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

STUDENT, by and through Parents,	)	
	)	January 3, 2011
Petitioners,	)	
vs.	)	
SCHOOL DISTRICT,	)	
Respondent.	)	

DECISION

This is the final decision of the hearing panel in an impartial due process hearing pursuant to the Individuals With Disabilities Act (IDEA), 20 U.S.C. §1415(f), and Missouri law, §162.961.3-.5 RSMo.

I. THE ISSUES

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

Issue Number 1. **What is the applicable statute of limitations?**

Issue Number 2A. **What was the operative IEP which governed the District's obligation to afford Student a FAPE?**

Issue Number 2B. **Did the District fulfill its obligations relating to that IEP?**

Issue Number 3. **With the December 2003 IEP in place as the "stay-put" IEP, did the District fulfill its obligations under IDEA?**

Issue Number 4. **Did the District provide Student with all required speech and occupational therapy services?**

Issue Number 5. **Did the District deny Student of a free appropriate public education by failing to conduct a Functional Behavior Assessment (FBA)?**

Issue Number 6. **Did the District violate Student's procedural rights by failing to give progress reports? If so, did said procedural violations prevent Student from receiving a free appropriate public education?**

Issue Number 7. **Did the District violate Student's procedural rights by implementing a different behavioral plan as set forth in the "stay-put" IEP and/or implementing goals and objectives on IEPs Parents did not agree to? If so, did such procedural violations prevent Student from receiving a free appropriate public education?**

Issue Number 8. **If Student was denied a free appropriate public education, what is the appropriate remedy?**

II. FINDINGS OF FACT

The Hearing Panel makes the following Findings of Fact:

A. The Parties, Counsel and Hearing Panel Members

1. During all times material to this due process proceeding, the Student resided with his Father and Mother within boundaries making him eligible to attend Lathrop. The primary mode of communication of Student and his Father is written and spoken English.

2. Lathrop (also referred to herein as "Respondent" and "District") is a public school district, organized pursuant to Missouri law, and has approximately 900 students with 100-120 of those students being served under an Individualized Education Program ("IEP"). Lathrop has one elementary school for grades K-5, one middle school for grades 6-8, and one high school for grades 9-12.

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

4. Lathrop was represented at the hearing by Teri B. Goldman, Esq., Mickes, Goldman, O'Toole, LLC, 5555 Maryville University Dr., Ste. 240, St. Louis, Missouri 63141.

5. The Hearing Panel for the due process proceeding was: Richard H. Ulrich, Hearing Chairperson; Mr. Rand Hodgson, Panel Member; and Dr. Terry Allee, Panel Member.

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

B. Procedural Background and Timeline Information

7. Student's Parents requested due process by filing a complaint ("Complaint") with the Department of Elementary and Secondary Education ("DESE") on October 29, 2008 (Panel Exhibit 1).[1]

8. Initially, DESE assigned Chairperson A as chairperson of the Panel. Petitioners requested a substitution. DESE then assigned Chairperson B. Respondent then requested a substitution. DESE then assigned Richard H. Ulrich as Chairperson.

9. On November 6, 2008, the District filed a response to the Complaint (Panel Exhibit 2) as well as a challenge to the sufficiency of the Complaint (Panel Exhibit 3).

10. On November 10, 2008, the Chairperson issued an Order ruling that the Complaint was deficient setting forth specific insufficiencies and granted Petitioners until November 20, 2008 to amend their Complaint (Panel Exhibit 4).

11. On or about November 13, 2008, Petitioners filed an Amended Complaint (Panel Exhibit 5).

12. On November 25, 2008, the District filed a response to the Amended Complaint and challenged the sufficiency of the Amended Complaint (Panel Exhibit 6).

13. On November 26, 2008, the Chairperson entered an Order wherein the challenge to the sufficiency of the Amended Complaint was denied with the exception that the parts of the allegations in the Amended Complaint which pre-dated the two year statute of limitations

[1] Exhibits introduced by Petitioners and admitted shall be referred to as P's Exhibits. Exhibits introduced by Respondent and admitted shall be referred to as R's Exhibits. Panel's exhibits shall be referred to as Panel Exhibits.

contained in the Individuals With Disabilities Education Act ("IDEA") would not be considered by the Panel unless the applicable exceptions enabling claims beyond the two year statute of limitations were proven. The Order further stated that the resolution period commenced on November 7, 2008 (Panel Exhibit 7).

14. On December 31, 2008, an Order was issued setting a telephone conference for January 7, 2009 (Panel Exhibit 8).

15. On January 5, 2009, an Order was issued re-scheduling the telephone conference for January 9, 2009, at the request of Stephen Walker, Esq., who at the time had not yet entered his appearance (Panel Exhibit 8).

16. On January 12, 2009, an Order was issued. In part, the Order addressed the issue that the resolution session had not yet been held which was conveyed to the Chairperson during the January 9, 2010 telephone conference wherein each party asserted that the reason the resolution session had not been held was the other party's fault. This Order specified the process by which the resolution session was to be scheduled and mandated that it be held on or before January 28, 2009 (Panel Exhibit 10).

17. On January 14, 2009, a resolution conference was held. It was unsuccessful.

18. Shortly before February 4, 2009, Stephen Walker entered his appearance on behalf of Petitioners. Also on February 4, 2009, the attorneys and the Chairperson had a conference call wherein, among other things, the hearing was scheduled for May 18, 19, 20, 21, and 22, 2009, with each party being allocated two and one-half days to present their respective cases. The decision was to be rendered on or before June 22, 2009. On February 13, 2009, an Order was issued setting forth these dates (Panel Exhibit 11).

19. Also on February 13, 2009, Petitioners filed "Petitioners' Supplementation of Issues" (Panel Exhibit 12).

20. On February 16, 2009, a telephone conference was held between the attorneys and the Chairperson wherein Petitioners' attorney expressed concern over his availability on the hearing dates of May 18-22, 2009 due to another trial that was also set during that time frame.

21. On February 18, 2009, an Order was issued memorializing the content of the telephone conversation of February 16, 2009 (Panel Exhibit 13). Said Order also referenced "Petitioners' Supplementation of Issues." Given that there had been filed an original Complaint, and an Amended Complaint, it was the Chairperson's opinion that to graft onto the prior Complaints, a supplementation of issues would create confusion and, accordingly, denied the filing of "Petitioners' Supplementation of Issues." However, Petitioners were granted until March 20, 2009 to file an Amended Complaint, if they so desired, that would incorporate all pending issues.

22. On March 18, 2009, Petitioners filed a "Revised Amended Complaint" (Panel Exhibit 14).

23. On March 24, 2009, Lathrop filed a challenge to the Revised Amended Complaint (Panel Exhibit 15).

24. On March 26, 2009, an Order was issued (Panel Exhibit 16) which addressed the Revised Amended Complaint and the challenge thereto. On its face, the Revised Amended Complaint was not compliant with the IDEA. It was apparent that the Petitioners intended to present their Revised Amended Complaint in conjunction with their initial Complaint, First Amended Complaint, and Supplementation of Issues. The deficiencies were cured if Petitioners' allegations were considered upon the total culmination of those pleadings; however, given the

complexities of the case, and for clarity and organizational purposes, this format was deemed unacceptable and Petitioners were granted until April 8, 2009 to file one document to comply with the pleading requirements of the IDEA. This Order further addressed other allegations as well as the statute of limitations issue. Many of Petitioners' allegations relate to events prior to October 29, 2006, and they alleged that the failure of the District to provide required information enlarged the statutory time period of two years. One specific allegation was that Petitioners did not receive copies of IEPs going back to 2004. Since the enlargement of the two year timeline was dependent upon factual determinations, and, if appropriate, would substantially increase the time of the hearing, the Order stated: "Given the fact that Petitioners have alleged that they did not receive copies of IEPs going back to 2004 which, as indicated above, would enlarge the timeline for consideration of issues herein and have a substantial impact on the scope of this hearing, the hearing will commence by Petitioners having two hours to present evidence that they did not receive said IEPs and Respondent having two hours to refute said contention. Upon hearing that evidence, the Panel will caucus and make a determination as to whether issues relating to IEPs, formulated and implemented prior to this statute of limitations time frame, will be considered, if any" (Panel Exhibit 16).

25. On March 25, 2009, a telephone conference was held between the attorneys and the Chairperson. On March 30, 2009, an Order was issued reflecting the substance of that telephone conference. Given Petitioners' attorney's commitment to another matter during the week of May 18, 2009, upon request of Petitioners and by agreement of the parties, the hearing was continued to August 31, September 1, 2, 3, and 4, 2009, with the decision to be rendered on or before October 7, 2009 (Panel Exhibit 17).

26. On March 31, 2009, an Order was issued granting Petitioners' request for an extension of time to respond to the Panel's Order of March 30, 2009, to April 7, 2009 (Panel Exhibit 18).

27. On April 13, 2009, Petitioners filed a Second Revised Amended Complaint and Objections to Orders dated February 13 and March 26, 2009" (Panel Exhibit 19). This document became the operative Complaint in this matter, subject to the two stricken items set forth in the Order of April 23, 2009 (Panel Exhibit 21). It also took exception with the Order that Petitioners had to consolidate their claims into one pleading.

28. On April 20, 2009, Respondent filed a "Response to Petitioners' Counsel's Second Revised Amended Complaint" (Panel Exhibit 20). Therein, Respondent challenged various allegations.

29. On April 23, 2009, an Order was issued partially granting Respondent's challenge to the Sufficiency of Petitioners' Second Revised Amended Complaint (Panel Exhibit 21). The Order also references Petitioners' exceptions to the Order requiring consolidation of the pleadings.

30. On August 9, 2009, Petitioners filed a "Motion to Continue Trial" (Panel Exhibit 22). The basis for the request was the commitment of Petitioners' attorney to another matter pending in Georgia which had earlier commenced but went beyond the time allotted, and was rescheduled for times conflicting with the scheduled hearing dates herein. Respondent objected to Petitioners' request for an extension of timelines.

31. On August 20, 2009, an Order was issued granting Petitioners' request for an extension of the timelines. Upon conferring with the attorneys and ascertaining their schedules, the timeline was extended to February 26, 2010 (Panel Exhibit 23). Upon conferring with the

attorneys and ascertaining their schedules, and upon a joint request, the timeline for the decision was extended to February 26, 2010.

32. On September 2, 2009, an Order was issue (Panel Exhibit 24). Subsequent to the Order of August 20, 2009, the Chairperson ascertained that the first viable time for the hearing was February 22-26, 2010. At Petitioners' request, the hearing was set on those dates with the decision being due on or before March 26, 2010. The Order also addressed other organizational matters.

33. On February 5, 2010, Respondent filed a Motion to Establish Time Limits (Panel Exhibit 25).

34. On February 7, 2010, Petitioners' filed a "Response to Respondent's Motion to Establish Arbitrary Time Limits" (Panel Exhibit 26).

35. On February 10, 2010, an Order was issued compelling the parties to exchange proposed exhibits and witness lists no later than February 12, 2010 (Panel Exhibit 27).

36. On February 11, 2010, an Order was issued wherein Respondent's Motion to Establish time Limits was granted (Panel Exhibit 28). This Order confirmed that each party would have two hours to present evidence on the issue of the statute of limitations, and stated that each party would then have 16 hours to present their respective cases which included cross-examination and closing arguments.

37. Also on February 11, 2010, Petitioners filed a request for reconsideration of the time limits imposed by Order dated February 11, 2010 (Panel Exhibit 29).

38. On February 18, 2010, an Order was issued denying Petitioners' request for reconsideration of the imposition of time limits (Panel Exhibit 30).

39. A nine day hearing was held on February 24-26, May 19-21, and May 24-26, 2010.

40. On March 3, 2010, an Order was issued (Panel Exhibit 31) memorializing matters and issues addressed at the hearing on February 24-26. Among them were:

a. Each party presented evidence on the issue of whether the statute of limitations should be enlarged before the date of October 29, 2006, and, upon request, were granted until March 26, 2010 to brief this issue, and that a ruling would be forthcoming shortly thereafter;

b. It was documented on the record that given the complexity and number of the issues, the number of witnesses and exhibits that this matter would require more than five days for hearing. The parties agreed with this determination;

c. The previous Order issued setting time limits was withdrawn. New time limits would be imposed, the duration of which would be determined by the Panel's decision on the statute of limitations issue;

d. The parties jointly agreed and requested that the timeline for the decision to be rendered be extended to October 1, 2010, and the request was granted;

e. Given the uncertainty of the attorneys' and Panel members' schedules, four different time blocks were set aside as hearing dates including April 26-28, 2010.

41. On April 1, 2010, an Order was issued (Panel Exhibit 32). Given the uncertainty of Petitioners' attorney's schedule, the April 26-28, 2010 time block was eliminated. The date the hearing was to resume then became May 19, 2010.

42. On April 27, 2010, an Order was issued (Panel Exhibit 33). This Order held:

a. Based upon the evidence produced, the two year statute of limitations was applicable;

b. That the Panel had the authority to hear claims up to the time Petitioners' Second (and final) Amended Complaint (April 9, 2009); and

c. Imposed a time limit giving each party 16 hours to present their respective cases.

43. On June 1, 2010, an Order was issued (Panel Exhibit 34). This Order established a schedule for the transcript preparation and the filing of briefs, as requested by the parties. It also set forth the Panel's understanding of the exhibits that were admitted into evidence, as requested by the parties, subject to the disclaimer that the official transcript would govern.

44. On August 11, 2010, an Order was issued (Panel Exhibit 35). This Order granted Petitioners' attorney's request for an extension until September 6, 2010 to file briefs due to health reasons and that the timeline for the decision to be extended to October 22, 2010. The District had no objection to this request. Since September 6, 2010 was Labor Day, the parties were granted until September 7, 2010 to file their briefs with the decision to be rendered on or before October 22, 2010.

45. On September 7, 2010, an Order was issued which granted Petitioners' attorney's request (with no objection from Respondent's attorney) to file briefs on or before September 10, 2010,with the decision being due on or before October 4, 2010 (Panel Exhibit 36).

46. On September 29, 2010, Petitioners' attorney requested, which was agreed to by Respondent's attorney, an extension for the decision to be rendered on or before November 10, 2010. Said request was granted by Order dated September 29, 2010 (Panel Exhibit 37).

47. On or about October 26, 2010, Respondent's attorney requested an extension of the timeline to December 7, 2010 for the decision to be rendered (Panel Exhibit 38). Said request was granted by Order dated October 27, 2010 (Panel Exhibit 39).

48. On or about November 30, 2010, Petitioners' attorney requested an extension of the timeline to January 3, 2011 for the decision to be rendered (Panel Exhibit 40). Said request was granted by Order dated December 2, 2010 (Panel Exhibit 41).

C. Background Facts

As stated above, the Panel did not consider any claims which predated the statutory two year cut off time of October 26, 2006. Accordingly, most of the facts applicable to that time frame will not be recited in this opinion. However, to provide an historical basis to better understand the issues presented to the Panel, and to help serve as legal foundation upon which this decision is based, it is appropriate to make factual determinations predating October 26, 2006.

1. Student transferred to the District in the fall of 2000 and was enrolled as a fourth grade student (R-4 at 57).

2. On or about January 8, 2002, the Missouri Department of Social Services, Division of Family Services ("DFS") corresponded with the District concerning a child abuse/neglect report involving the children of Student's Parents (R-12 at 149-149A). The referral was received by DFS on December 5, 2001. On December 19, 2001, a meeting was held wherein, an autism consultant, as well as Student's parents, attended. The autism consultant, as

well as another participant, opined that Student's acting out could be considered typical for extreme autism and not a cause for concern (R-12 at 149A). While the abuse/neglect report was resolved, this incident strained the relationship between the District and Parents.

3. On or about October 16, 2002, Student's multidisciplinary team convened to review the results of a re-evaluation which resulted in a re-evaluation as evidenced by the Evaluation Report of same date (Ex R-38 at 253-275).

4. On or about March 25, 2003, an incident occurred between Student and a school paraprofessional. When Father picked up his son (Student) on this date, he observed his son very upset and screaming[2]. Upon talking to another student, hearing Student's screams, and (according to Father) observing the paraprofessional ". . . acting all stupid and just aggravating the kid terribly" (Tr. p. 1821) Father called the paraprofessional a child abuser (Tr. p. 1821 and 1822). The record reflects the intensity with which this message was delivered as Father testified at the hearing that "…I got a bit upset and I had a few words for them. . ." (Tr. p.1820) His actions prompted the filing of the charge of peace disturbance against Father by the paraprofessional. Father ultimately pled guilty to the charge and, as a result, a one-year probation was agreed upon. As a part of the plea, Father was not to go onto school property. As a result of the 2003 incident, Father requested that the District prohibit the paraprofessional from being with Student. The District did not agree. Thereafter, Student did not attend school for the remainder of the 2003-2004 school year and the first part of the 2004-2005 school year as he returned to school on or about January 24, 2005. Father testified that the decision to withhold Student from school was precipitated by safety concerns for Student (and his brother) (R-44 at

[2] Subsequently, based upon visual observations of marks on Student's body and review of a hospital report, Father determined that the screams on March 25, 2003 were caused by Student being grabbed by his backpack and swung around in such a way that it left physical marks on Student's body.

373). Father further testified that his decision to withhold Student from school for this time frame was supported by professional opinion.

Father attributed the march 25, 2003 incident as ". . . a trigger point for just about everything that followed." (Tr. p. 1820, 1835). One thing that followed was the hospitalization by Father as shortly thereafter, he testified that his "…mind snapped." (Tr. p. 1826). Father became both suicidal and homicidal and was eventually diagnosed as Bi-polar with massive depression. He was hospitalized as a result of an incident with the police arising from an arrest because of someone's accusations.

5. Prior to March 27, 2003, Father and District personnel exchanged correspondence concerning several issues including an incident that occurred on or about March 20, 2003 concerning a dog owned by a staff member that was present at Student's school on a leash. Father, who was in the building at the time, became angry that Student was exposed to the dog and according to the staff member present, Father got in her face yelling and the staff member felt frightened and threatened (R-43 at 350).

6. Another incident concerned Father's concern over Student being questioned by school staff without his parents' consent (R-44 at 355). Another incident concerned Father's concerns of possible physical abuse suffered by Student from another student and the investigation thereof (R-94 at 357). Sometime prior to March 27, 2003, Father was informed by the District's superintendent, Dr. Chris Blackburn, that Father could no longer enter the school in which Student was attending (R-43 at 352).

7. On or about March 27, 2003, Dr. Blackburn corresponded with Father limiting his access to school premises due to conflict toward District staff which had been ". . . disruptive, threatening, and unacceptable." However, as noted in the letter, Father could attend ". . . parent

teacher conferences, posted public meetings, to drop off or pick up Student from school or school activities, or to attend scheduled appointments with school staff." Dr. Blackburn encouraged Father's involvement in all these activities, but conditioned Father's attendance on prior contact with her or Dr. Quick, District's Director of Special Education, before entering the premises (R-44 at 374). This letter was addressed only to Father. Father testified that this conditional right to appear on school premises inhibited and restricted his ability to advocate for his son, and, coupled with his depression, did not enable him to fully participate in the educational decisions made concerning his son as long as the meeting were held on District's property.

8. Accordingly, as set forth above, as of approximately April 2003, Father was restricted from entering onto school premises by both an edict from the District's Superintendent and a Court Order. Student's Mother was not affected by either.[3]

9. From August 5, 2003 to December 15, 2003, there were communications between the parties concerning the development of a new IEP and the scheduling thereof. The stumbling block for such meetings was the proposed locations. It was the District's position that the meetings should be held on school premises for "safety reasons" and granted Father permission to attend. Father would not attend meetings on school premises because of his feelings that his behavior at the meetings was at the subjective discretion of Dr. Quick which inhibited his advocacy. On occasions, Father also advised the District that he could not attend due to his medical disability. The District offered participation by telephone which was refused by Father, although, at least during some time frame, the District had listed a wrong telephone number for the Parents. Written notification of the proposed meetings from the District was sent to Mother

[3] Father testified (Tr. p. 1823) that his wife was also banned from school premises without getting special permission from Dr. Quick or Dr. Blackburn by virtue of Dr. Blackburn's letter of March 27, 2003. This was not the case as Dr. Blackburn's letter was addressed only to Father.

and Father. Sometimes, the IEP team would assemble but not consider a new IEP because of Parents' lack of participation, on other occasions, the team would not meet once advised by Father that Parents would not participate on school premises or by telephone. On at least one occasion (November 4, 2003), Student's IEP team convened to review and revise his IEP. Parents did not participate in the meeting and efforts to contact Parents by telephone were unsuccessful. Parents received a copy of the revised proposed IEP on or about November 12, 2003, but it was not implemented because Student was not attending school at the time.

10. In November of 2003, Parents were represented by an attorney. The District maintains that working through Parents' attorney, in an effort to get Student back into school, offered to move the IEP meeting to the local police station and the said offer was made out of concern for safety and not Father's "alleged" disability.

11. Thereafter, a series of IEP meetings were held at the police station, culminating in a meeting on December 15, 2003 attended by the IEP team which included Parents. Rand Hodgson, Parents' advocate, also attended. The District presented a draft IEP at the meeting, with a final copy being sent to Parents on or about January 5, 2004 (R.76). Dr. Quick testified that the December 2003 IEP was appropriate when developed and the placement described therein was Student's least restrictive environment at the time. After the meeting, both the Parents and the advocate expressed pleasure with the IEP and Father, by letter dated December 18, 2003, stated that ". . . we now have an IEP in place for [Student] that will work for the school and is acceptable to us." (R-78 at 783).

12. The Panel holds that the December IEP was appropriate and compliant with the requirements of the IDEA and reasonably calculated to afford Student a free appropriate public

education ("FAPE"). Student did not attend school for over a full year after the December 2003 IEP was developed.

13. From October 23, 2003 to November 18, 2003, the Missouri Department of Elementary and Secondary Education ("DESE") issued decisions responding to child complaints filed by Father. The first held that the District was not out of compliance in that Father was physically able to visit the school premises to review records in response to Father's child complaint that he could not go to school to review records because he was medically disabled. The second DESE decision concerned, in part, a complaint by Father that the District failed to hold IEP meetings at a mutually convenient place and he could not attend meetings on school property due to a court order and that he was medically unable to attend meetings on school property. Supporting his complaint, Father submitted a letter to DESE from Joseph Baker, a licensed clinical social worker, stating that Dr. Baker advised Father not to enter school grounds because of a recent hospitalization (R-72 at 705). DESE held that the District was not out of compliance as the District afforded Parents with ample opportunity to participate in Student's IEP meetings at school or by telephone. The Panel notes these DESE decisions – not for any precedential value for this Decision but because Dr. Quick testified that these decisions served as a basis for him to insist that IEP meetings did not have to be held off of school premises.

14. On or about January 5, 2004, Father initiated an IDEA due process hearing on behalf of Student (R-95 at 853A-854). Therefore, the December 2003 IEP became the stay-put IEP.

15. On or about January 29, 2004, Father withdrew the January 5, 2004 complaint.

16. On or about February 26, 2004, Father filed a second request for due process on Student's behalf placing Student back into stay-put under the December 2003 IEP (R-80 at 798).

17. During March, April, and May of 2004, the IEP team convened to consider issues raised in the pending requests for due process, Father's request for a physical therapy evaluation and placement. These meetings were held at the police station.

18. On or about May 20, 2004, father initiated a third due process request on Student's behalf (R-94 at 880-81). Kenneth Chackes, Esq., was assigned as the Panel Chair. The still pending second due process request and the new third due process request maintained the December 2003 IEP as the stay-put IEP.

19. On or about June 2, 2004, Father requested a fourth due process hearing on Student's behalf (R-95 at 885). With three due process requests pending, the December 2003 IEP remained as the operative IEP.

20. On or about June 10, 2004, Father withdrew the second request for due process (R-96 at 912), still leaving the other pending due process requests alive with the December 2003 IEP remaining operative.

21. On or about June 24, 2004, Chairperson Chackes entered an Order in which he scheduled the third due process case for hearing, and noticed Stephen Walker, Esq.'s representation (R-96 at 921-925).

22. In January of 2005, Parents re-enrolled Student in school, because the paraprofessional who was involved in the incident of March 25, 2003 was no longer employed by the District and they wanted Student to receive services. At this time, Student remained in stay-put under the December 2003 IEP due to the pending due process cases.

23. On August 31, 2005, the Circuit Court of Clinton County, Missouri, entered a preliminary order in prohibition preventing the third due process request pending before Chairperson Chackes from proceeding (R-97 at 932). While difficult to fathom, that preliminary

writ remained in place at the time of the due process hearing in this matter. On the date the temporary writ was entered, the December 2003 IEP was the stay-put IEP. This scenario constitutes a major issue in this case as the Panel must determine the Parents' rights and the District's responsibilities based upon an IEP that was over six years old at the time of the hearing.

24. In September of 2005, Father filed two child complaints with DESE. While several issues were the subject matter of the complaints, most salient were:

a. The District had failed to conduct annual reviews of Student's IEP; and

b. The District had failed to provide Parents with the required copy of the IDEA procedural safeguards; and

c. The District denied Parents an opportunity to participate in IEP meetings due to Father's medical condition by insisting that the meetings be held on school property.

25. On or about November 14, 2005, DESE rendered its decision holding that (R-106 at 1014-1015):

a. The District was not out of compliance noting that Student had not attended school during the relevant time frame and Student remained in "stay put"; and

b. The District had provided Parents with the required procedural safeguards, and therefore was not out of compliance; and

c. The District's scheduling of meetings regarding IEP(s) on school premises was not out of compliance as "[in general, any locations within the boundaries of the school district is presumed to be convenient to the

> Parent" and "[w]hile the location was not preferred by the Parent, it was nonetheless acceptable" (R-106 at 1019). DESE also determined that the IEP team could meet without the Parents in attendance after two attempts to seek Parents' participation (R-106 at 1019).

The Panel does not accord any precedential value to DESE's decisions, but cites them as Dr. Quick testified this served as a basis for some of his decisions.

26. On or about October 10, 2005, Student's IEP team (without either Parent) convened at the high school counselor's office to conduct a review of existing data for Student's three year re-evaluation and to revise Student's IEP after providing Parents two notifications of the meeting (R-10 at 960-966; R-104 at 967-1004). After reviewing existing data, it was concluded that Student continued to meet criteria to be considered a student with autism as defined by the IDEA and that no additional data or assessment was necessary (R-103 at 964-956). The Parent Notification Documentation Form included notification which advised Parents that they had the right to request assessments.

> "Parents have the right to request an assessment IF the purpose of conducting the assessment is to determine continued eligibility. If the parent requests additional assessments for reasons other than continued eligibility (e.g., additional disability identification, updated test results, etc.) the district/agency would consider the request a parent request for reevaluation and provide appropriate Notion of Action" (P-27 at 176 and R-103 at 965).

The review satisfied the District's obligation to conduct a three year evaluation. On or about October 20, 2005, Father corresponded with the District wherein he stated that if the District did re-evaluate Student, he (Father) was requesting an independent evaluation at the District's expense (P-28). In response, on October 28, 2005, the District, through Dr. Quick, advised Father than the team determined that no additional assessment was necessary to determine Student's continued eligibility or programming and that Father's request did not

indicate any disagreement with the District's most recent evaluations, and therefore there was no basis to seek an independent educational evaluation ("IEE") (R-105 at 1011-1012). The District's response set forth its policy (IGBA) regarding IEEs and also included a copy of the District's IEE policy. The response also referenced the IDEA procedural safeguards which were enclosed in a prior correspondence (R-105 at 1011). The District received no response to its October 28, 2005 letter.

27. After conducting the review of existing data, Student's IEP team (without Parents) also reviewed and drafted a proposed revision of Student's IEP (R-104 at 967-1004). This IEP was the first created for Student subsequent to his return to school in January of 2005 after a year and a half absence. The October 11, 2005 IEP included changes from the immediately preceding IEP as well as a comparison to the stay-put IEP of December 2003. The Present Level of Performance noted progress Student had made. It also noted that Student remained in stay-put and the District therefore cannot implement the new IEP without Parents' agreement. This IEP reflected that, at the time, Student was not exhibiting behaviors that impeded his learning or that of others and that his behavior had improved during the 2005-2006 school year (R-104 at 968-69). However, this IEP continued to include a behavior plan (R-104 at 998-1001). The services summary section of this IEP reflected that Student was attending high school and would be receiving special services in that environment (R-104 at 991). It further listed the regular education courses in which Student was participating. The District provided Parents with a copy of the proposed revised IEP on or about October 28, 2005. Thereafter, Parents did not contact the District to question any part of the proposed draft IEP.

28. Although the District prepared a new draft IEP in October of 2005, the District continued to implement Student's stay-put IEP during the 2005-2006 school year and Student

made progress with respect to the stay-put IEP. The Panel holds that the October 2005 draft IEP complied with the mandates of the IDEA, and satisfied the District's obligation to review Student's IEP given the stay-put status.

29. In conjunction with the October 11, 2005 IEP, on that same date, Dr. Quick corresponded with Parents and informed that the Student's IEP team had convened to review existing data as part of the three year evaluation and to revise Student's IEP (R-102 at 959). Dr. Quick informed Parents that the team had attempted to telephone their home to invite their participation, but found that the line was no longer in service (R-102 at 959). The District had provided Parents with two meeting notifications prior to the IEP meeting of October 10, 2005. Dr. Quick acknowledged Parents' concerns about meeting on school property, but noted that Father had attended a conference for his daughter at the high school during the 2004-2005 school year.

30. During the 2006-2007 school year, Student attended Lathrop High School and was a tenth grade student (R-114 at 1065). During that school year, Jeananne Jarboe and Karen Westhues served as Student's special education teachers with Ms. Jarboe providing instruction, math, language arts, and functional living and provided those same instructional services to Student up through the time of the hearing.

31. During the 2006-2007 school year, Ann Johnson was Student's speech implementer and Laurie Smith was his speech language pathologist. His occupational therapist was Carol Riley and Howard Morgan was his paraprofessional. Ms. Westhues served as Student's case manager.

32. On or about September 7, 2006, the District provided Parents with notification for an IEP meeting for September 18, 2006 at the high school counselor's office (R-109 at 1038).

According to the District, the meeting was scheduled at that location because the number of staff involved. On that same date, Ms. Westhues, Student's case manager, provided Parents with a second notification for an IEP meeting for October 2, 2006 at the same location (R-109 at 1040). On or about September 27, 2006, the District provided an additional notification for Parents for an IEP meeting for October 10, 2006 at the high school counselor's office (R-109 at 1044).

33. On or about October 10, 2010, Father corresponded with Dr. Quick wherein he objected to the meeting being held on school property (R-108 at 1034). On or about October 10, 2006, Student's IEP team convened in an effort to revise Student's IEP (R-110 at 1047-48). Ms. Westhues and Ms. Jarboe both attended the meeting but the Parents did not. On that same date, the District provided Parents with a notification for an IEP meeting for October 24, 2006 at the high school counselor's office. There is nothing in the record that would indicate that Parents responded to this notification.

34. On or about October 24, 2006, Student's IEP team convened without Parents (R-112 at 1051-52).

35. On or about October 26, 2006, Father corresponded with District personnel and requested an IEP meeting for Student "as soon as possible" and requested that the meeting be held off school property "to accommodate my disability" (R-113 at 1058).

36. On or about October 30, 2006, Dr. Quick corresponded with Parents and enclosed a new proposed IEP developed for Student for the 2006-2007 school year (R-113 at 1059). Dr. Quick noted that the IEP could not be implemented without agreement by all parties (R-113 at 1059). In response to Father's October 26, 2006 request for an IEP meeting, Dr. Quick provided notification for a meeting for November 8, 2006 at the high school counselor's office (R-113 at

1059-60). Again, Dr. Quick advised Parents that they could participate by phone. There is no indication in the record that Parents responded to this notification.

37. On or about November 8, 2006, Student's IEP team again convened and proposed a revision of Student's IEP (R-114 at 1063-1089). Parents did not attend (R-114 at 1063-64). The Present Level of Performance on this IEP noted that Student was a tenth grade student at the time and further noted that he continued to make progress in the school setting (R-114 at 1065). The Present Level of Performance detailed more of Student's progress, and further reflected the additional education classes that Student attended and further reflected changes from the stay-put IEP of December 2003. Also noted in the IEP was that Student was displaying some different behaviors than in past years including self-abusive behaviors (R-114 at 1065). However, the Present Level of Performance also noted that the behaviors did not seem to impede Student's learning. The IEP noted Student's progress both academically and behaviorally and included goals of survival skills, sensory reading, writing, manners, functional writing, following directions, communication, and problem-solving. It also contained a sensory diet behavior plan and transition plan (R-114 at 1063-89). The IEP provided for 21% to 60% of Student's day to be spent in special education, and specified related services with a paraprofessional (R-114 at 1084-86). Ms. Westhues provided a copy of this draft IEP to Parents.

38. The Panel holds that the November 8, 2006 draft IEP is compliant with the mandates of the IDEA, and satisfied the District's obligation to review Student's IEP given the stay-put status.

39. Due to the continued impasse between Parents and District, Student remained in stay-put. The District continued to implement and provide progress notations with respect to the goals in the December 2003 stay-put IEP (R-143) as Student demonstrated continued mastery of

the 2003 goals[4] although this is certainly an expected result give the time lapse between the December 2003 stay-put IEP and the November 8, 2006 IEP. These notations of continued mastery of goals, progress depicted in the subsequent proposed IEP and credible testimony at the hearing, lead the Panel to conclude that Student made educational progress during the 2006-2007 school year.

40. During the 2007-2008 school year, Student attended the District's high school as an eleventh grade student with Ms. Jarboe and Ms. Westhues remaining as his special education teachers and Joni Saling became his paraprofessional. The Panel holds, based upon the notification of continued mastery of goals relating to the stay-put IEP, progress noted on the subsequent IEP (October 8, 2008) as referenced below, and credible testimony at the hearing, that Student made educational progress during the 2007-2008 school year.

41. On or about September 6, 2007, the District provided Parents with a notification for an IEP meeting for September 27, 2007 at the high school counselor's office (R-118 at 1118).

42. On or about September 27, 2007, Student's IEP team convened to review and revise Student's IEP (R-118 at 1120). While the IEP team, without Parents, convened, the meeting was not held and was rescheduled for October 9, 2007 and Parents were provided with additional written notification thereof (R-118 at 1120). In preparation for that meeting, Ms. Westhues prepared a draft IEP and subsequently provided the same to Parents (R-118 at 1120-48). The Present Level of Performance of the draft was based on data that Ms. Westhues collected from working with Student and indicated that Student was making progress in the area of reading comprehension. The draft IEP also noted that although some behaviors had surfaced during the first quarter of the 2006-2007 school year, those behaviors had improved (R-118 at 1122). The draft Present Level of Performance also noted that Student attended regular

[4] The notations as depicted by R-143 illustrate mastery of the stay-put IEP goals on a quarterly basis.

43. In the fall of 2007, the District provided Parents a letter advising them that the parental rights accorded by the IDEA were transferred to Student at the time of his 18th birthday (R-118 at 1147). Subsequently, while Student's rights afforded by the IDEA would normally have been transferred to Student at the time of the hearing, Father had procured guardianship of Student prior to the hearing and, accordingly, this is not an issue.

44. On or about October 9, 2007, Student's IEP team convened to review and revise Student's IEP (R-119 at 1152-85). The Present Level of Performance of the October 9, 2007 IEP indicated progress by Student during the prior year. The information for the new Present Level of Performance was based on data collected by Student's teachers. The IEP further noted that Student was exhibiting behaviors that impeded his learning and included a behavior plan (R-119 at 1184). The Present Level of Performance however did note that Student's behavior had decreased (R-119 at 1160). At the time the October 9, 2007 IEP was developed, Student continued to have a need for specialized instruction regarding reading comprehension and his level in that area had advanced to the fifth grade. Accordingly, as an 11th grader, Student's

reading comprehension was at the fifth grade level which was an improvement over the stay-put 2003 IEP. The October 9, 2007 draft IEP included appropriate goals including reading comprehension, manners, writing, language, behavior, problem-solving, sensory, and survivor skills (R-119 at 1162-1171). The IEP further provided for various accommodations and modifications related to services and a paraprofessional and addressed Student's transition needs (R-119). Parents did not attend the October 9, 2007 draft IEP meeting (R-119 at 1152). The October 9, 2007 IEP addressed Student's transition needs (R-119 at 1177). The District did not implement the October 9, 2007 proposed IEP because of the December 2003 stay-put IEP.

45. On or about October 9, 2007, Dr. Quick corresponded with Parents and provided Parents with a copy of the proposed (draft) October 9, 2007 IEP (R-119 at 1185). In that correspondence, Dr. Quick reminded Parents that the proposed IEP could not be implemented unless Parents and the District agreed to override the December 2003 stay-put IEP. Parents did not respond to that correspondence to advise they had concerns with the October 9, 2007 proposed revised IEP, and they also did not advise the District that they were in agreement which again left all parties with the December 2003 stay-put IEP which was approximately four years old at the time.

46. The Panel holds that the October 9, 2007 IEP was compliant with the standards imposed by the IDEA, and satisfied the District's obligation to review Student's IEP given the stay-put status.

47. In March of 2008, Father filed an additional due process on behalf of Student in which it was alleged that the District has failed to provide Student with transportation (R-142 at 1365-67). At this time, Student remained in stay-put. In regard to the due process filing and the required resolution meeting, the District agreed to provide Student with transportation as a

related service and Parents agreed to override the stay-put on this issue. At the time, Father did not request any additional override of stay-put and after the resolution session, Parent withdrew his due process request relating to transportation (R-142 at 1398).

48. During the 2008-2009 school year, Student attended the District as a twelfth grade student, but did not attend during December 2008 and was withdrawn by Father in mid-March for the remainder of the year. During the school year, Karen Westhues and Jeananne Jarboe were Student's special education teachers and Joni Saling was his paraprofessional. The District contracted with Marilyn Shanklin as an autism/behavior specialist.

49. On or about August 26, 2008, the District, through Karen Westhues, corresponded with parents informing them that Student was due for a re-evaluation and, as a result, the District was scheduling a team meeting to review existing data for September 5, 2008 in the high school counselor's office (R-123 at 1205 and R-124 at 1207). In that correspondence, the Parents were informed that they were welcome to participate by conference call (R-124 at 1207).

50. On or about September 15, 2008, Student's IEP team, without the Parents, met to conduct a review of existing data as part of Student's re-evaluation (R-126 at 1216-1221; P-43 at 235). Ms. Westhues, Ms. Jarboe, and Ms. Shanklin were among the individuals who participated in the meeting (R-126 at 1220). Also, on or about September 15, 2008, Ms. Westhues corresponded with Parents and provided them with a copy of the review of the existing data documentation form (R-126 at 1215). The form provided Parents noted that the team reviewed existing information and concluded that no additional information was needed (R-26 at 1215-21). The information provided Parents notified them of their right to request assessments.

> "Parents have the right to request an assessment IF the purpose of conducting the assessment is to determine continued eligibility. If the parent requests additional assessments for reasons other than continued eligibility (e.g., additional disability identification, updated test results, etc.) the district/agency would consider the

request a parent request for reevaluation and provide appropriate Notion of Action" (R-126 at 1221).

Thereafter, Ms. Westhues was not contacted by Parents to state that they disagreed with the information included in the review form. The District maintains that Parents never contacted it or requested a re-evaluation with assessment, however, at the hearing, Parents presented a letter indicating a request for an independent evaluation (P-42). The letter did not indicate any disagreement with an evaluation. Dr. Quick testified that he never received that letter.

51. On or about September 15, 2008, Student's IEP team, without the Parents, convened to review and revise Student's IEP (R-27 at 1222-51). That meeting, although convened, was not held. Thereafter, on or about the same date (September 15, 2008), Ms. Westhues sent an additional notification for a meeting for October 8, 2008 at the high school counselor's office to review and revise Student's IEP (R-25 at 1214). In anticipation of the meeting, a draft IEP was prepared which reflected a transition plan with a goal for Student to attend Clinco, a sheltered workshop (R-27 at 1245). The District did not receive a consent for the transition to Clinco.

52. On or about October 1, 2008, Dr. Quick corresponded with the Parents concerning the IEP meeting scheduled for October 8, 2008 (R-28 at 1254). In that letter, Dr. Quick offered telephone participation or participation of the Clinton County Alternative School in Plattsburg, Missouri. Said school is not located on Lathrop property and the Parents did not attend at that alternative location (R-28 at 1254).

53. On or about October 6, 2008, a telephone conversation transpired between Father and Karen Westhues which was originated by Father. This was the first conversation between Ms. Westhues and Father. Ms. Westhues kept notes of the conversation but these notes did not entail the entire conversation (R-128 at 1255-57). Among the items discussed during that

conversation, Father said he would not be at the October 8, 2008 meeting, at that he wanted ABA for Student and did not like the IEP goals. He further indicated that he wanted placement at PBM (Partners in Behavior Milestones) for his son and that he would attend meetings off school property with Dr. Quick or on-site with a different administrator. Further, Father informed Ms. Westhues that he and his wife had not received an IEP since 2004 but had received the paperwork for the September 15, 2008 meeting including the procedural safeguards.

54. Following the telephone conversation of October 6, 2008, Ms. Westhues corresponded with Father advising him that the meeting would be held on October 8, 2008 so the District could remain in compliance with the IDEA and that the meeting would be held at the high school and the Parents could participate by phone (R-128 at 1258).

55. On or about October 7, 2008, the District provided Parents with an additional notification for a meeting on October 20, 2008 at the high school conference room (R-128 at 1259). This notice did not state a purpose of the scheduled meeting.

56. On or about October 8, 2008, Father again telephoned Ms. Westhues and Ms. Westhues again took notes of the conversation (R-128 at 1262). Father again informed Ms. Westhues that he would not attend the meeting scheduled for that date and that he "rejected" the entire IEP (R-128 at 1262). Father further demanded the IEP meeting be held off school property and stated he would consider attending a meeting off of school property. During this conversation, Father again stated he wanted Student placed at PBM.

57. In regard to Student's placement at PBM, Dr. Quick discussed the possibility of the placement with Marilyn Shanklin, the District's autism/behavioral consultant, and it was her opinion that PBM was not an appropriate placement and Dr. Quick agreed with this assessment as he agreed that Student could continue to be educated at the District.

58. On or about October 8, 2008, Student's team (without Parents) convened at the high school to review and revise Student's IEP (R-129 at 1263-94). Parents did not attend this meeting nor did they participate by phone. The IEP team (again, without Parents) made changes to the Present Level of Performance noting Student's progress and that the information was based on data collected (R-129 at 1265-71). The Present Level of Performance also noted that Student's participation in regular education (R-129 at 1265-71) and further noted Student's progress with respect to behavior (R-129 at 1265-66). The IEP further noted that Student demonstrated behavior that impeded his learning or that of others (R-129 at 1262). It also noted that Student was able to make progress in spite of such behavior and a behavior plan was included to be proactive (R-129 at 1271). Further, the IEP changed goals which included goals in reading comprehension, writing, money, behavior, social skills, manners, independence, sensory, language, and problem solving (R-129 at 1277-81). The IEP further included a behavior plan in the event that the behaviors recurred (R-129 at 1282). The IEP also included a variety of accommodations and modifications as well as a transition plan (R-129 at 1283, 1291). The IEP also provided for Marilyn Shanklin to be a consultant in support for school personnel (R-129 at 1288). Parents did not consent to the implementation of this IEP and therefore it was not implemented which left Student in stay-put under the December 2003 IEP. A copy of the October 8, 2008 IEP was provided to Parents on or about October 10, 2008 (R-129 at 1263) and thereafter Parents never contacted Karen Westhues, Student's case manager, about the information in the IEP.

59. The Panel holds that the October 8, 2008 IEP was compliant with the requirements of the IDEA and satisfied the District's obligation to review Student's IEP given the stay-put status.

60. On or about October 8, 2008, the District provided Parents with a notification for resolution for October 14, 2008 at Clinton County Alternative School in Plattsburg, Missouri (R-130 at 1295). This location was within the boundaries of the Lathrop School District but was not on property owned or controlled by Lathrop. While this notice was sent in relationship to a new due process request that Father had filed, not directly associated with this case, Father was unwilling to attend at that location.

61. On or about October 29, 2009, Father filed a due process request ("Complaint") that is the subject matter of this decision (R-142 at 1427-1429). As indicated earlier above in this decision, DESE assigned Chairperson A and Father requested a substitution for Chairperson A. Thereafter, DESE assigned Chairperson B and the District requested a substitution of Chairperson B. Thereafter, Richard H. Ulrich was assigned as Chairperson of this Panel.

62. On or about November 6, 2008, DESE sent Parents a letter summarizing the status of various cases filed by Parents on behalf of both of their sons (R-142 at 1467-68). In that letter, DESE explained to Father, in response to his inquiry regarding whether he could file and withdraw various cases (in an attempt to get a different chairperson) (R-142 at 1468), the rules relating to the assignment of chairpersons. DESE's response answered Father's questions while setting forth a detailed chronological sequence of the filings (R-142).

63. On or about December 2, 2008, Father corresponded by e-mail with the District Superintendent, Dr. Chris Blackburn (R-135 at 1310). In that correspondence, Father alleged that the District had changed Student's placement and that Dr. Quick took Student in his car off school property and "something has happened that is sexual in nature" (R-135 at 1310). Dr. Quick testified that the allegation that something happened that is sexual in nature was not true and that the District investigated the allegations and nothing sexual in nature occurred. The

record does not contain any facts that would support this allegation. Student was transported from one building to another within the District by Dr. Quick in Dr. Quick's automobile.

64. Student did not attend school during December, 2008.

65. On or about December 15, 2008, Dr. Blackburn corresponded with the Parents and provided notification for an IEP meeting scheduled for January 14, 2009 at the Brazilton Community Center which is a facility not owned or operated by the District but which is within the boundaries of the District (R-135 at 1319 and P-52 at 309-10).

66. On or about December 28, 2008, Dr. Blackburn advised Father that the District had not changed Student's placement (R-135 at 1312).

67. On or about January 9, 2009, Father acknowledged Dr. Blackburn's IEP notification and stated that he looked forward to attending the scheduled IEP meeting (R-137 at 1324).

68. On or about January 12, 2009, an Order was issued by the Chairperson which resulted from a telephone conference held between Father, the School District's attorney, and the Chairperson on January 9, 2009. In that Order, it was stated that "(t)o assure a resolution session is held, as required by law," the parties were ordered to hold the resolution meeting on or before January 28, 2009 and further noted that "(d)ue to the fact that Parent has scheduled IEPs with the District for January 14, 2008, it is suggested that if time permits, the resolution conference will be held on that date" (R-142 at 1532 and Panel Exhibit 10).

69. On or about January 12, 2009, in response to the aforesaid Order, the District provided Parents with notification regarding a resolution meeting for January 14, 2009 at the Brazilton Center following the IEP meeting (R-137 at 1326).

70. On or about January 14, 2009, Student's IEP team convened for the scheduled IEP and a resolution session meeting at the Brazilton Center. Father attended, Mother did not. During the IEP meeting, Father leaned across a table in a threatening manner towards District's attorney who was in attendance at the IEP meeting.

71. The purpose of the January 14, 2009 IEP meeting was to see if the parties could agree on an IEP for Student to override the stay-put IEP of December, 2003. During the meeting, the IEP team shared with Father their opinions that there was a correlation between Student's school behavior and the various legal proceedings which had been filed and that it was their belief that the South Park video purchased by Father for Student was having an effect on his school behavior. Father acknowledged that he had purchased the video, had not considered the possible school impact, and seemed surprised that the videos were impacting Student's behavior. During that meeting, the team attempted to review Student's IEP, but was unable to complete the process because Father did not have his glasses and could not read the document. He stated that he would take the IEP home and review it there. Thereafter, Father never contacted the District to resume the IEP meeting. Father did not request a change of placement to PDM during the meeting.

72. After the IEP meeting of January 14, 2009 was held, a separate resolution meeting was held which was unsuccessful. Ms. Goldman did not attend the resolution meeting.

73. On or about March 17, 2009, Student was withdrawn from school and did not attend the District for the remainder of the 2008-2009 school year.

74. A nine day due process hearing was held in this matter on February 24-26, May 19-21, and May 24-26, 2010. During the February hearing dates, the Panel took testimony with respect to the applicability of the IDEA's two year statute of limitations and at the conclusion of

the testimony and evidence, the Chairperson ordering a briefing with respect to the statute of limitations issue. On or about April 27, 2010, the Chairperson issued a decision holding that the two year statute of limitations would apply (Panel Exhibit 33). Further, the Chairperson imposed time limitations for the presentation of evidence over Petitioner's objection (Panel Exhibit 33).

75. On May 24, 2010, the Chairperson made a statement on the record regarding Father's conduct off the record on May 21, 2010. As stated by the Chairperson, after the record was closed on May 21, Father made a gesture towards Dr. Quick "in the format of extending his index finger." The Chairperson then indicated to Father the he would not tolerate that type of behavior and Father's response to the Chairperson was "they screwed my child out of his education" (Tr. 1367). Father's behavior occurred in a setting off school property.

76. As depicted above, the relationship between Parents and District was riddled with animosity, hostility, and distrust which was exacerbated by threats, intimidation, police intervention, and a restraining order. A product of this relationship was Parents' unwavering refusal to meet on school premises or participate by telephone to review and revise a very old stay-put IEP. Another product was the District's insistence, on most occasions, that the IEP meetings would be held on school property. The District did offer Parents participation by telephone, and on at least one occasion, offered to hold the meeting on property within the District, but not on school property which was unacceptable to Father. In addition, even when one meeting was held off school premises, Father displayed aggressive behavior toward the District's attorney, and even during the hearing in this matter, Father acted inappropriately by extending his middle finger toward Dr. Quick.

77. In rendering this decision, the Panel was confronted with Father's aggressive behaviors and insistent refusal to participate in IEP meetings in person or by telephone. On the

other hand, Dr. Quick's testimony was often inconsistent and revealed a surprising lack of appreciation of Father's concerns and the extent of procedural rights afforded Parents under the IDEA. Examples of Dr. Quick's testimony are:

1. Q: Was it your position you had no obligation to conduct an annual review of the IEP because of stay-put?

A: That's correct.

Q: Okay, so it wouldn't matter what information the Parents gave you; you felt you had no obligation to even do an annual review, did you?

A: Correct (Tr. 241-242).

2. Q: Do you believe that you have an obligation to hold it (IEP meeting) at a mutual, agreeable place?

A. No.

Q: Do you believe that you have to make reasonable accommodations to the Parents so that they can attend the IEP meeting?

A: No (Tr. 1060-1061).

Q: Do you think you and your staff are capable of developing a Behavior Intervention Plan which would correct those behaviors so that he wouldn't have to be sent home in a police cruiser?

A: I don't know that for sure.

The Panel does not condone some of Dr. Quick's words and actions, but it must, within the context of the low bar set by the stay-put IEP, base its decision on: first, whether the District was guilty of procedural flaws that violated Student's rights under the IDEA and these violations impeded Student's right to a FAPE, significantly hampered Parents' opportunity to participate, or

caused a deprivation of Student's educational benefits; and secondly, whether the District satisfied the substantive requirements of the IDEA.

III. – CONCLUSIONS OF LAW – DECISION

The hearing Panel makes the following Conclusions of Law:

A. General

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

2. The Student is now and has been during all times material to this proceeding, a "child with a disability" as that term is defined in the Individuals with Disabilities Education Act, 20 U.S.C. § 1401(3)(A) ("IDEA") and its regulations, 34 C.F.R. § 300.8. The Student is now and has been a resident of the District during all times relevant to this due process proceeding, as defined by Section 167.020 RSMo.

3. The IDEA, its regulations and the *Missouri State Plan for Special Education: Regulations Implementing Part B of the Individuals with Disabilities Education Act* (2007), ("State Plan") set forth the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District in providing special education and related services to students with disabilities.

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

5. The IDEA is designed to enable children with disabilities to have access to a free appropriate public education which is designed to meet their particular needs. *O'Toole by O'Toole v. Olathe District Schools Unified School District No. 233,* 144 F.3d 692, 698 (10th Cir. 1998). The IDEA requires the District to provide a child with a disability with a "basic floor of opportunity. . . which [is] individually designed to provide educational benefit to the handicapped child." *Board of Education of the Hendrick Hudson Central School District, Board of Education, Westchester County v. Rowley,* 458 U.S. 176, 102 S.Ct. 3034, 3047, 73 L.Ed.2d 690 (1982).

6. IDEA does not require that a school district "either maximize a student's potential or provide the best possible education at public expense," *Rowley, supra.,* 102 S.Ct. 3034, 3049; *Fort Zumwalt School District v. Clynes, supra.* 119 F.3d 607, 612; and *A. W. v. Northwest R-1 School District,* 813 F.2d 158, 163-164 (8th Cir. 1987). Likewise, the IDEA does not require a school district to provide a program that will, "achieve outstanding results", *E.S. v. Independent School District No. 196,* 135 F.3d 566, 569 (8th Cir. 1998); that is "absolutely [the] best", *Tucker v. Calloway County Board of Education,* 136 F.3d 495, 505 (6th Cir. 1998); that will provide "superior results," *Fort Zumwalt School District v. Clynes, supra.* 119 F.3d 607, 613; or, that will provide the placement the parents prefer. *Blackmon v. School District of Springfield, R-12,* 198 F. 3d 648, (8th Cir. 1999); E.S., *supra.* 135 F.3d 566, 569. See also: *Tucker, supra,* 136 F.3d 495, 505; and *Board of Education of Community Consolidated School District No. 21 v. Illinois State Board of Education,* 938 F. 2d 712, 716-17 (7th Cir. 1991).

7. IDEA requires that a disabled child be provided with access to a "free appropriate public education." ("FAPE") *Rowley, supra.,* 102 S.Ct. 3049. The term "free appropriate public education" is defined by 34 C.F.R. § 300.17 as follows:

> *Free appropriate public education* or *FAPE* means special education and related services that—
>
> (a) Are provided at public expense, under public supervision and direction, and without charge;
>
> (b) Meet the standards of the SEA [(State Educational Agency)], including the requirements of this part [(34 C.F.R. Part 300)];
>
> (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
>
> (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

8. A twofold inquiry has been defined by the *Rowley* Court to determine whether a student has received a free, appropriate public education:

> (a) has the State complied with the procedures set forth in the Act? And
>
> (b) is the individualized educational program developed through the act's procedures reasonably calculated to enable the child to receive educational benefits?

Rowley, Supra, 458 U.S. at 206-207.

9. The first of the Court's twofold inquiry, looks at whether the District has satisfied IDEA's procedural requirements:

> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies –
>
> (I) impeded the child's right to a free appropriate public education;
>
> (II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

20 U.S.C. § 1415(f)(3)(E)(ii) (2005); *See Independent Sch. Dist. No. 283 v. S.D. by J.D.*, 88 F.3d 556, 562 (8th Cir. 1996).

10. The second of the Court's twofold inquiry, regarding the individualized educational program, looks at whether the District has satisfied the substantive requirements of IDEA. A Student is substantively provided a free, appropriate public education ("FAPE") when the Student receives:

> personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Rowley, Supra, 458 U.S. 176, 203-4 (1982). Two 'student achievement' components in the *Rowley* standard that must be satisfied for a Student to be deemed to have substantively received FAPE are: the "benefit" component, and the "advance" or 'progress' component.

11. The 'benefit' component of the *Rowley* standard refers specifically to the use of the term "benefit" in the definition of "related services."

> The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that

> such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education.

20 U.S.C. § 1401(26)(A) (2005). The term "special education" means "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability…." 20 U.S.C. § 1401(29). Thus, to satisfy the 'benefit' component, a Student must receive "benefit" from his special education instruction.[5] Courts have defined benefit as being a requirement for "some benefit," "meaningful benefit," and "more than de minimis benefit." *Neosho, Supra*, 315 F.3d at 1027-30.

12. The 'progress' or "advance" component of the *Rowley* standard, is that portion that requires the IEP to "be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Rowley*, 458 U.S. at 203-4. This 'progress' component merely mirrors the requirements found in the statutory definition. The statutory definition of an individualized education program (IEP) is:

> a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes –
>
> (a) a statement of the child's present levels of academic achievement and functional performance, including - (aa) how the child's disability affects the child's involvement and progress in the general curriculum . . .
>
> (b) a statement of measurable annual goals, including academic and functional goals, designed to (aa) 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 (bb) meet each of the child's

[5] In *Rowley*, the Court specifically stated that it was defining "to benefit" within the circumstances of the facts of *Rowley*. *Rowley*, 458 U.S. at 203 n.25. The Court in *Rowley* was "presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system." *Id*. at 203-4. The Court specifically noted, "We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a 'free appropriate public education'." *Id*. at 203 n.25.

> other educational needs that result from the child's disability . . .
>
> (c) 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 for the child - (aa) to advance appropriately toward attaining the annual goals; (bb) to be involved and make progress in the general education curriculum . . . and to participate in extracurricular and other nonacademic activities; and (cc) to be educated and participate with other children with disabilities and non-disabled children in the activities described in this subparagraph.

20 U.S.C. § 1414(d)(1)(A) (2005).[6]

Student's IEPs, material to the decision, as written, all meet these requirements.

13. If parents believe that the District has violated IDEA in the "identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child," they may obtain a state administrative due process hearing. 34 C.F.R. § 300.507; *Thompson v. Board of the Special School District No. 1*, 144 F.3d 574, 578 (8th Cir. 1998); *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997). The right to file a request for a due process hearing is also available to the Local Educational Agency ("LEA"), which in this case is the District.

14. The burden of proof in an administrative hearing arising under the IDEA is generally placed upon the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537 (2005). The due process complaint in this case was filed by the Student's Father, and accordingly, Petitioners have the burden of proof.

B. Issues

[6] Additionally, the IEP must define how progress will be measured and reported. 20 U.S.C. § 1414(d)(1)(A)(III) (2005).

Issue Number 1. What is the applicable statute of limitations?

The initial request for due process in this case was file, pro se, on October 29, 2008. Revisions were filed thereto culminating in a Second Revised Amended Complaint ("Operative Complaint") which was filed on April 13, 2009. It was this Operative Complaint which contained 21 paragraphs describing the nature of the problems that were considered by the Panel, with the exception that the allegations therein relating to violations of No Child Left Behind were stricken. Various allegations in the Operative Complaint made no time reference. Petitioners primarily maintained that the District withheld information from Parents, which was required to be provided, and therefore, the statutory period should be extended. To address this issue, the Chairperson commenced the hearing on February 25, 2010 by affording each party two hours to present their respective cases on whether the Panel should extend the timeline before October 29, 2006. After the presentation of said evidence, the parties briefed their positions on this issue and a detailed Order was issued on April 27, 2010 holding that the two year statute of limitations would apply (Panel Exhibit 33).

In *Strawn v. Missouri State Bd. of Educ.*, 210 F3rd 354 (8th Cir. 2000), the Court held that under Missouri law, the two year statute of limitations applied to IDEA claims. This two year period was confirmed and codified in 2004 and 2006 respectively as the IDEA and its implementing regulations were revised to provide the same limitations. 20 U.S.C. §1415(f)(3)(C)34; C.F.R. §300.507(a)(2); 34 C.F.R. §300.511(e). It is clear that a party must request an impartial due process hearing within two years of the date that it was known or should have been known about the alleged action forming the basis of the due process complaint.[7]

[7] An exception to this rule is if the State has an explicit time limitation for presenting such a complaint, the State's time limitation would be applicable. 20 U.S.C. §1415(f)(3)(C); 34 C.F.R. §300.507(a)(2); 34 C.F.R. §300.511(e). This exception is not applicable as the Missouri State Plan for Part B of the IDEA at page 64 mirrors the two year statute of limitations.

There are two exceptions that would toll the two year limitation period and render it not applicable:

> …if the parent was prevented from filing a due process complaint due to – (1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or (2) the LEA's withholding of information from the parent that was required under this part to be provided to the parent.

34 C.F.R. §300.511(f); 20 U.S.C. §1415(f)(3)(D); *see also* Missouri State Plan for Part B of the IDEA at 64.

In examining the exceptions to the application of the two year statute of limitation period, no evidence was presented that would suggest that specific misrepresentation by the LEA resolved the problem forming the basis of the due process complaint and accordingly, this exception is clearly not applicable[8]. It is Petitioners' primary contention that the second exception is applicable - that Lathrop withheld information from Parent that was required to be provided to the Parent which should extend the statutory period.

Evidence was presented by the District that it provided Petitioners written notices of action, progress reports, Procedural Safeguards and IEP's and that some of the documents were hand delivered and some were mailed. However, it was shown that, at least on one occasion, the providing of a particular IEP by hand as represented by a District document was not possible. Father testified, in essence, that he received some documents, did not receive others, wasn't sure if he received others, and wasn't sure if he read some of the documents provided. Based upon the evidence produced, a minimal number of the required documents (including a Notice of

[8] Petitioners contend that Respondent's failure to provide required documents constituted a misrepresentation and cited the case, among others, of *Rakes v. Life Investors, Ins. Co. of America*, F3d, 082626 (8th Cir. 2009) for the proposition that "A misrepresentation can be based upon a failure to disclose information in certain circumstances." While this principle of law is clear, in the *Rakes* case, the Eighth Circuit sustained a summary judgment in favor of Defendant because Plaintiffs did not show that Defendant's insurance policies contained a fraudulent misrepresentation (p. 13). The Court also ruled that the alleged misrepresentations in the documents accompanying the rate hike were not actionable (p. 5). Herein, as in the *Rakes* case, Plaintiffs did not prove that the failure to produce required documents constituted misrepresentation(s).

Action regarding the refusal to change a paraprofessional and a copy of an IEP) over a multi-year period were not provided. However, it was clear from the evidence that virtually all required documents were indeed provided including Procedural Safeguards, which included advising Parent of the right to file a due process complaint, were timely provided.

Whether all of the required documents were provided or not, the real issue is whether the failure to provide a de minimis number of documents prevented Parent from filing a due process complaint. It is Parents' burden to prove that the failure to provide required documents prevented Parent from filing a due process complaint. See *Schaeffer v. Weast*, 546 U.S. 49 (2005); *West Platte R-II Sch. Dist. v. Wilson*, 439 F3rd 782, 785 (8th Cir. 2006). Such proof was not presented. Of note, in January, February, May, and June of 2004, Father had filed due process requests on behalf of his son. Also during the time frame predating October 29, 2006, Parent was represented by an attorney and had an advocate.

To permit Petitioners to toll the statute of limitations on the basis that documents were not received without proof that such failure prevented the filing of a due process complaint would be to ignore the specific language requiring that such failure prevented the Petitioners from filing a due process complaint. Where a statute clearly defines the rights of parties, the statute may not be unsettled or ignored. *Zuenzle v. Missouri State Highway Patrol*, 865 S.W.2d 667, 669 (Mo. banc 1993) (citing *Milgram v. Jiffy Equipment Co.*, 362 Mo. 1994, 247 S.W.2d 668, 676 (1952)). When considering the meaning of a statute, the primary rule is "to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." *Westrope & Associates v. Director of Revenue*, 57 S.W.3d 880 (Mo. App. 2001).

A corollary issue of whether the two year statute of limitations should be extended came into play as the Chairperson ruled (Panel Exhibit 33) that the Panel would consider events from October 29, 2006 until April 13, 2009, the date the Operative Complaint was filed. Fueling the decision was an effort by the Chairperson to dispose as many issues as possible given the long history of litigation and disputes. The Chairperson finds no law on point, but finds that Federal Rules of Civil Procedure ("FRCP") 15(c) affords authority for this forward extension. FRCP 15(c)(1) provides that an amendment to a pleading relates back to the date of the original pleading, and thus extends the statute of limitations period, when (A) "the law that provides the applicable statute of limitations allows relation back; (B) the amendment asserts a claim or defense that arose out of conduct, transaction, or occurrence set out or attempted to be set out in the original pleadings…." Respondent contests this Panel's authority to extend the statutory time period forward by maintaining that the principle of relation back as set forth in FRCP 15(c)(1)(A) is not contemplated under the IDEA and its implementing regulations which set forth a two year statute of limitations for due process claims. To the contrary, 34 C.F.R. §300.511(d), specifically notes that "[t]he party requesting the due process may not raise issues at the due process hearing that were not raised in the due process complaint. . ." Further, even if relation back principles are applicable to the IDEA, such principle does not control in this matter as Petitioners' Second Revised Amended Complaint merely reflects Petitioners' attempt to comply with IDEA requirements for filing a sufficient complaint and does not constitute a pleading as contemplated under FRCP 15(c)(1)(B) that would extend the statute of limitations period.

To take Respondent's last argument to its logical conclusion that the Operative Complaint merely reflects Petitioners' attempt to comply with IDEA requirements for filing a

sufficient complaint does not constitute a pleading as contemplated by FRCP 15(c)(1)(B) would extend the statute of limitations period, would suggest that the applicable time frame herein would be April 13, 2007 to April 13, 2009, which the Panel rejects.

Even if the determination that the time frame for the consideration of issues of October 29, 2006 to April 13, 2009 ("relevant time frame") is in error, it does not effect this decision as the Panel's ruling would remain the same regardless of whether the time frame is October 29, 2006 to October 29, 2008 or October 29, 2006 to April 13, 2009.

Issue Number 2A. What was the operative IEP which governed the District's obligation to afford Student FAPE?

As stated above in this decision, the Panel holds that the December 2003 IEP is the operative stay-put IEP. While a due process hearing is pending, a student must remain in his/her then current educational placement (referred to as the stay-put IEP), *unless* (emphasis added) the parents and the state agency agree otherwise. 20 U.S.C.A. §1415(j) specifically states:

> "Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed."

In *Lathrop R-II School District*, 2009 WL 2982645, at p. 12, (W.D. Mo. 2009), (involving similar facts) the Court stated:

> "Thus, the IDEA requires a child remain in the placement specified in the last mutually agreed upon IEP until the entire dispute is resolved or the parties agree to change placement. *See Cosgrove v. Bd. of Educ. of the Niskayuna Cent. Sch. Dist.*, 175 F.Supp.2d 375, 383 (N.D.N.Y. 2001)."

Petitioners aptly point the Panel to case law that supports the conclusion that the stay-put provision was included in the IDEA for the benefit of students and parents in order to protect them during the review process.

The United States Supreme Court in *School Comm. of Burlington, Mass. V. Department of Educ. of Mass*., 471 U.S. 359, 373 (1985) "We also note that §1415(e)(3) [referring to the then stay-put provision] is located in a section detailing procedural safeguards which are largely for the benefit of the parent and child." In *Susquenita Sch. Dist. v. Raelee*, 96 F3d 78 (3rd Cir. 1996), the Court held:

> The pendent placement provision was included in the IDEA to protect handicapped children and their parents during the review process. The Supreme Court referred to this protective purpose when it wrote: "We think it clear . . . that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school. *Honig v. Doe*, 484 U.S. at 323.

The Parents contend that the District employed the stay-put provision as a weapon to bludgeon the Parents with while it cavalierly regurgitated the same pathetic program over and over again year after year without any genuine attempt to improve the program, update the goals, modify the behavior plan, or enhance progress.

In spite of the intent of the stay-put provision is for the benefit of students and parents and the unbelievable time period in which it was in effect, the Panel holds that the clear, unambiguous language of 20 U.S.C.A. §1415(j) requires the stay-put IEP remain effective and mandates that the December 2003 IEP controls.

By analogy, in *Kirk Knight and Heather Knight v. Washington School District*, 2010 U.S. Dist. Lexis 45433, U.S. District Court for the Eastern District of Missouri, Eastern Division, the Judge upheld the dismissal of a due process complaint by a chairperson even though the Court clearly questioned the appropriateness of the dismissal. The Court concluded that it was bound to dismiss the case for lack of subject matter jurisdiction citing IDEA's restrictions of federal court jurisdiction to the review of decisions and findings from hearings under 20 U.S.C. §1415(f), and because the complaint was dismissed prior to such a hearing, the Court was

powerless to review the propriety of the dismissal. Just as the Court in the *Knight* case, *id.*, was powerless to deviate from the language of IDEA, so is this Panel.

Issue Number 2B. Did the District fulfill its obligations relating to that IEP?

As stated above, the December 2003 IEP was in compliance with the requirements of the IDEA and was calculated to afford Student with a FAPE.

In determining whether an IEP is appropriate and reasonably calculated to offer an educational benefit must be measured at the time it was offered to the student. *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F2d 1031, 1035 (3rd Cir. 1993). No evidence was presented to suggest that the December 2003 IEP was not reasonably calculated to offer an educational benefit to Student in December of 2003. Credible evidence was presented that Student received educational progress under the stay-put IEP and quarterly notations and Present Level of Performance in subsequent drafted IEPs reported benefits. The Panel holds that Student, during the relevant time frame, received meaningful educational benefit and Parents received progress reports noting said benefit – under the December 2003 IEP.

Issue Number 3. With the December 2003 IEP in place as the stay-put IEP, did the District fulfill its obligations under IDEA?

When a student is in stay-put, the district is required to maintain the student's current placement and is not required to update that student's IEP. See *C.P. v. Leon County School Board of Florida*. 483 F3d 1151 (11th Cir. 2007); see also *Smith v. James C. Hormel School of Virginia Institute of Autism*, 2009 WL 4799738, at *14 (W.D. Va., 2009) (finding that once stay-put was invoked, the district's "hands were tied with respect to its ability to implement or revise [the student's] IEP."); *Kuszewski v. Chippewa Valley Sch. Dist.*, 56 Fed. Apx. 655 (6th Cir. 2003) (where parents challenged the adequacy of their son's IEP because it has not been annually updated during the course of litigation, the Court found that there was no merit to the argument

that the school's compliance with the stay-put provision of the IDEA caused the student's IEP to be inadequate.)

While the case law referenced above dispels the requirement for the District to revise the IEP, it does not remove the District's obligation to conduct meaningful annual reviews while the student is enrolled. In *CP v. Leon County School Bd. of Education, Id.*, the parent, under a stay-put IEP, argued that the defendant failed to comply with 20 U.S.C. Section 1414(d)(4)(A) requiring the IEP team to review a student's IEP periodically, at least annually, to determine whether the annual goals are being met and to revise as appropriate. *Id*. at 1157. She contended the defendant violated the IDEA by its failure to update student's IEPs. *Id*. The Court held this section of IDEA does not require an IEP to be *altered* annually, but merely *reviewed* and revised as appropriate. *Id.*

OSEP has issued a somewhat similar interpretation of stay-put obligations for districts as the 11th Circuit held in the *CP* case. In *Letter to Watson*, 48 IDELR 284 (April 12, 2007), OSEP concludes that nothing in the IDEA's stay-put provision "relieves districts of their duty to convene an IEP team 'not less than annually' and to revise a child's IEP as needed." Then OSEP concedes that even if a district revises an IEP, it is bound to follow the stay-put IEP during the pendency of a due process action unless the parents consent otherwise. The IDEA requires the IEP team "to review the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved, and revise the IEP as appropriate. . ." 20 U.S.C. §§1414(d)(2)(A) and 1414(d)(4)(A).

The Panel holds that the stay-put provision of IDEA does not affect the District's annual review obligation.

Inherent in the obligation to review is the statutory procedural rights afforded to Parents. Pursuant to the mandate of 20 U.S.C. 1415, parents of children with disabilities have (pertinent to the issues in this case):

(a) "an opportunity . . . to examine all records relating to such child and to participate in 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, and to obtain an independent educational evaluation of the child;

(b) the right to receive "written prior notice . . . whenever such agency – proposes to initiate or change; or refuse to initiate or change; the identification, evaluation, or educational placement of the child, . . . or the provision of a free appropriate public education to the child";

(c) the right to receive a copy of the procedural safeguards notice at certain specified times."

See *Evans v. District No. 17 of Douglas County, Neb.*, 841 F2d 824, 828 (8th Cir. 1988).

Congress plainly emphasized the importance of the IDEA's procedural safeguards so that parents would be able to participate in the development of a student's IEP. *Independent Sch. Dist. No.* 283, 88 F.3d 556, 562 (8th Cir. 1996). Significantly, however, well-established law holds that minor technical procedural violations should not lead to a finding of a denial of FAFE. *Id.* at 567. As one 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. Defendants I*, 898 F.2d 1186, 1190 (6th Cir. 1999). Thus, liability for an IDEA procedural violation may be found only if the violation comprised the student's right to an appropriate education, seriously hampered the parents' opportunity to participate in the IEP process, or causes a deprivation of educational benefits.

The Panel addresses the procedural rights afforded to Parents by 20 U.S.C. §1415 within the context of this case.

Opportunity to examine records: Parents of students have the "right to inspect and review the education records of their children." 20 U.S.C. §1232g(a)(1)(A); 34 C.F.R. §99.10(a). Under the IDEA, the parents of a child with a disability "must be afforded, . . . an opportunity to – (1) inspect and review all education records with respect to – (i) The identification, evaluation, and educational placement of the child; and (ii) The provision of FAPE to the child." 34 C.F.R. §300.501.

While Father contended that his inability to appear on school premises prevented him from receiving records, the record does not reflect any request from Parents to examine educational records during the relevant time frame. In addition, Student's Mother went onto school premises and could have accessed the records if a request had been made. Accordingly, the Panel holds, given the record, that Parents were not deprived of an opportunity to review their son's educational records.

Right to participate: IDEA regulations mandate that school districts "take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded an opportunity to participate[.] C.F.R. 34 Section 300.322(a). This includes early notification of meetings. 34 C.F.R. Section 300.322(a)(1). Herein, appropriate notification was provided Parents for the IEP meetings during the relevant time frame. School districts also must take steps to "schedule[e] the meeting at a mutually agreed on time and place. 34 C.F.R. Section 300.345 (a)(2). Herein, the parties could not agree on a place to convene IEP meetings. The District's insensitivity to Father's medical situation is unfortunate, but the District's concern over safety is understandable. The Panel holds that, given the impasse on acceptable meeting locations, the Petitioners did not sustain their burden of proof that the District violated its obligation to make efforts for the meetings to be held at a mutually convenient place.

The IDEA regulation also presents other methods of parent participation: "If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls, consistent with 34 C.F.R. 300.328 (related to alternative means of meeting participation). 34 C.F.R. 300.501(c)(3). 34 C.F.R. 300.328 is titled "Alternative Means of Participation" and states ". . . the parent of a child with a disability and a public agency may agree to use alternative means of meeting participation, such as video conferences and conference calls." Of important note is that 34 C.F.R. 300.501(e)(3) begins by "If neither Parent. . ." and 34 C.F.R. Section 300.322(a) uses the language of ". . . one or both of the parents" (emphasis added). In this case, there were no restrictions or conditions imposed on Mother's participation. No evidence was produced indicating that she could not attend. In addition, the District offered participation by telephone.

In *Lathrop R-II School District*, 611 F3d, 419, 427 (8th Circuit), 2010, involving similar facts regarding parents' participation, the Court stated:

> "After a careful review of the record, we conclude that even if there were a technical violation regarding the requirement to schedule a meeting at a "mutually agreed [up]on" location, 34 C.F.R. § 300.345(a)(2), it did not affect the IEPs or otherwise deprive [Student] of educational benefit. . .. The District attempted to include the parents in its meetings regarding the 2003 IEP, and offered to enable [Parents'] participation by telephone on those occasions when he could not or would not attend in person.

This Eighth Circuit's Opinion sustained the District Court's Opinion, *Lathrop R-II School District*, 2009, WL 2982645 referenced above. These decisions are poignant, not only on the issue of whether parents were afforded an opportunity to participate, but also on the mandate that the stay-put IEP remained the operative IEP, and the overriding emphasis on educational progress.

The District afforded appropriate notices and took the legally required steps in its efforts for the parents to participate[9]. Parents were not denied the opportunity to participate in the IEP process during the relevant time frame.

The Panel further holds that the District did not conduct "unofficial" IEPs and provided all required notices, progress reports, and proposed IEPs to Parents during the relevant time frame.

Right to obtain an independent educational evaluation. On two occasions, Father requested an Independent Educational Evaluation ("IEE") in writing. The first request was on October 20, 2005. As stated in the background facts, the District responded by advising Father that the team determined no additional assessment was necessary to determine the Student's continued eligibility or programming and that Father's request did not indicate any disagreement with the District's most recent evaluations and therefore there was no basis to seek an independent evaluation. In the District's response dated October 28, 2005, the District set forth its policy regarding IEEs and also included a copy of the actual policy. Thereafter, the District received no response to its October 28, 2005 letter. It was the District's position that since Father did not indicate any disagreement with the District's most recent evaluations, there was no basis for the Parents to seek an independent evaluation. 34 C.F.R. §300.502(b) states: "parent right to evaluation of a public expenses (1) a parent has a right to an independent educational

[9] Dr. Quick's testimony reflected his attitude toward Father's medical condition and its bearing on whether it should be considered in having IEP meetings off school premises. Q: "If you had known that Mr. Gray's presence on school property would cause him to have greater depression and it might result in hospitalization, in your opinion would that have been a legitimate basis for the school to defer to him and offer an IEP meeting off of school grounds? A: No. Q: Do I gather from what you've said that no matter how sick these meetings may have caused Mr. Gray to become, you were unwilling for that reason anyway to consider having a meeting off school grounds; fair to say? A: I was unwilling - - yes. [Tr. 1038-1039] Q: Sir, after August 23rd, 2006, if you had known that Mr. Gray was being treated for major depression for three years, would it have still been your position not to accommodate him by having an IEP meeting off of school grounds? A: Yes. [Tr. 1028]" While this testimony is disturbing, for reasons stated in this decision including Parents' unwillingness to participate by telephone, Mother's ability to participate in person, and safety concerns, Parents were afforded the opportunity to participate to the extent required by law.

evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency subject to the conditions in paragraphs (d)(2) through (4) of this section." (Emphasis added) Father's request for the independent evaluation (P. 28 at 177) reads "if you did reevaluations for my son (Student's sibling") and Student, I am requesting independent evaluations at public expense.) Not only did Father not object to an evaluation, his request related to any unknown reevaluations. There was no evidence presented to suggest that there were any unauthorized reevaluations and the District's notification indicated that the Parents had a right to request an additional assessment to determine whether this child continued to be a child with a disability of autism. The parent notification data received by Parents (P. 27, pages 171-176) set forth the results of the review of the existing data which does not reflect any new reevaluations.

The Panel holds that Petitioners, as a result of Father's "request" of October 20, 2005, were not entitled to an independent educational evaluation at public expense because there was no objection to existing evaluations.

The second request for an independent educational evaluation was submitted to the District (P. 42 at 234) which reads: "I asked for independent evaluations the last time the boys were reevaluated and Ms. Blackburn and you refused to do that. I am asking for independent evaluations again and I am wondering if you have changed your minds and will allow the independent evaluations." Just as Father's prior request for an IEE, the September 4, 2008 request did not express any objection to any evaluation conducted by the District. The Panel holds that Petitioners were not entitled to an IEE at public expense as a result of Father's request of September 4, 2008.

The case of *School Board of Lee County v. E.S.*, 561 F.Supp. 2nd 1282 is instructive on the clarity required in requesting an IEE. In the *E.S.* case, E.S.'s attorney, by letter, simply requested "independent evaluations" *E.S., Id.*, at 289, without specifying what evaluations were being sought. The School Board responded by letter, asking counsel to specify the evaluations being requested. It was not until approximately six weeks later, along with the due process hearing demand letter, that E.S.'s attorney identified seven specific evaluations and a catchall evaluation which were being requested. When the School Board attempted to set up an IEE, the parties could not agree on the evaluator. Under these facts, the court ruled that E.S.'s initial request for independent evaluations was too vague to trigger any obligation concerning an IEE by the School Board. *E.S., Id.*, at 1289. Herein, Father's requests were as vague as the request made in the *E.S.* case.

Right to receive written prior notice. The Panel holds that all required notices during the relevant time frame were provided to Parents.

The right to receive a copy of procedural safeguards. The Panel holds that no sufficient evidence was produced that supported the proposition that Parents did not receive the required procedural safeguards during the relevant time frame.

Supplementing the rights of Parents as set forth above, and also affected by the stay-put provisions was the obligation of the District to conduct triennial evaluations. The IDEA requires school districts to conduct re-evaluations at least every three years unless the district and parents agree to waive same. 34 C.F.R. 300.303 reads:

> Reevaluations.
>
> (a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§300.304 through 300.311 –

(1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(2) If the child's parent or teacher requests a reevaluation.

(b) Limitation. A reevaluation conducted under paragraph (a) of this section-

(1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

Two triennial evaluations come into play during the relevant timeframe, October 2005 and September 2008. In both instances, the District's IEP team met after giving appropriate notification to Parents and provided Parents with the notice of the conclusion that in reviewing existing data, no additional data was needed, and that Student continued with the categorical disability of Autism. The notifications also advised Parents that if the Parents requested additional assessments for reasons other than continued eligibility (e.g., additional disability identification, updated test results, etc.) the District would consider the request of a parent for reevaluation or provide appropriate notice of action. (P-27 at 176 and R-103 at 965 relating to the October 2005 triennial evaluation and R-126 at 1221 regarding the September 2008 triennial evaluation.) Parents did not make any requests for additional assessments. While Dr. Quick acknowledged awareness of Parents' ongoing request for evaluation, his response, when examined in context, is referring to R-105 at 1011 where Dr. Quick was responding to Father's IEE request. Further, Dr. Quick testified that from October 2006 through April 2009, Father never requested a reevaluation, but did request an IEE (Tr. at 1977). In addition, when Dr. Quick was asked whether he was aware that in 2005 and 2008, Parents wanted evaluations done, he

answered "no" (Tr. at 229). Further, Dr. Quick stated that whether he understood that the IEE request was, in essence, asking the District do some evaluation, he answered no" (Tr. at 230). Father indicated that he asked for evaluation and reevaluation "many times" (Tr. at 1905). However, he could not answer specifically as to when that occurred and that he considered an IEE request and reevaluation request to be the same (Tr. at 1946-1949). Parents were provided the procedural safeguards designating the difference. Ms. Jarboe testified that additional assessments would not have changed Student's educational diagnosis or alter the way she approached serving Student under an IEP (Tr. at 1729).

In regard to the District's right to make their determinations triennial evaluations, it is clear that they may do so upon review of existing data. 34 C.F.R. §300.305(d) states:

> (d) Requirements if additional data are not needed:
>
> (1) If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the public agency must notify the child's parents of –
>
> (i) That determination and the reasons for the determination; and
>
> (ii) The right of the parents to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs.
>
> (2) The public agency is not required to conduct the assessment described in paragraph (d)(1)(ii) of this section unless requested to do so by the child's parents.

Herein, the District, in October of 2005 and September of 2008, complied with the requirements that no additional data was needed.

<u>Issue Number 4</u>. Did the District provide Student with all required speech and occupational therapy services?

There was no evidence presented that the District did not provide Student with all required speech and occupational therapy services during the relevant time period and accordingly, failed to satisfy its burden of proof on this issue.

Issue Number 5. Did the District deny Student of a free appropriate public education by failing to conduct a Functional Behavior Assessment (FBA)?

During the relevant timeframe, Petitioners did not request an FBA. An FBA is required only when the district wants a disciplinary change of placement and the IEP determines that the misconduct was a manifestation of the student's disability. See 34 C.F.R. §300.530(f). Also, when a disciplinary change of placement occurs and the IEP team determines that the misconduct was not a manifestation of student's disability, the student must receive, as appropriate, a Functional Behavioral Assessment" 34 C.F.R. §530(d)(1)(ii). During the timeframe the District did not impose a disciplinary change of placement.

Since during the relevant timeframe, there was no disciplinary change of placement and accordingly, the District had no obligation to conduct an FBA. The testimony revealed that Student's behaviors increased during the relevant time frame, but in general, the District was able to manage his behaviors. The District utilized his Behavior Intervention Plan contained in the stay-put IEP. Student's behaviors did not prevent him from receiving FAPE and meaningful progress under the stay-put IEP.

Issue Number 6. Did the District violate Student's procedural rights by failing to give progress reports? If so, did said procedural violations prevent Student from receiving a free appropriate public education?

There was evidence from October 2006 to April 2009 that the District was not sending the Parents any progress on the goals and objectives that were implemented which the Parents did not agree to. Also, there was testimony that the District did not send the Parents targeted behavioral sheets as required by the December 2003 IEP. Much of Student's progress was

reported in the relevant time frame draft IEPs in the Present Level of Performances. The record reflects that Student was continuing to master the goals contained in the stay-put IEP and was making educational progress. The failure to provide progress information or achievement outside of the stay-put IEP goals and objectives, and failure to provide Parents with the targeted behavior sheets, within the context of the stay-put IEP did not impede Student's right to a free appropriate public education, significantly impede the Parents' opportunity to participate in the decision making process, or cause a deprivation of educational benefits.

Issue Number 7. Did the District violate Student's procedural rights by implementing a different behavioral plan as set forth in the stay-put IEP and/or implementing goals and objectives on IEPs Parents did not agree to? If so, did such procedural violations prevent Student from receiving a free appropriate public education?

There was evidence that the District implemented a different behavior plan set forth in the stay-put IEP and that the District implemented goals and objectives that the Parents had not agreed to. The Panel holds that the District's actions provided appropriate higher instructional levels than those contained in the stay-put IEP, educational progress was made, and, accordingly, the procedural violations did not impede the Student's right to a free appropriate public education, significantly impede the Parents' opportunity to participate in the decision making process, or cause a deprivation of educational benefits.

Issue Number 8. If Student was denied a free appropriate public education, what is the appropriate remedy?

Even in the event Petitioners prevailed herein, they failed to meet their burden regarding the requested relief of services from Partners in Behavior Milestones ("PBM"). Petitioners are requesting a PBM supervised, house based program of 25 hours per week for three school years. Clearly, a home based program would be severely restricted. While Petitioners presented information concerning PBM (P. 18 at 99-102), and Father testified that the PBM program and

services would be appropriate for Student, the Panel does not believe that sufficient evidence was presented that would allow it to award the relief Petitioners are requesting. In seeking private placement or reimbursement for a private placement, the Parents had the burden to establish that the proffered placement was appropriate. *Burlington*, 417 U.S. at 370.

Conclusion

The Panel concludes, by a 2-1 majority, that the IDEA's two year statute of limitations applies and the relevant time period is October 29, 2006 through April 13, 2009, and that Petitioners failed to carry their burden of proof on their claims of remedial procedural violations or that the District did not satisfy the substantive requirements under the IDEA.

Appeal Procedure

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

Dated:_____

_____
Richard H. Ulrich, Chairperson

_____
Dr. Terry Allee, Panel Member

_____
Rand Hodgson, Panel Member (Dissenting)

CERTIFICATE OF SERVICE

I do hereby certify a copy of the foregoing placed in the U.S. Mail, certified mail, return receipt requested this 3rd day of January, 2011 addressed to:

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