 (8th Cir. 1996); *Mark A. v. Grant Wood Area Education Agency*, 795 F.2d 52, 54 (8th Cir. 1986), *cert. denied*, 480 U.S. 936 (1987).

Each school district must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services, including instruction in the regular classes (general education environments) with any necessary supplementary services such as resource room or itinerant instruction, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 CFR § 300.115. The least restrictive environment should always be considered in determining whether a parentally preferred placement is appropriate. *Independent School District No. 83*, 88 F.3d at 561.

Parents are not required to keep their children in educational placements proposed by school districts that the parents believe are inappropriate. However, "parents who unilaterally change their child's placement during the pendency of the review proceedings, without the consent of state or local school officials, do so at their own financial risk." *Burlington v. Department of Education*, 471 U.S. 359, 373-74 (1985); *Fort Zumwalt*, 119 F.3d, 611-12; *T.F. v. Special School District*, 449 F.3d at 820. Reimbursement is only appropriate if the public school district has failed to provide FAPE and the parental placement is appropriate. *Burlington*, 417 U.S. at 370. If this showing is not made, the costs of the private placement do not shift to the public agency and the parents bear the cost of the private placement. *Id.*; *Florence County School District No. 4 v. Carter*, 510 U.S. 7 (1993).

The 1997 amendments to the IDEA specifically address unilateral private placements by parents. The amendments recognized that parents may be reimbursed for a private placement if the school district was unable to provide FAPE but provided standards for Parents seeking reimbursement of these costs; notably, prior notice to the school district before placing their child. 20 USC § 1412(a)(10)(C); 34 CFR § 300.148. The 2004 amendments to IDEA provide that privately placed students are entitled to services as service plan students within the public school district where the private school is located. 20 USC § 1412(a)(10)(A)(i); 34 CFR § 300.132.

The starting analysis is not whether the parents gave the prior notice. Rather, the analysis is first, did the District offer FAPE, and if not, was the private placement appropriate and if so, should reimbursement be reduced or denied if notice was not given.

1. PROCEDURAL ISSUES

As case law has established that in the event of substantial procedural harm that the substantive question of whether the IEP provided FAPE is not addressed by the hearing panel, the panel first turns to the Parents' procedural arguments. Parents' argue that their opportunity to participate in the IEP process was seriously hampered sufficient to deny Student FAPE. As procedural violations, the Parents in their Post Trial Brief argue that: the School District refused to fairly consider the recommendations of the outside experts, even the one (presumably Angie Gentry) with whom the School District contracted, the failure to develop a meaningful behavioral plan; the School District failed to provide the Parents with meaningful data upon which they could determine Student's functioning with respect to the goals and objectives that were being proposed; and "the stifling manner in which the meetings themselves were conducted effectively extinguished a free exchange of thoughts and any hope of a collaborative product." While not stated as an issue in the initial statement of issues in the Parents' Brief, there is some discussion of the requirements of Parents' rights to receive prior written notice of the intended action contemplated by the School District containing a detailed explanation of the basis upon which the particular action or decision was made. The Brief cites to "the cavalier manner in which the School conducted its business" and its "disdain for even explaining virtually all of its decisions to the Parents."

While referenced in Parents' Brief as procedural violations, there is no discussion of how the alleged failure to receive meaningful data and the failure to develop a meaningful behavior plan are procedural violations in contrast to substantive violations. Presumably the allegation of the Parents' alleged failure to receive meaningful data is the same as their baseline argument under the alleged failure of the IEPs to include measurable goals and objectives and is addressed in the substantive analysis following. The alleged failure to develop a meaningful behavioral plan is likewise discussed within that analysis. Any procedural issue with respect to the development of a behavior plan would seemingly be that if behavior were an issue that it was not appropriately discussed in the IEP process, which clearly was not the case as behavior was discussed. Whether a "meaningful" plan was developed is not procedural issue.

A. Parental Participation.

The parent's right of participation is limited by the IDEA to the opportunity to participate in meetings, including IEP meetings, with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child. 20 U.S.C. § 1415 (b)(1); 34 C.F.R. §§ 300.345, 501; *see also Gill*, 217 F.3d at 1037. Parents also have the right to invite "other individuals who have knowledge or special expertise regarding the child," to attend IEP meetings and function as a member of the IEP team. 34 C.F.R. § 300.344(a)(6).

The IDEA's parental participation requirements are satisfied where "a school district provides parents with proper notice explaining the purpose of the IEP meetings, the meeting is conducted in a language that the parents can understand, . . . the parents are of normal intelligence, and they do not ask questions or otherwise express their confusion about the proceedings." *Blackmon*, 198 F.3d at 657; *see also Burilovich v. Board of Education*, 208 F.3d 560, 568 (6th Cir.) *cert. denied*, 531 U.S. 957 (2000) (finding that parents failed to demonstrate that they were denied participation in the special education process where they expressed their views and had the opportunity to participate at IEP meetings). A school district's "failure to apprehend and rectify that confusion" is not a procedural violation. *Blackmon*, 198 F.3d at 657.

The IDEA's encouragement of consensus in the development of the IEP does not mean that a school district must accede to parental demands. As the Eighth Circuit stated in *Blackmon*, "[a] school district's obligation under the IDEA to permit parental participation in the development of a child's educational plan should not be trivialized. . . . Nevertheless, the IDEA does not require school districts simply to accede to parents' demands without considering any suitable alternatives." 198 F.3d at 657. Thus, where a district considers, but rejects a parental request, "[t]he School District's adherence to this decision does not constitute a procedural violation of the IDEA simply because it did not grant [the] parents' request." *Id.* at 657.

The panel finds no violation of the IDEA in the area of parental participation. The Parents were notified of all IEP meetings and actively participated in all IEP meetings. In fact, Parents can be characterized as being allowed to play an "aggressively participative role" in the IEP development process. *Independent School District No. 283*, 88 F.3d 556, 562 (8th Cir. 1996). There is no evidence that Parents or their advocate when in attendance or Milestones' representatives were precluded from providing their input or opinions about the IEP components. There was no evidence that the District failed to answer any questions of Parents; rather, the District's answers may not have been the ones Parents wanted to hear. Parents received notice of their due process rights and acknowledged receiving same at every IEP meeting. Parents also were provided written notices of action when the District refused their request for a 1:1 paraprofessional and for placement and IEP service changes. The Petitioner's feeling that the School District never seriously considered their input does not equate to a procedural violation. The School District considered information from Milestones and Ms. Leeper's observations of Student there. Again, merely not acceding to parental demands is not a denial of FAPE. *Blackmon*, 198 F.3d at 657. In fact, the School District's representatives testified that they added goals in order to accommodate Parents' desires that Student be taught at his grade level. While consensus on all elements of the IEP is indeed the most desirable result, the desire to obtain consensus should not result in a school district abandoning its professional judgment in order to give in to parental demands. *Id*. A school district's consideration and ultimate rejection of a parental request does not constitute a procedural violation of the IDEA. *Id*. At 657-58.

B. Consideration of Outside Experts.

Parents do not specifically argue in their Brief why they believe that the School District did not fairly consider the recommendations of outside experts. The panel assumes that Parents are referring to the District's refusal to allow additional observations by Ms. Angie Gentry. The IDEA does not allow a parent who initiated litigation the right to have unrestricted observations

of the student at school. *Ryans v. Gresham*, 6 F. Supp.2d 595 (E.D. Tex. 1998) (the parents' right to direct the education of their children does not include a right to access the classes in which the child participates).

At the Parents' request, the District had Ms. Gentry conduct a number of observations and those observations assisted the team in addressing Student's challenging behaviors. The District was not obligated to bring in Ms. Gentry in the first instance and certainly was not required to bring her back for additional observations simply because the Parents so demanded. There is no evidence that the District's refusal to authorize additional observations impaired the Parents' rights of participation or Student's right to FAPE. When the Parents made their request, the District provided them with a written notice of refusal.

With respect to the consideration of other expert opinions and recomendation, as discussed under parental participation above, there is no evidence that the School District failed to consider any expert opinions in the IEP process, including that of Milestones' representatives. The fact that those recommendations may not have been adopted wholesale does not mean they were not fairly considered. In fact, Ms. Gentry's recommendations were adopted and IEPs were revised to take into account her input.

The panel finds no IDEA procedural violation as a result of disallowing additional observations by Ms. Gentry or by not considering the input of experts in the IEP process.

C. Notices of Action.

The sufficiency of the various notices of action sent by the School District was not raised as a specific issue for consideration by the panel. However, the panel believes the notices of action that were sent were sufficient to comply with the requirements of 34 C.F.R. § 300.504(a) in that they included an explanation of the procedural safeguards available to the parents, a description of the action proposed or refused, an explanation of why the action was proposed or refused, a description of any options the school considered and why those options were rejected, a description of the evaluation procedures used to form the basis of the proposal or the refusal, and a description of other relevant factors. 34 C.F.R. § 300.505(a).

The Parents do not suggest that the notices of action were insufficient to advise them of the action proposed by the School District; in fact, some contained a Parent's signature. Rather, Parents disagreed with some of the proposed action contained therein. That is a different issue. *O'Dell v. Special School District*, 503 F. Supp. 2d, 1206, 1217 (E.D. Mo. 2007) ("mere disagreement is not a lawful basis for concluding that defendant Special School District did not properly apply [the IDEA]").

The panel finds no procedural violation relating to the notices of action sent by the School District.

The panel finds that the Parents failed to sustain their burden of proof by clear and convincing evidence to establish an IDEA procedural violation.

2. SUBSTANTIVE ISSUES

A. Did the IEPs fail to include measurable goals and objectives?

The arguments Parents make regarding the alleged failure of the IEPs at issue to include the required measurable goals and objectives are stated in their Brief as follows:

> So the question before this panel as relates to this aspect of this argument is twofold. First, does IDEA's requirement of measurability compel the conclusion that the starting points for goals and objectives are implicitly, if not explicitly, mandated under IDEA. Second, does the failure to include that vital information render the IEP substantively flawed….

Thus, the Parents' measurability contentions solely concern the alleged failure to include starting points for goals and objectives in the IEPs and apparently no other perceived measurability deficit. The Brief goes on to cite cases from the Sixth, Ninth and Tenth Circuit Courts of Appeal in support of Parents' argument that this so-called "baseline" information is required in IEPS. Whether this may or may not be in fact the law in these other circuits, it is not the law in the Eighth Circuit. The panel finds it disingenuous on the part of Parents not to bring up the fact that the Eighth Circuit and Western District of Missouri District Court both ruled against Parents' counsel on these baseline arguments. *Lathrop R-II School District v. Gray*, 611 F.3d 419 (8th Cir. 2010) (district court decision at 2010 WL 2982645 (W.D.Mo. 2009)). Even more recently in another case in which Parents' counsel was involved, although a decision was rendered after the date the Brief was submitted, in *Fort Osage R-I School District v. Sims* (W.D. Mo. Sept. 30, 2010) the Western District confirmed its *Lathrop* holding. The IDEA does not require that the IEP must include baseline or starting point data. *Lathrop*, 611 F.3d at 425. According to the Eight Circuit, "even the entire absence of present level of performance does not deny a student of FAPE if the parties involved knew the information through other means." *Id*., *citing Doe v. Defendant I*, 898 F.2d 1186, 1189-91 (6th Cir. 1990).

What the IDEA does require is for IEPs to contain "[a] statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum." 34 C.F.R. § 300.320. The Western District specifically held that neither the statute nor regulations require more. The Western District in *Lathrop* admonished the hearing panel for adding baseline requirements to the unambiguous statute. *See also O'Toole v. Olathe District Schools Unified School District No. 223*, 963 F. Supp. 1000 (D. Ks. 1997), *aff'd*, 144 F.3d 692 (10th Cir. 1998) (rejecting parent argument that IEPs contained insufficient present level and finding also that parents actively participated in the formulation of the IEPs during which the present levels were thoroughly discussed and explained); *Logue v. Shawnee Mission Public School Unified School District No. 512*, 959 F. Supp. 1338 (D. Ks. 1997), *aff'd*, 153 F.3d 727 (10th Cir. 1998) (holding that present level was not too broad in describing student's present levels of functioning and concluding that the IDEA did not require any more specificity).

Although the requirement for baseline does not exist, Student's present levels included a great deal of baseline data in the Present Levels of Academic Achievement and Functional

Performance sections ("PLEP") with respect to his performance on prior IEP goals and included objectives/benchmarks when appropriate and exceeded any statutory or regulatory authority and complied with the *Lathrop* holdings.

In addition to information on PLEP, the IEP must contain "[a] statement of measurable annual goals, including academic and functional goals designed to— (A) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (B) Meet each of the child's other educational needs that result from the child's disability." 34 C.F.R. § 300.320(a)(2). There is no requirement that an item entitled "objectives" or "benchmarks" be included in the IEP under the State Plan, except for children with disabilities who take alternative assessments aligned to alternate achievement standards." State Plan Regulation IV at page 43.

While there is no further detail provided within the IDEA or state or federal regulations regarding the definition of a measurable goal, the law is well-established that the IEP goals and objectives are not expected to be as detailed as a teacher's lesson plans. *See, e.g., Nack v. Orange City School District*, 454 F.3d 604 (6th Cir. 2006) (rejecting attorney Walker's argument regarding measurable goals and holding that student's IEPs fully complied with all IDEA procedural requirements and the goals and objectives were capable of measurement); *Kuszewski v. Chippewa Valley School District*, S6 Fed. Appx. 655, 659 (6th Cir. 2003) (rejecting parents' argument that IEP lacked measurable goals and objectives where IEP contained such objectives as that "Brian will recall four story events in sequence after a reading" and noting that such objectives "are concrete examples of the measurable objectives Brian's parents claim the IEP lacks"); *O'Dell*, 503 F. Supp.2d at 1216 (rejecting parent contention that the IEP goals needed to be stated with specificity and finding that where the student's areas of developmental delay were identified, the IEP present level and goals provided "sufficient information" by which to assess the student's disability and the "efficacy of the IEPs"); *O'Toole*, 963 F. Supp. at 1000 (rejecting parent argument that annual goals were too general in nature and noting that parent failed to cite to any legal authority requiring district to establish more specific annual goals); *Logue v. Shawnee Mission USD No. 512,* 959 F. Supp. 1338 (D. Kan. 1997), *aff'd*, 153 F.3d 727 (10th Cir. 1998) (rejecting parent argument that stated goals were too general in nature and stating that parents failed to cite any legal authority to support their position);

Despite the lack of an IDEA requirement for either information entitled "objectives/benchmarks" or "baseline", the IEPs contained this information where applicable and at least with respect to baseline, the testimony is that the information entitled "Baseline" was included for each goal at parental request. Parents and their various advocates and experts who were present at IEP meetings had the opportunity to "aggressively participate" in the development of those goals and objectives. On several occasions, the Parents requested and were given the opportunity to review draft IEPs and to request changes to the goals and other components. On some occasions, the team agreed to change goals at the Parents' request and, on other occasions, the Parents did not indicate in any manner that the IEP goals were not to their satisfaction. Mother testified that she would not have hesitated to write to the School District if she believed any information in the IEPs was inaccurate. Neither Parents nor their advocates requested any placement changes until Student had already been removed from the District.

As in the fact situation described by the *Lathrop* court, the challenged IEPs contained several pages of PLEP, including a discussion of how the disability affected Student's ability to access the general curriculum and discussed health, motor skills, sensory processing abilities, cognitive and adaptive behaviors, academic abilities, speech, and social skills. There were sections for parental concerns which were filled out as well as sections indicating changes since the prior IEP. The number of goals were extensive, more than 30, and had baselines and internal objectives where applicable. Underneath each goal there was the ability to check how the goal would be measured and room to record progress.[24]

The panel finds that the Parents have not met their burden of proof by clear and convincing evidence to establish an IDEA violation regarding the inclusion of measurable goals in the IEPs.

B. Were the IEPs required to address stereotypical behaviors that impeded the Student's learning?

Parents contend that the IEPs at issue failed to adequately address Student's stereotypical behaviors that impeded the Student's learning and that the School District failed to develop a meaningful behavior plan. There was no discussion of legal authority regarding behavior intervention plans (BIPs) in Parents' Post Hearing Brief.

The IDEA does not require the inclusion of a BIP at any particular date. In *Lathrop*, one of the grounds for the district court overturning the hearing panel was its decision that the student in question was denied FAPE due to the failure of the district to adequately address behavior issues in the IEP. The panel had stated that the IDEA does not require a school district to create goals or objectives for behavior in an IEP, but the panel believed that the IEP should document in some way that behaviors are being addressed, through goals and behavior plan or a statement in the present levels section of the IEP. The district court disagreed, as the panel had found that the student was continuing to progress academically. The district court stated, "if the student's IEP is "reasonably calculated to enable the child to receive academic benefits" [quoting Rowley], then the IDEA's IEP requirements have been met." *Lathrop,* 2010 WL 2982645 *9.

Neither does the IDEA require an IEP to create specific goals with regard to behavior. *Lathrop*, 611 F.3d at 425. The IDEA requires that, in developing an IEP for a child whose behavior impedes the learning of the child or others, that the team "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i). There is no requirement that the strategies and interventions be developed in any particular way or that they take any particular form. *CJN v. Minneapolis Public Schools*, 323 F.3d 630 (8th Cir. 2003).

[24] The panel notes that there are some unchecked boxes underneath some of the goals to indicate how progress would be measured. However the absence of the check marks does not equate to an inability to determine how in fact progress will be measured and there was ample discussion at the hearing and in the IEP meetings about the methods of measuring Student's progress. Neither does the absence of check marks equate to a denial of FAPE. This is a minor technical procedural violation which should not lead to a finding of a denial of FAPE. *Independent School District No. 283* 88 F.3d at 567. As another court has noted, "[t]o hold that technical deviations from the IDEA's procedural requirements render an IEP entirely invalid would 'exalt form over substance.'" *Doe v. Defendant I*, 898 F.2d 1186, 1190 (6th Cir. 1999).

The *Lathrop* Court cited the *CJN* case with approval. In *CJN*, the child continued to exhibit inappropriate behavior which regularly disrupted his education but the child continued to progress academically. *CJN*, 323 F.3d at 634. The child's teacher tried accommodating the behavior but the behavior was such that the child at points had to be physically restrained. The *Lathrop* court contrasted the *CJN* holding with the Eighth Circuit holding in *Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003), in which case the Court of Appeals found a FAPE violation as the child had not progressed academically. Similarly, the *Lathrop* court distinguished the district court in Minnesota's finding of a FAPE denial in *Larson v. Independent School District No. 361*, 2004 WL 432218 (D. Minn. March 2, 2004) as in this case the sole focus of the IEP was the student's significant behavior problems.

The *CJN* court noted that the student's steady academic progress despite severe behavioral problems was evidence that the school district had at least made a good faith attempt to address behaviors. Academic progress is an important factor in determining whether an IEP is reasonably calculated to provide educational benefits according to the Supreme Court's *Rowley* decision, 458 U.S. at 202. The severity of the behavior problems exhibited by the student in *CJN* made "his academic progress even more relevant to the educational benefit inquiry, because it demonstrates that his IEPs were not only reasonably calculated to provide educational benefit, but, at least in part, did so well." *CJN*, 323 F.3d at 638. Consistent with *Rowley*, a student receives FAPE even where that student continues to exhibit behaviors if the student is making meaningful progress in other areas. *CJN*, 323 F.3d at 634-35. In finding for the district in that case, the Eighth Circuit cautioned that courts must be careful not to impose their view of preferable educational methods upon schools and further reasoned that:

> When a disabled student has failed to achieve some major goals, it is difficult to look back at the many roads not taken and ascertain exactly how reasonable his IEPs were at the time of their adoption. . . . Specific results are not required. . . . Thus, even assuming arguendo that more positive behavior interventions could have been employed, that fact is largely irrelevant. The record reveals that the District made a "good faith effort" to assist CJN in achieving his educational goals. . . .

Id. at 638-39.

Finally the *CJN* court noted that it wished that the student "had made more behavioral progress, but the IDEA does not require that the schools attempt to maximize a child's potential, or, as a matter of fact, guarantee that the student actually make any progress at all." *Id.* at 642. *See also Adam J. v. Keller Independent School District*, 328 F.3d 804, 810 (5th Cir. 2003) (holding that student with autism received FAPE even where he continued to exhibit severe behavioral problems where the student made incremental progress and the behaviors were improving).

Student's IEPs contained appropriate positive behavioral interventions, strategies and supports to address his behavior once such behaviors surfaced in the winter of 2007 and more so during the 2007-08 school year. After the implementation of the District's BIP in April of 2007, the documentation adduced at hearing demonstrated that Student's problematic behaviors decreased.

When Student began exhibiting behaviors which affected his ability to learn, the District responded to those behaviors by convening his IEP team, initiating behavioral strategies and interventions, hiring an expert consultant to assess Student's behaviors, and writing a BIP. Additionally, Ms. Leeper testified that in response to Student's increased behaviors, the District began charting Student's day-to-day behaviors and eventually employed an outside behavior consultant, Ms. Gentry, to modify Student's BIP. Ms. Smith, the autism consultant, worked with Student's teachers on different programming and methodologies to help address Student's behaviors. Ms. Leeper and others testified that while Student did exhibit behaviors that affected his ability to learn, Student was able to continue to progress in spite of those behaviors. Several witnesses, including Ms. Smith, testified that Student did not require a formal behavior plan, but the team agreed to prepare one in an effort to assist Student in dealing with his behaviors.

Even before the behavior plan was put in place, the evidence showed that Student's IEP contained other positive behavioral interventions, strategies and supports and those were reasonably calculated to provide educational benefit at the time the IEPs were developed. Contrary to the Parents' contention, the strategies and behavior plan were implemented as stated in the IEP. District staff testified that other strategies and interventions were successfully used with Student. The District's efforts at addressing Student's behaviors were not unchanging; new strategies and efforts to determine the antecedents and proper reinforcements for his behaviors were used throughout the relevant time.

Applying these standards regarding the treatment of behavioral issues allows the panel to conclude that there was no IDEA violation in how Student's behaviors were addressed. Much testimony was provided by Ms. Royer about the necessity of knowing which behaviors were attached to which antecedents, which was the purpose of conducting a functional behavior assessment (FBA). While a School District-conducted FBA may have provided additional information and allowed greater academic progress, this is not required by the IDEA and there is no suggestion that the School District did not act in good faith to address the behaviors. School District representatives testified that their observations allowed them to identify behavior antecedents. The April 2008 IEP contains behavioral interventions for both task focus and aggressive behaviors and goals in these areas. Both the regular and special education teachers indicated that progress was being made both academically and behaviorally under the IEPs that had been implemented. Mother indicated that progress in certain areas was being made as well.

The panel finds that the Parents have not met their burden of proof by clear and convincing evidence to establish an IDEA violation regarding the treatment of Students' behavior issues in the IEPs.

C. Were the IEPs required to be research based, or alternatively, based upon reliable assessments and/or accurate anecdotal observations?

This is another issue identified by the Parents but not briefed in the Post Hearing Brief. From testimony at the hearing, it appears that Parents are contending that the School District's IEPs were inadequate because they were not exclusively based on the applied behavior analysis ("ABA") approach advanced by Ms. Royer and used at Milestones. According to her testimony, this method is the only research based strategy proven effective for the education of autistic

children. Ms. Leeper testified that the School District followed an "eclectic" approach with children with autism. According to Ms. Royer, the District's use of its eclectic program for autistic children is not research based and thus not appropriate. Further, a 1:1 ratio of staff to Student is necessary for Student to learn new skills. This is a hallmark of the Milestones program, along with errorless teaching, a discrete trial format and high levels of reinforcement and presumably this is encompassed in the ABA strategy.

The Milestones' ABA approach is a methodology. An IEP that is otherwise appropriate cannot be invalidated based upon a school district's choice of methodology. In *Gill v. Columbia 93 School District*, 217 F.3d 1027 (8th Cir. 2000), the Eighth Circuit determined that the parents were not entitled to dictate the use of the Lovaas method of instruction, which is a one-on-one training method, for their autistic child. That Court held:

> Federal courts must defer to the judgment of education experts who craft and review a child's IEP so long as the child receives some educational benefit and is educated alongside his non-disabled classmates to the maximum extent possible. Here, Matthew's program was modified in response to the Gills' requests to provide more one-on-one therapy, but the District believed that the proposed private program would deprive him of social interaction necessary for his intellectual development. Parents who believe that their child would benefit from a particular type of therapy are entitled to present their views at meetings of their child's IEP team, to bring along experts in support, and to seek administrative review. The statute set up this interactive process for the child's benefit, but it does not empower parents to make unilateral decisions about programs the public funds. Since Matthew received a free appropriate public education, the Gills have not made out a claim against the District or the Department.

Id. at 1038. *See also 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); *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 614 (8th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998) ("As long as a student is benefiting from his education, it is up to the educators to determine the appropriate educational methodology", citing *Rowley*, 458 U.S. at 208).

Although the Parents did not specifically allege a denial of FAPE based on the District's refusal to provide a full-time 1:1 paraprofessional which is apparently a part of the ABA strategy, that would also constitute a methodology subject to the discussion of authorities above. The evidence demonstrated that the team fairly considered the parents' request and in fact had a meeting exclusively for the purpose of considering the request at which Father attended and participated. The team considered least restrictive environment in making the decision that use of a 1:1 paraprofessional might hamper Student's need to gain independence. Student still utilized paraprofessional support, at times 1:1, for a large part of the school day although it was not exclusively 1:1 as requested by the Parents. The team informed the Parents that such support would continue to be adjusted according to Student's needs.

The IDEA does not require a school district to furnish "every special service necessary to maximize each handicapped child's potential." *Rowley*, 458 U.S. at 199. Rather, the purpose of the IDEA is to facilitate the provision of "a "basic floor of opportunity" by opening the door of public education to disabled children, with the hope of integrating them in regular classrooms as much as possible." *Yankton School District v. Schramm*, 93 F.3d 1369, 1373 (8th Cir. 1996) (*quoting Rowley*, 458 U.S. at 92).

While no argument was made by Parents in the Brief on any part of this issue, the panel finds that the assessments of Student were appropriate. In addition to standard tests, one-on-one observation was utilized to determine Student's knowledge base and progress. Ms. Leeper, Parents and Ms. Royer all acknowledged that one-on-one observation was an effective method of determining Student's progress, along with consideration of other types of assessments, including standardized tests.

The panel finds that the Parents have not met their burden of proof by clear and convincing evidence to support an IDEA violation based upon the School District's choice of educational methodologies for Student's IEPs or by the IEPs being insufficiently research based.

D. Were the IEPs and/or their implementation required to afford the Student meaningful educational progress?

Parents arguments stem from a concern that the School District's program did not result in any perceived progress for Student. Recognizing that the School District's IEPs need only provide "some educational benefit", Parents argue that the School District has not shown that this "minimal threshold" was attained by School District efforts and not as "the consequence of happenstance, heroic home efforts or simply the maturation of the student."

Parents recognize that the program provided by the IEP is not required to maximize the educational benefit to the child, or to provide each and every service and accommodation that could conceivably be of some educational benefit. *Rowley*, 458 U.S. at 199; *Ft. Zumwalt*, 119 F.3d at 612; *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998). A local educational agency fulfills the requirement of FAPE by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. Although an educational benefit must be more than de minimis to be appropriate, *Doe v. Board of Education*., 9 F.3d 455, 459 (6th Cir. 1993), *cert. denied*, 128 L.Ed.2d 665 (1994), an appropriate educational program is one that is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207. In articulating the standard for FAPE, the Rowley Court concluded that "Congress did not impose any greater substantive educational standard than would be necessary to make such access meaningful." *Id*. at 192.

Although parental preferences must be taken into consideration in deciding IEP goals and objectives and making placement decisions, parental preference, standing alone, "cannot be the basis for compelling a school district to provide a certain educational plan for a handicapped child." *Brougham v. Town of Yarmouth*, 823 F. Supp. 9 (D. Me 1993); see also *Blackmon*, 198 F.3d at 658 ("IDEA mandates individualized 'appropriate' education for disabled children, it

does not require a school district to provide a child with the specific educational placement that [his] parents prefer."). Accordingly, the Panel's review must focus on the District's proposed placement and not on the placement proposed by the Parents.

A determination of whether an IEP is appropriate and reasonably calculated to confer an educational benefit must be measured from the time it was offered to the student. *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1035 (3rd Cir. 1993). As noted by the *Fuhrmann* court, "[n]either the statute nor reason countenance "Monday Morning Quarterbacking" in evaluating the appropriateness of a child's placement." 993 F.2d at 1040.

A determination of whether an IEP is valid is "a necessarily ***prospective*** analysis" [emphasis in original] and "consideration of proof of whether an IEP meaningfully contributed to the child's education is not altogether proper." *D.F. v. Ramapo Central School District*, 430 F.3d 595, 598 (2nd Cir. 2005). The *Ramapo* court cites with approval to *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990), where the First Circuit stated:

> Moreover, appellants' argument misperceives the focus of an inquiry under [IDEA]: the issue is not whether the IEP was prescient enough to achieve perfect academic results, but whether it was "reasonably calculated" to provide an "appropriate" education as defined in federal and state law. This concept has decretory significance in two respects. For one thing, actions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated. *Id*. at 992 (internal quotation marks and citations omitted). *See also Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 530 (3d Cir. 1995) ("In any event, appropriateness is judged prospectively so that any lack of progress under a particular IEP, assuming arguendo that there was no progress, does not render that IEP inappropriate."); *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) ("Instead of asking whether the [program] was adequate in light of the [child's] progress, the district court should have asked the more pertinent question of whether the [program] was appropriately designed and implemented so as to convey... a meaningful benefit. We do not judge [a program] in hindsight; rather, we look to the [program's] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer ... a meaningful benefit.").

In a pertinent discussion of the issue of progress under an IEP, the Third Circuit in *Carlisle* discounted the parents arguments that because IEPs for successive years were similar that they were somehow inappropriate. The student's failure to make progress on an earlier IEP, "a judgment made retrospectively", does not render either that IEP or the successive IEP inappropriate. The Court stated that "if a student had failed to make any progress under an IEP in one year, we would be hard pressed to understand how the subsequent year's IEP, if simply a copy of that which failed to produce any gains in a prior year, could be appropriate." 62 F.3d at 534. While there were in some instances what seemed to be identical goals in Student's April

2008 IEP and the December 2007 IEP, the IEPs themselves are not identical. As with the *Carlisle* case, the Third Circuit found the differences between the 1992-93 IEP and the 1991-92 IEP for the student in question to be "not merely formal; they reflect the very essence of an IEP. As we have explained, the statute requires that school districts prepare the IEP's based on the student's needs; so long as the IEP responds to the needs, its ultimate success or failure cannot retroactively render it inappropriate." *Id*. Thus the issue according to these courts is not ***progress*** under an IEP but whether the IEP is designed to confer a ***meaningful benefit***.

In a recent case from the Southern District of California, *M.P. v. Poway Unified School District*, 2010 WL 2735759 (S.D. Cal. 2010), the district court considered Parent's argument that the IEP was not designed to provide meaningful educational benefit because student progress was minimal at best and it was likely that an identical IEP would not have accomplished much going forward. However, the school district's witnesses did testify to progress and that therefore student must have received some meaningful benefit. The court upheld the administrative law judge's holding as follows:

> The Court, therefore, agrees with the ALJ [administrative law judge] and finds that Plaintiffs have not sufficiently established by a preponderance of the evidence that the IEP did not address Student's needs and/or that Student did not receive "meaningful benefit" or make "meaningful progress" towards his goals in violation of the IDEA's substantive prong. To be sure, Student did not meet all his goals or reach the level of an average, proficient student according to the testing, his report card, and Goals Progress Report. That, however, does not indicate that "meaningful progress" was not made. In fact, all the District witnesses who directly observed Student indicated that progress *had* been made.

Id. at *11.

Applying the above-referenced law to the evidence in this case, it is clear that the relevant IEPs developed for Student offered him FAPE in the least restrictive environment ("LRE"). The evidence at hearing demonstrated that Student IEPs contained appropriate goals and objectives that addressed all of his disability-related needs. Moreover, those IEPs were reasonably calculated to provide educational benefit and those that were implemented prior to Student's departure from the District did provide him with benefit, although this is not the primary analysis. The fact that some goals and objectives were repeated shows that the individual needs of the child were being considered and there was not just a desire by the District to push him into a higher level school curriculum which at least at times, had been the desire of the Parents.

The documentary evidence prepared close in time to the implementation of the IEPs prior to Student leaving the School District, conclusively demonstrated that Student mastered many of his goals and objectives and made meaningful progress on the majority. Moreover, Ms. Leeper and Ms. Snyder testified that Student made progress with respect to his IEP goals and objectives, and the District's contemporaneous meeting notes reflect that the Parents agreed that there was progress and at time during the hearing Mother acknowledged such. Courts generally give deference to reports of progress from teachers and school staff who have day-to-day contact with that student. *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1057 (7th Cir. 1997); *Christopher*

M. v. Corpus Christi Independent School District, 933 F.2d 1285, 1292 (5th Cir. 1991); *King v. Board of Education*, 999 F. Supp. 750, 778 (D. Md. 1998) (noting that courts have commented on the importance of testimony by teachers and staff who have daily contact with students). With respect to the IEP finalized in April 2008, and because of the parents' unilateral placement of Student before that IEP was even given an opportunity to be fully implemented, there could be no evidence as to whether Student could or did make progress under that IEP as the Parents never gave the District's proposed programs an opportunity to succeed. However the IEP as written supports that it was reasonably calculated to provide educational benefit on a prospective basis. All IEPs prepared during the two year period before the filing of the due process complaint included the required components and included measurable goals and objectives that were specifically individualized to Student and addressed the deficits that resulted from his disability. The relevant IEPs also contained present levels that accurately described the deficits that resulted from Student's educational disability and the effects of that disability on his ability to access the general curriculum. The relevant IEPs also provided Student with an appropriate array of special education, regular education and related services.

The IEPs also provided FAPE to Student in the LRE. 34 C.F.R. §§ 300.114-120. Pursuant to the IDEA, states must ensure that disabled and nondisabled children are educated together "to the maximum extent appropriate" and that "special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when 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." 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114. The LRE determination is made in accordance with the child's abilities and needs.

Although the LRE provision expresses a Congressional preference for educating disabled students in the regular classroom, the mainstreaming preference is not an "absolute commandment." *Poolaw v. Bishop*, 67 F.3d 830, 836 (9th Cir. 1995); *A.W. v. Northwest R-1 School District*, 813 F.2d 158, 162 (8th Cir. 1987). The Supreme Court has recognized that "[d]espite this preference for mainstreaming handicapped children. . . Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children." *Rowley*, 458 U.S. at 181. Accordingly, the mainstreaming preference must be "balanced with the primary objective of providing handicapped children with an appropriate education." *Wilson v. Unified School District of Pima County*, 735 F.2d 1178, 1183 (9th Cir. 1984); see also *Mark and Ruth A. v. Grant Wood Area Education Agency*, 795 F.2d 52, 53 (8th Cir. 1986) (noting that Eighth Circuit has rejected the "view that the mainstreaming provisions of the Act are satisfied only if a handicapped child is educated in the same classroom with non-handicapped children"). Thus, a more restrictive environment may be the least restrictive environment for a particular child. *Carter v. Florence County School District Four*, 950 F.2d 156, 160 (4th Cir. 1991), *aff'd*, 510 U.S. 7 (1993) ("where necessary for educational reasons, mainstreaming assumes a subordinate role in formulating an educational program"). Mainstreaming in the regular classroom environment to the maximum extent possible is not required by IDEA; rather the law requires mainstreaming to the maximum extent appropriate. *Beth B. v. Van Clay*, 282 F.3d 493, 499 (7th Cir. 2002), *Board of Education v. Michael R.*, 2005 WL 2008919, 17-18 (N.D. Ill. 2005).

The contention of the Parents in their Brief is that the segregated placement of Milestones is the appropriate placement for Student as it is the LRE for him. The evidence at hearing established that the School District placements were the least restrictive placements for Student. Student's IEP placements were balanced between time in the special education classroom and time with his nondisabled peers in regular education settings. Parents presented little or no evidence that the placement and services described in his IEPs were not appropriate for Student. Parents were seemingly in agreement with the amount of special education time that Student received. However with their placement of Student at Milestones Academy, the Parents are seeking reimbursement for a very restrictive placement. The District's placements, at all relevant times, were much less restrictive than the Milestones Academy placement. The District's IEPs offered something to Student that was not available to him at Milestones Academy – the opportunity to be educated to the maximum extent appropriate with his nondisabled peers. The District's IEPs also provided Student with access to the District's general curriculum as required by the IDEA which access was not available through Milestones.

The panel concludes that Parents have not met their burden of proof by clear and convincing evidence to establish an IDEA violation regarding the provision of FAPE through the District IEPs.

3. RIGHT TO REIMBURSEMENT

While the panel finds that the Parents did not meet their burden of proof to support their complaint that the School District has not provided FAPE to Student, the panel would likewise deny Petitioner reimbursement even if FAPE had not been provided. After a determination is made that FAPE is not provided by a school district, the next question is the appropriateness of the parents' placement. *Burlington*, 471 U.S. at 370 (1985). The LRE requirement is also a consideration in the appropriateness of the private placement. *T.F. v. Special School District*, 449 at 821.

While it is correct that private schools do not need to meet state education standards in order to be deemed an appropriate placement according to the U.S. Supreme Court in *Florence County School District Four v. Carter*, 510 U.S. 7, 14 (1993), it is not true that a private school placement is to be reviewed absent all considerations under the IDEA. The district court, in *Reese v. Board of Education*, 225 F.Supp. 1149, 1159 (E.D. Mo. 2002), provides a summary of cases where courts have held that the private school placement chosen by the parents must comply with IDEA requirements. The private placement must "at a minimum, provide some element of special education services in which the public school placement was deficient." *Berger v. Medina City School District*, 348 F.3d 513, 523 (6th Cir. 2003). While a "segregated environment does not disqualify schools that specialize in educating disabled children", *Justin G. v. Board of Education*, 148 F.Supp.2d 576, 584, (S.D. Md. 2001), and clearly parents generally opt for a private placement that is segregated in the area of their child's disability, mainstreaming must remain "a consideration that bears upon a parent's choice of an alternative placement and may be considered by the hearing officer in determining whether the [private] placement was appropriate." *Reese*, 225 F.Supp. 2d at 1159-60, *quoting from M.S. v. Board of Education*, 231 F.3d 96, 105 (2nd Cir. 2000). The Eighth Circuit has also indicated that this requirement of the IDEA should be considered by a hearing panel when determining whether a parentally preferred

placement is appropriate. In *T.F. v. Special School District*, the court denied reimbursement for parents' private placement and noted that the IDEA's LRE requirement provides "a "strong preference" that disabled children attend regular classes with non-disabled children and a presumption in favor of placement in the public schools" and found that school district should have had the opportunity and the duty to try less restrictive alternatives before recommending a private placement. 449 F.3d at 820. *See also Evans,* 841 F.2d at 832 ("[C]hildren who can be mainstreamed should be mainstreamed, if not for the entire day, then for part of the day; similarly, children should be provided with an education close to their home, and residential placements should be resorted to only if these attempts fail or are plainly untenable.")

The panel is not prepared to say that the Milestones' placement would be appropriate in the event that FAPE had not been provided. The panel observes that some of the Milestones' strategies were adopted by the School District, for instance the use of 1:1 paraprofessionals. From testimony it is apparent that the primary focus of Milestones is behavior; thus the access of the disabled children in attendance to the general curriculum is not as extensive as that provided by the School District's proposed and implemented IEPs. The panel notes that Student did not receive speech language therapy for much of his time at Milestones, a service that Mother characterized as critical. If additional self-contained instruction was a goal, this could have been increased without placement of Student in a private school geographically distant from his home; however the Parents consistently sought more regular education placement, not less. While Student may have been progressing in the Milestones' program - and it is debatable whether academic progress was in fact increasing - and while Milestones may have provided the best behavioral environment, parental zeal in ensuring the best possible result for Student does not mean the School District is required to pay for the best possible result. *Slama v. Independent School District No. 2580*, 259 F.Supp. 2d 880, 882 (D. Minn. 2003). Ms. Royer, the only Milestones employee called to testify, was unable to provide much information regarding the qualifications of Student's teachers and provided little to no testimony regarding the implementation of Student's program as she was not the day-to-day implementer. Without showing the academic services provided by Milestones' implementers, the panel is unable to determine whether that program would have provided FAPE assuming the School District was found unable to do so.

Assuming parents could have proved that Milestones was an appropriate placement in the event FAPE had not been provided, the next step in the panel's analysis is to determine whether the reimbursement for the private placement should be reduced or denied because of the parents failure to provide the notice specified in 20 U.S.C. §1412(a)(10)(C) and 34 C.F.R. § 300.148 (d)(1)(i).

In Missouri, parents seeking reimbursement for the unilateral placement of a child in a private school must first meet a threshold test articulated by the Eighth Circuit in *Evans v. District No. 17*, 841 F.2d 824 (8th Cir. 1988), and affirmed in *Fort Zumwalt School District v. Clynes*, 119 F.3d 607 (8th Cir. 1997) and *Schoenfeld v. Parkway School District*, 138 F.3d 379 (8th Cir. 1998). The test requires that the "parent must make clear to the district that they want the school district to 'initiate' a change in placement" before unilaterally placing the child in the private setting. 841 F.2d at 829. In finding that the parents did not meet the threshold test, the court stated that "the Evanses neither formally nor informally asked [the school district] to make a change in

Christine's placement." *Id.* Rather, "[f]rom the evidence the district court could have reasonably concluded that the Evanses decided that they wanted to place Christine in the program at [the private school], regardless of whether [the public school] could provide her with a free appropriate public education. . . ." *Id.* In the *Evans* case, the court held that the parents' expressions of concern to staff members in the public school district regarding their child's education did not meet this threshold requirement. *Id.* Because the Evanses did not make clear to the district that they wanted the school district to initiate a change, they were not entitled to reimbursement. *Id.; see also Ft. Zumwalt*, 119 F.3d at 614 (rejecting parents' claim for reimbursement and concluding "[t]he abrupt removal of Nicholas from Hawthorne prevented the district from following through on the request made by the Clynes for a review in the fall and from responding to their then current concerns" and noting that a public school district does not fail to provide an appropriate education "where the school district had not been given an opportunity to change the child's educational placement"); *Schoenfeld*, 138 F.3d at 382 (denying private school reimbursement under IDEA stating that "[s]ince Parkway was denied an opportunity to formulate a plan to meet Scott's needs, it cannot be found that it had an inadequate plan under IDEA. Reimbursement of his private placement would therefore be inappropriate because school officials were excluded from the decision.").

Even if the Panel were to find that the District denied Student FAPE, it would not order reimbursement based on the *Evans* test. As in *Evans* and *Ft. Zumwalt*, the Parents may have expressed some concerns about Student's placement prior to August 8, 2008, the day the Parents informed Dr. White that they were withdrawing Student from the District. However, the Parents never made clear, until at least March 1, 2009, that they wanted the District to initiate a change to Milestones Academy or any other private school. Indeed, the evidence showed that the Parents failed to identify Milestones Academy as the placement even after the School District requested that information. At the time the Parents sent their August 8, 2008, letter, they had not given the District an opportunity to implement Student's most recent IEP and did not request or give the District an opportunity to change Student's educational placement.

This panel does not find reimbursement to be precluded just by virtue of a private unilateral placement if FAPE is not provided by the IEPs at issue and the private placement chosen by the parent is appropriate and if the notice requirements of 34 CFR § 300.449(d) are met. While a failure of notice allows the panel to deny or reduce reimbursement otherwise merited by the failure to provide FAPE, the bulk of applicable case law denies reimbursement when prior notice is not given.

Another factor that would impact the Parents' ability to seek reimbursement after the removal of Student from the District is the private placement provisions of the amended IDEA. One of the 1997 IDEA amendments limited the rights of children placed privately by their parents. 20 U.S.C. § 1412(a)(10)(A). Since the 1997 IDEA, children privately placed by their parents have no individual right to special education and related services and, therefore, no right to a free appropriate public education. 34 C.F.R. § 300.137(a); *Jasa v. Millard Public School District No. 17*, 206 F.3d 813 (8th Cir. 2000); *Foley v. Special School District*, 153 F.3d 863 (8th Cir. 1998). Because privately placed children have no right to FAPE, the parents of such children do not have a right to initiate due process to challenge proposed services and placement. 34 C.F.R. § 300.140(a); *see Greenland School District v. Amy N.*, 358 F.3d 150, 157 (1st Cir. 2004)

(concluding that, because the student was enrolled at the private school at the time her parents filed due process, her rights under IDEA were governed by 20 U.S.C. § 1412(a)(10) and holding that adequacy of the student's IEP was, therefore, not an appropriate subject for a due process hearing because the statute limited the parent's ability to pursue that complaint through the state complaint procedure).

The 2004 amendments to the IDEA in addition to maintaining those provisions that removed the obligation to provide FAPE to such students, provides now that students enrolled by their parents in private elementary and secondary schools are the responsibility of the "school district served by a local educational agency." 20 U.S.C. § 1412(a)(10)(A)(i) (2004); 34 C.F.R. § 300.132. Under this provision, students placed by their parents in private schools must look to the public school district where the private school is located for their potential share of the proportionate funding services that might be available. As Milestones Academy is not located within the School District, the School District ceased being obligated to provide a FAPE to Student upon Parents' unilateral placement which occurred before the Parents filed for due process.

CONCLUSIONS OF LAW

The hearing panel makes the following conclusions of law on Petitioner's issues:

1. The Parents did not sustain their burden of proof by clear and convincing evidence to establish an IDEA procedural violation by the Cameron R-I School District.

While panel member Teson joins in the panel's decision regarding Parents' failure to sustain their burden of proof, she does not believe that the School District properly responded to Parents' requests for additional documentation made during and outside of IEP meetings and this adversely affected Parents' rights of participation.

2. The Parents did not sustain their burden of proof by clear and convincing evidence to establish an IDEA violation by the Cameron R-I School District regarding the provision of FAPE to Student in the following respects:

A. The Parents did not sustain their burden of proof to establish that the IEPs at issue did not comply with the IDEA requirements regarding measurable goals and objectives.

While panel member Teson agrees with the panel's determination regarding Parents' failure to sustain their burden of proof and panel decision regarding baseline data, she believes that the goals as written meet the most minimal requirements as they are vague, repeated from year to year and do not consistently include a measurement for progress.

B. The Parents did not sustain their burden of proof to establish that the IEPs at issue did not comply with the IDEA requirements regarding the treatment of Students' behavior issues.

While panel member Teson agrees with the panel's determination regarding Parents' failure to sustain their burden of proof, she believes that the discipline plan developed by the School

District for Student would have been more effective had the School District conducted a functional behavior assessment.

C. The Parents have not met their burden of proof to establish that the IEPs at issue did not comply with the IDEA requirements based upon the School District's choice of educational methodologies for Student's IEPs or by the IEPs being insufficiently research based.

D. The Parents have not met their burden of proof to establish that the IEPs at issue did not provide FAPE based upon Student's progress.

While panel member Teson agrees with the panel's determination regarding Parents' failure to sustain their burden of proof, she believes that a free appropriate public education was provided by the School District at its most minimal standard and that the Student was progressing though the IEPs at a minimal rate.

DECISION

The Panel finds in favor of the Cameron R-1 School District on all issues raised by the Petitioners' due process request.

APPEAL PROCEDURE

This order constitutes the final decision of the Missouri Department of Elementary and Secondary Education in this matter. Pursuant to § 162.962 R.S.Mo., the following procedures apply to requests for judicial review:

1. Proceedings for review may be instituted by filing a petition in the state circuit court of the county of proper venue within forty-five (45) days after the receipt of the notice of the agency's final decision and are governed by Chapter 536, R.S.Mo., to the extent not inconsistent with other provisions of Chapter 162 R.S.Mo. or 34 C.F.R. Part 300.

2. The venue of such cases shall be at the option of the plaintiff, be in the Circuit Court of Cole County, or in the county of the plaintiff's residence.

3. You also have a right to file a civil action in federal or state court pursuant to the Individuals with Disabilities Education Act, 34 C.F.R. § 300.516.

IT IS SO ORDERED this 15th day of December, 2010.

Janet Davis Baker
Chairperson

Accord:

Dr. George Wilson

Vicky Teson (subject to noted comments)

Copies sent this date to:

Petitioners (by regular and certified mail)
Respondent (by regular and certified mail)
Stephen Walker, attorney for Petitioners (by regular mail and electronic mail)
Teri Goldman, attorney for Respondent (by regular mail and electronic mail)
Vicky Teson (by regular mail and electronic mail)
Dr. George Wilson (by regular mail and electronic mail)
Jackie Bruner, DESE (by regular mail)
Wanda Allen, DESE (by electronic mail)