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

XXXXXXXX, by and through his parents,	)	
YYYYYYYYYYYYY	)	
	)	
Petitioner/Student,	)	
	)	
v.	)	**Filed on April 22, 2009**
	)	
LATHROP R-II SCHOOL DISTRICT,	)	
	)	
Respondent/District.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

The Hearing Panel, after conducting the due process hearing in this matter on October 27-30, 2009, January 6 & 8, 2010 and March 23-24, 2010, issues the following Findings of Fact, Conclusions of Law, Decision and Order:

FINDINGS OF FACT

The Hearing Panel makes the following Findings of Fact:

The Parties

1. XXXXX ("Student") is the Petitioner in this case. Student turned 19 in 2010, and is the son of YYYYYYYY (collectively as "Parents" or individually as “Father” or “Mother”). The Parents are co-Guardians for Student. Hearing Panel Ex #3. Parents currently reside within the boundaries of the District.

2. The Lathrop R-II School District (“the District”) is a Missouri Public School District which is organized pursuant to Missouri statutes. The District is located in Clinton County, Missouri and educates approximately 900 students, including approximately 300 high school students. (2008-09 Missouri School Directory).

3. The Student and his Parents were represented by Stephen Walker, 212 East State Road 73, Suite 122, Saratoga Springs, UT 84043. He withdrew his appearance on April 2, 2010 via e-mail.

4. The District was represented by Teri B. Goldman, who is with the law firm of Mickes Goldman O’Toole, LLC, 555 Maryville University Drive, Suite 240, St. Louis, Missouri 63141.

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

Pamela S. Wright	Hearing Chairperson
Dr. Terry Allee	Panel Member (selected by the District)
Rand Hodgson	Panel Member (selected by the parents)

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

Dr. Chris Blackburn	School Superintendent
Dr. Ken Quick	Director of Special Education
Karen Westhues	Special Education Teacher
Vickie Malott	Paraprofessional

Time Line Information and Procedural Background

7. The Parents requested a due process hearing by letter to the Department of Elementary and Secondary Education ("DESE") dated April 22, 2009, which was received by DESE that same day. Ex. R-62 at 1884-91.[1] The parties waived a Resolution Meeting on May 3, 2009.

8. On or about May 6, 2009, the District challenged the sufficiency of Parents' April 2009 complaint. Ex. R-62 at 1893.

9. On or about May 14, 2009, the Chairperson granted the District's sufficiency challenge and ordered Parents to file an amended complaint on or before May 26, 2009. Ex. R-62 at 1901-02.

10. On or about May 26, 2009, the Parents' attorney filed a [First] Amended Complaint. Ex. R-62 at 1904-14.

11. On or about June 1, 2009, the District challenged the Parents' Amended Complaint. Ex. R-62 at 1924.

12. On or about June 11, 2009, the Chair deemed the Amended Complaint to be sufficient and declared the 45 day timeline to run from that date. Ex. R-62 at 1928.

[1]As will be set out later in more detail, the Parents had filed Due Process Complaints on September 29, 2008 (their third since January 2004); October 29, 2008; November 3, 2008 and January 2, 2009, all of which covered the same claims as alleged in the current Due Process Complaint. None of these Complaints, including the current one, contained a claim for an alleged Section 504 violation.

All references to the Petitioners' Exhibits will be cited as "Ex. P-[#]"; references to Respondent's Exhibits will be cited as "Ex. R-[#]" and references to the Panel's Exhibits will be cited as "Panel Ex. [#]."

13. On or about June 19, 2009, the Chair stated, in writing, the issues for hearing (based on the First Amended Complaint) for the parties' consideration. Ex. R-62 at 1935-36.

14. After the attorneys agreed on the issues as well as an extension of the timeline, the Chair issued a Scheduling Order on July 1, 2009 providing, *inter alia*, hearing dates of October 27-30, 2009; the issues to be resolved by the Hearing Panel, including whether a Hearing Panel had authority or jurisdiction to hear and rule on alleged violations under the federal statute informally known as "No Child Left Behind"; allocating 16.0 hours to each party for presenting direct and cross-examination; an extension of the timeline to January 1, 2010. [2]

15. On July 8, 2009, the District filed a Motion to Dismiss the Petitioners' No Child Left Behind Claim. On September 25, 2009, after both parties fully briefed the issue, the Chair entered a detailed Order dismissing the Petitioners' claim under the No Child Left Behind Act.

16. The first four days of hearing occurred on October 27-30, 2009 at the City Hall in Lathrop. The Chair closed the hearing as per the request of the Parents and their counsel. Student and Parents used 12 hours, 20 minutes of their allocated 16.0 hours of time for direct and cross-examination during the first four days of hearing. The District used 7 hours 18 minutes of its allotment. At the close of the 4th day of hearing, the parties agreed to continue the hearing to January 6-8, 2010. (These were the first three consecutive days when the attorneys for the parties were both available.) The parties also agreed to extend the timeline to March 22, 2010 for the issuance of an opinion.

17. The parties resumed the hearing on January 6, 2010 but adjourned early because of a major snowstorm that struck the Kansas city area. They were able to resume the hearing on the 8th. Upon conclusion, the Petitioner and his Parents had used 14 hours of their allotted 16 hours; the district had used 11 hours 30 minutes of its 16 hours of time. At the close of the hearing on the 8th, the parties agreed to additional hearing dates of March 23-24, 2010. (These were the first two consecutive days when the attorneys for the parties were both available.) The parties agreed to an extension of the timeline from March 22, 2010 to June 14, 2010 for the issuance of the opinion, with briefs to be filed no later than May 10, 2010.

18. On March 2, 2010, counsel for Student and Parents filed a Motion for Continuance [of the Hearing Dates]. On March 4, 2010, the District filed its Suggestions in Opposition to the Motion for Continuance. Later that day, counsel for Student and Parents filed a Reply. On March 5, 2010, and after consulting with the other Hearing Panel members who were in agreement, the Chair entered a detailed Order denying the Motion for Continuance.

19. A few days later, the Father sent an e-mail directly to the Chair asking for a reconsideration of the denial of the Motion for Continuance pleading an inability to pay for the airfare for his counsel to travel from his office in Utah to Missouri. Father asked for a two week

[2]The Order does not reflect the Parents and their counsel's objections to any time limits being imposed on them. Mr. Walker noted his objection on the record when the hearing opened on October 27, 2009. Tr. 1: 6. His objection is noted as a *continuing one* throughout the proceedings.

The court reporters' transcript runs seven volumes so all references to the record will be as follows: Tr. [volume#]: [page#].

continuance, which was objected to by the District. The Chair denied the request for the following reasons: (1) when trying to find common available dates for continuances in late October and again in early January, the parties' attorneys needed *at least two months*, not just two *weeks*;[3] and (2) there was no valid reason offered that Mr. Walker could not advance the funds and then be repaid two weeks later by the Parents.

20. After the Chair denied the request for reconsideration by Father, Stephen Walker on March 9, 2010 sent an e-mail advising that Father was directing him not to advance the airfare and not to appear at the scheduled March hearing dates. Mr. Walker further advised that Father would be representing himself at the March 23-24, 2010 hearing dates.

21. For reasons that will become very obvious later in this opinion, the Chair arranged for security to be posted outside the hearing room on March 23-24, 2010. She contacted other members of the Hearing Panel but did not consult with either the Parents or District regarding the security arrangements. When the hearing began on March 23, 2010, the Father objected: (1) to having to conduct the hearing without counsel; (2) to the presence of a police officer outside the door; (3) to the Chair's refusal to grant extra time beyond the original 16.0 hours allocated to him and (4) the Chair's refusal to step aside as the Chairperson of the Hearing Panel. Tr. VII:5-9.

22. The Hearing continued on March 23 & 24, 2010. Father and Mother were present on the 23rd but left abruptly after the lunch hour on the 23rd. Tr. VII: 161-162. They did not return on the 24th. At the end of the hearing on the 24th, the District asked for (and was granted) a three week extension for the parties to file Briefs (from May 10, 2010) to June 1, 2010 and for a two week extension for filing the opinion (from June 14, 2010) to July 2, 2010.[4] The Hearing Panel remained after the hearing concluded on March 24, 2010 to discuss *at length* its decision, including Mr. Hodgson's plan to file a dissenting opinion.

23. The District filed its Brief on June 1, 2010.[5] The Parents did not submit a Brief. This opinion is issued within the timeline of July 2, 2010. [6]

24. The Petitioner introduced Exhibits A-G. The District objected to page 30 of Exhibit C and all of Exhibit F. The District objected to any and all Exhibits that were not produced within 5 business days prior to the start of the hearing in October 2009. The Chair admitted Exhibits A-Q. Tr. VI, p. 127-147; Tr. VII:72-74.

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[3]The problem with another two plus months continuance was the real risk the case (which basically has been on file since September 2008 as noted in Finding of Fact #7) would extend into still another school year before the case could be concluded. It is axiomatic that schools are closed as a practical matter over the summer months from a standpoint of having witnesses available for a hearing. Thus, based on past history of the schedules of the parties' attorneys, the next hearing dates would likely have been in September, with an opinion issued several months later.

[4]The Chair memorialized these extensions in an Order sent to the attorneys on March 26, 2010. Mr. Walker sent a detailed e-mail on April 2, 2010 indicating, *inter alia*, his clients' objections to the extensions, his withdrawal from the case and that his client would not be filing a Brief.

[5]The District's counsel had requested via e-mail a second extension of the due date to file its Brief. The Father objected to the request. The Chair denied the request.

[6] The Dissent is correct that the Chair e-mailed the 32 page Findings of Fact section in draft form to the other Panel Members on June 22, 2010 (10 days in advance of the due date for the final opinion) for review and comments. The remaining 20+ pages of the opinion were sent in draft form on June 29, 2010 for review and comments.

25. The District presented Exhibits 1-47; 49-51, 54; 62-68. Exhibits 1-3 were admitted into evidence without objection. Exhibit 4 was admitted over Petitioner's objection to the sections containing handwriting. The following pages from Exhibit 5 were admitted: 101-107; 112-114; 116; 118-119, with Petitioner objecting to page 101. Exhibit 6 was admitted over Petitioner's objection to the sections containing handwriting. Exhibit 6. The following pages from Exhibit 6 were admitted: 163-164 and 167-172, with Petitioner objecting to the admission of pages 167-172. Exhibits 8, 9 & 10 were admitted without objection. The following pages from Exhibit 11 were admitted: 193-194; 196; 198-199 & 201. The following pages from Exhibit 12 were admitted: 202; 208-210 & 216. Exhibit 13 was not admitted into evidence based on an objection made by Petitioner. Exhibit 14 was admitted into evidence. Page 236 of Exhibit 15 was admitted over an objection made by Petitioner.[7] Exhibit 16 was admitted without objection. The following pages from Exhibit 17 were admitted: 242-245 & 247. The following pages were admitted from Exhibit 18: 248 and 249. Exhibits 19, 20, 21, 22 and 23 were admitted without objection. Exhibit 24 was admitted over the objection of the Petitioner as to DESE correspondence included in the Exhibit. Exhibit 25 was admitted over the objection of the Petitioner. Exhibits 26 and 27 were admitted without objections. Exhibits 28 and 29 were admitted over the objections made by Petitioner. Exhibits 30 & 31 were admitted without objection. Exhibit 32 was admitted over the objection of Petitioner. Exhibits 33-38 were admitted without objection. Exhibit 39 was admitted over an objection made by the Petitioner. Exhibit 40 was admitted without objection. Exhibit 41 was admitted over an objection made by the Petitioner. Exhibits 42, 43, 44, 45, 46 & 47 were admitted without objection. Exhibits 49, 50, 51 and 54 were admitted over objections made by the Petitioner. Exhibits 62-68 were admitted over the objection of Petitioner as to Exhibits 65 and 68. Tr. I: 192-196; Tr. VI: 151-166; VII: 127; 130-131; 236-245; 274-275. [8]

26. There were five Hearing Panel exhibits: (1) 2009 Procedural Safeguards; (2) Student's School Schedule for 2009-2010; (3) Order for Letters of Co-Guardianship of Student entered by the Clinton County Circuit, Probate Division on June 25, 2009; (4) Opinion entered by the Hearing Panel (2-1 decision) on August 18, 2005; and (5) Opinion entered by the Hearing Panel (again 2-1 decision) after remand on March 24, 2008.

27. Witnesses for the Petitioner included: Mother; Father; Dr. Ken Quick; Dr. Chris Blackburn; Karen Westhues. The District presented the following witnesses: Dr. Ken Quick; Vickie Malott; Laura Carder; Lori Smith.

The Issues Heard by the Hearing Panel

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

(a) Did the District violate the procedural requirements of the IDEA by (a) failing to provide copies of all required notices of action, progress reports and IEPs,

[7] No other pages were offered from Exhibit 15.

[8] The Dissent makes reference (on page 7 of his opinion) to Father's Deposition but this Exhibit was neither offered nor admitted into evidence.
The Chair did not deduct from either party's 16.0 hours allotment the extensive time spent discussing the admissibility of exhibits. Similarly, no deduction was made for questions asked of witnesses by members of the Hearing Panel.

including those IEPs alleged by the Parents to be "unofficial" IEPs; (b) failing to hold IEP meetings and a triennial re-evaluation meeting at a place agreeable to the Parents; and/or (c) scheduling "unofficial" IEP meetings to which the Parents were not invited.

(b) Did the District violate the IDEA by (a) failing to provide speech and occupational therapy services; (b) improperly relying on "stay-put" to avoid the development of a new IEP; and/or (c) failing to conduct a Functional Behavioral Assessment and collect data so that an appropriate BIP could be developed?

(c) If FAPE was not provided or the IEPs not reasonably calculated to provide educational benefits, what conduct, if any, of the Parents materially contributed to the failure to provide a FAPE or the development of an adequate IEP? Did the District deprive the Parents of an opportunity to participate meaningfully in the development and/or implementation of proposed IEPs?

(d) Did the District, from 2004 until April 22, 2007, withhold information it was required to provide under the IDEA, such that the IDEA's two-year statute of limitations is inapplicable?

(e) Assuming FAPE has been denied during the period in question, what are the appropriate remedies?

BACKGROUND FACTS[9]

Student's Educational Disability

29. Student's autism is in the moderately severe to severe range and impacts him a "great deal" academically. Tr. I:253; III:156. Student's autism has a severe impact on his ability to progress in the regular curriculum and at the same rate as his peers. Tr. I:254; III:156. His autism affects his ability to communicate effectively, and he communicates best through the written, rather than the verbal, word. Tr. I:254; V:14; VII: 101, 203. Although Student has been functionally non-verbal, his verbal skills recently are developing. Tr. IV:94, 143-146; VII:101-102. Student's autism also affects his ability to, or desire to, interact with others and, accordingly, he has difficulty with social skills. Tr. VII:89, 187; IV:142. Student also has significant sensory and sensory processing issues. Tr. VII:87, 204-205. Further, Student's autism impacts his behavior and causes him to become easily frustrated and to, at times, exhibit self-stimulatory behaviors when he becomes agitated or angry. Tr. I:254; V:14; VII:87-88, 198.

Student's Educational History Covering October 20, 2000-January 3, 2004[10]

[9] We include more Background Facts than are necessary, especially in view of our holding on the statute of limitations issue. We recognize, however, that this opinion may very well be reviewed in the state or federal courts so a thorough Findings of Fact section may be helpful at the higher level. A detailed Findings of Fact section also provides context for our holding on what we see as one of the main issues in this case—-alleged lack of opportunity for parental participation in the IEP process during stay- put.

[10] This time frame covers Student's initial enrollment in the District up until when the first Due Process Complaint was filed on January 4, 2004.

30. On or about October 20, 2000, Student transferred from the Putnam County School District and enrolled in the District as a fourth grade student. Ex. R-68. On or about November 13, 2000, the District convened Student's IEP team and prepared an IEP for him, the first IEP developed at the District. Ex. R-1; Tr. I:197. Father attended and participated in that meeting that was held on school property. Ex. R-1 at 2; Tr. I:197. No issues arose with respect to Father's participation. Tr. I:197.

31. During the 2001-02 school year, Student was enrolled in and attended the District's schools as a fifth grader. Ex. R-68; Ex. R-2. On or about November 7, 2001, the District convened Student's IEP to review and revise his IEP and Father attended and participated in that IEP meeting. Ex. R-2 at 16; Tr. I:197-99. That IEP meeting also was held on school property and Father had no difficulties in participating. Tr. I:198.

32. During the 2002-03 school year, Student was enrolled in and attended the District's schools as a sixth grader. Ex. R-68.

33. On or about October 16, 2002, the District convened Student's multidisciplinary team to review the results of his three-year reevaluation. Ex. R-3 at 27; Tr. I:198. Father and his advocate, Rand Hodgson, attended and participated in that meeting. Ex. R-3 at 47; Tr. I:198. That meeting was held on school property and Father was able to participate there. Tr. I:198.

34. On or about November 6, and 14, 2002, the District convened Student's IEP team to review and revise his IEP. Ex. R-4 at 48; Tr. I:198-202. Father and his advocate, Rand Hodgson, attended and participated in both the meetings. Ex. R-4 at 49; Tr. I:199. Those meetings were held on school property and Father and his advocate were able to cooperatively participate. Tr. I:199. At the conclusion of the meeting, Father was at least in implied agreement with the IEP. Tr. I:199-200.

35. On or about April 30, 2003, the District convened Student's IEP team to discuss his need for extended school year. Ex. R-4 at 85. Father did not attend that meeting. Ex. R-4 at 85. The District offered ESY services to Student. Ex. R-4 at 85.

36. In or around the summer of 2003, the District's Superintendent sent Father a letter prohibiting him from coming onto school property based on his inappropriate conduct towards a paraprofessional.[11] Tr. I:210-215; III:148. The Superintendent, however, permitted Father to come onto school property with permission for matters such as IEP meetings. Tr. I:205-15; III:146-48. The District never refused permission for Father to go onto school property for any IEP or IEP-related meeting involving Student. Tr. III:148.

37. During the 2003-04 school year, Student was enrolled in and attended the District as a seventh grader. Ex. R-68; Tr. I:248.

[11]Contrary to Mother's testimony, the District never banned or prohibited her from going on District property to attending IEP meetings or school functions. Tr. VII: 256-257. From 2000 to the present, Mother has not attended any IEP meetings for Student. *Id*.

38. On or around August 27, 2003, Father corresponded with Dr. Kenneth Quick, the District's Director of Special Education, and scheduled an IEP meeting for Student at Parents' home. [12] Ex. R-5 at 104; Tr. I:214. Per Father, he was scheduling the meeting at his home for the convenience of both Parents. *Id.* Father's letter did not assert that he had a medical disability that prevented him from going on school property. *See Id.*; Tr. I:214. In response, Dr. Quick informed Parents, in writing, that IEP meetings would be held on school property. Ex. R-5 at 105; Tr. I:215 Dr. Quick provided Parents with permission to attend the meeting on school property. Ex. R-5 at 105; Tr. I:215. On or about August 31, 2003, Father again corresponded with Dr. Quick regarding the location of the meeting but did not assert a medical disability. Ex. R-5 at 106; Tr. I:215-16. On or about September 3, 2003, Dr. Quick corresponded with Parents and informed them that they could participate in the IEP meeting for Student that was scheduled for September 4, 2003. Ex. R-5 at 112; Tr. I:216-17. The District convened Student's IEP team on September 4, 2003, as requested by Parents, but Parents did not attend. Ex. R-5 at 113-14; Tr. I:217-18.3

39. At hearing, Dr. Quick credibly testified regarding why Father ceased attending IEP meetings at or around the fall of 2003. Tr. VII:273. Prior to that time, the District's contracted occupational therapist made a "hotline" call to the State to report her suspicion that Student may have been sexually abused. Tr. III:183; VII:273. The District did not file that hotline complaint. Tr. III:183. The District never filed a complaint of sexual abuse against the Student's family. Tr. III:184-85. Put simply, Father's anger directed at the District was unrelated to Student's IEP. Tr. VII: 273.

40. On October 6, 2003, Father pleaded guilty to a charge of public peace disturbance and was sentenced to one-year probation. Ex. R-4 at 94; Tr. I:205-08. As a condition of his probation, he was ordered not to enter onto school property without prior approval from school personnel. Ex. R-4 at 94. Subsequent to receiving the letter, the District provided Father permission to attend special education meetings on school property. Tr. I:207; *see also* Ex. R-5 at 101; Tr. I:208-09.

41. On October 10, 2003, the District provided Parents with a written notice of a meeting for an IEP meeting for Student to be held in Dr. Quick's office. Ex. R-4 at 96. On or about October 30, 2003, the District provided Parents with a second written notice for an IEP meeting to be held on November 11, 2003. Ex. R-4 at 100.

42. On or about November 11, 2003, the District convened Student's IEP team to review and revise his IEP. Ex. R-6 at 128; Tr. I:32, 221-22.[13] The Parents did not attend. Ex. R-6 at 129; Tr. I:74, 222. The team convened without Parents because the District had provided the requisite two notifications of meeting. Tr. I:219-222.

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[12]On August 22, 2003 and August 23, 2003, Father filed child complaints with DESE for (1) failure to provide copies of Student's records and (2) failure to implement occupational therapy minutes required under Student's IEP. Ex. R-5 at 102-103. On October 21, 2003 DESE found that the District was not out of compliance under IDEA. Ex. R-5 at 98-99.

[13]At hearing, Dr. Quick identified the November 2003 IEP as Student's stay-put IEP. Tr. I:32-37. After Father filed for an IDEA due process hearing in January 2004, the District continued to implement the stay-put IEP per IDEA mandates and because Parents would not agree to override stay-put. Tr. I:32-36, 229-230; II:16, 18, 26, 128, 162, 164-65.

43. The November 11, 2003 IEP noted the progress that Student had made during the previous school year and that IEP contained baseline data regarding Student's IEP goals. Ex. R-6 at 138-143. The IEP also noted that Student's ritualistic behaviors and finger biting had decreased, but needed to be monitored to prevent reoccurrence. Ex. R-6 at 143. The IEP contained goals and objectives in the following areas: telling time, money skills, reading, measuring, writing, staying on task, language, adaptive skills, motor, and sensory integration. Ex. R-6 at 144-158. The IEP also contained numerous accommodations and modifications, many of which constituted positive behavioral strategies to address Student's targeted behaviors. Ex. R-6 at 137. The IEP also provided for Student to participate in regular PE with accommodations as addressed in the IEP. Ex. R-6 at 160. The IEP also contained a behavior intervention plan as well as a sensory diet. Ex. R-6 at 131-136. The November IEP proposed a placement of 1375 minutes per week in special education, 60 minutes per week of occupational therapy, and 150 minutes per week of language therapy. Ex. R-6 at 159. The IEP also proposed a full-time paraprofessional, consultation by a behavior therapist and 30 minutes per week of recreational therapy. Ex. R-6 at 159.[14]

44. The District provided Parents with a copy of the finalized November 11, 2003 IEP on or about November 18, 2003. Ex. R-6 at 128; Tr. I:223. After that time, Parents did not inform the District that they objected to the IEP or its implementation nor did they file for an IDEA due process hearing within ten days subsequent to November 18, 2003. Tr. I:223-224. The District, therefore, was obligated to begin implementing that IEP as soon as possible. Tr. I:224. The November 2003 IEP constituted the last agreed upon IEP by Parents and the District. Tr. I:32-34, 75. The District began implementing that IEP in late November 2003. Ex. R-6 at 128; Tr. I:224.

45. On or around November 18, 2003, DESE issued its decision with respect to a child complaint that Father filed on September 4, 2003. Ex. R-7 at 167; Tr. I:225-29; III:141-43. In that decision, DESE indicated that Father had submitted a letter from Joseph Becker in which he advised Father not to enter school grounds because of a recent hospitalization for major depression and aggressive behavior. Ex. R-7 at 169; Tr. I:228. DESE found in the District's favor with respect to that allegation and concluded that the District was not out of compliance with the requirement to provide two meeting notifications prior to conducting a meeting without parents in attendance. [15] Ex. R-7 at 170; Tr. I:226-28. As Director of Special Education, Dr. Quick relied on that and future DESE decisions regarding Parents' meeting participation. Tr. III:143.

[14]In an order dated September 11, 2009, the United States District Court held that the November 2003 IEP provided Student with FAPE and also held that the District was obligated to continue implementing the November 2003 IEP due to IDEA's stay-put requirements.

[15]DESE also found that the District was not out of compliance on three of the remaining four allegations raised in the Child Complaint. While DESE concluded that the District had failed to document or share with the Parents the basis for not including a regular teacher in decisions regarding ESY and MAP-A, DESE opined that the District had given the Parents ample opportunity to participate at IEP meetings earlier that fall either at school or by telephone conference. EX R-7 at 167-172.

Student's Educational History Covering January 4, 2004-April 21, 2007[16]

46. On or about January 4, 2004, Father requested an IDEA due process hearing on behalf of Student by writing to DESE. Ex. R-8; Tr. I:229. That due process request did not allege that the November 2003 IEP was inappropriate or denied Student a free appropriate public education. Ex. R-8 at 177-78; Tr. III:140. That request also did not allege that Father had a medical disability that prevented him from going onto school property. Ex. R-8; Tr. I:230.

47. Because the District was implementing the November 11, 2003 IEP at the time the January 2004 due process request was filed, that IEP became the "stay-put" IEP under the statutory mandate. Tr. I:32, 222, 229. From January 2004 to the time of the hearing in this case, the District has never been out of "stay-put" with respect to Student. Tr. I:230.

48. After Father filed for due process, Student continued attending school in the District for the remainder of the 2003-2004 school year. Ex. R-68.

49. On or about January 26, 2004, the District provided Parents with a meeting notification for an IEP meeting to be held on February 9, 2004, at the Lathrop Police Station to discuss possible compensatory services for Student. Ex. R-9 at 191; Tr. 231. The District enclosed a copy of the IDEA procedural safeguards with that notification. Ex. R-9 at 191. The District proposed the police station as the location due to safety concerns. Tr. I:231. At the time, Father had been involved in an issue involving a gun in the community. Tr. I:231. The Parents did not attend the meeting. Ex. R-11 at 193; Tr. I:232-33. On or about February 9, 2004, the District provided Parents with a second meeting notification for the same IEP meeting to be held on February 23, 2004, also at the Police Station. Ex. R-11 at 194; Tr. I:233-34. The District enclosed another copy of the IDEA procedural safeguards. Ex. R-11 at 194. On or about February 19, 2004, the District provided Parents with an additional meeting notification for the same IEP meeting rescheduled for March 4, 2004, at the Police Station. Ex. R-11 at 199; Tr. I:234-35. The District enclosed another copy of the IDEA procedural safeguards. Ex. R-11 at 199.

50. On or about March 4, 2004, the District convened Student's IEP team at the Police Station to discuss compensatory services. Ex. R-12 at 202; Tr. I:235. Father attended and participated in the meeting. Ex. R-12 at 202; Tr. I:231, 236. The meeting was held without difficulty. Tr. I:231, 236. [17]

51. On or about April 19, 2004, attorney Stephen Walker entered his appearance with respect to the January 2004 due process request. Ex. R-14. Ten days later, he filed a pleading called Clarification of Issues {basically an amended Due Process Complaint} which contained no allegation of an IDEA violation for failing to schedule IEP meetings at a neutral location because of Father's alleged disability. Ex. R-16.

[16]This time frame covers the date of the filing of the first due process complaint against the District on behalf of this Student up to two years before the filing of the current due process complaint -- the **seventh** due process complaint--against the District on behalf of this Student.

[17]Near this time, the Parents completed a Consent Form for Student to participate in Special Olympics at the District football field. Parents indicated on the form that they would be attending. Ex-R 12 at 216.

52. On or about April 20, 2004, Student's IEP team convened to discuss his need for extended school year services and Father attended that meeting. Ex. R-15 at 235-36; Tr. I:242. The District offered ESY services to Student. Ex. R-15 at 235; Tr. I:242-45. From January 2004 through the time of hearing, Student never attended ESY services even though the District offered these services annually. Tr. I:242-45.

53. On or about May 14, 2004, the District provided Parents with written notification of an IEP meeting for Student at the Police Station to discuss a parent request to discuss placement. Ex. R-17 at 242; Tr. I:246-47. The District again proposed the police station for safety reasons. Tr. I:247. The District enclosed a copy of the IDEA procedural safeguards. Ex. R-17 at 242. On or about May 18, 2004, Student's IEP team convened at the Police Station to discuss the parent's request regarding placement and Father attended and participated. Ex. R-17 at 244; Tr. I:247. Upon the conclusion of the meeting, the District refused Father's request for a change of placement to Positive Behavioral Milestones ("PBM") [a private school for autistic students] and provided him with a written notice of action to that effect. Ex. R-17 at 245. The written notice of refusal references the IDEA procedural safeguards. Ex. R-17 at 245.

54. On or about May 24, 2004, the District informed Parents that the compensatory speech time owed to Student had been completed. Ex. R-17 at 247.

55. During the first half of the 2004-05 school year, Student did not attend school in the District. Ex. R-68; Tr. I:180, 249. Because Student was not in attendance, the District did not and was not obligated to convene Student's IEP team to conduct an annual review of his IEP. Tr. I:258.

56. On or about January 24, 2005, Parents re-enrolled Student in the District in response to a statement made by the January 2004 due process panel chair. Ex. R-68; R-18 at 248-49; Tr. I:249-51, 252. Student, therefore again began attending school and did so through the remainder of the 2004-05 school year. Ex. R-68. When Student returned, he did not appear to have regressed from the time of his prior attendance. Tr. I:254. Upon his re-enrollment and attendance, the District resumed implementation of the stay-put IEP. Tr. I:255. Because of Student's lack of attendance during 2004-05, the stay-put IEP remained appropriate for him. Tr. III:137-138.

57. On or about April 5, 2005, the District provided Parents with a notification of meeting for an IEP meeting for April 19, 2005 at the Police Station to discuss extended school year. Ex. R-19 at 252; Tr. I:257. The District enclosed a copy of the IDEA procedural safeguards. Ex. R-19 at 252; Tr. I:257. On or about April 7, 2005, Dr. Quick corresponded with Father regarding the April IEP meeting that he requested and informed him that the parties remained in stay-put and IEP changes could, therefore, be made only with agreement of the parties. Ex. R-19 at 254; Tr. I:257.

58. During the 2005-06 school year, Student attended school in August and September 2005. Ex. R-68; Tr. I:259-60. Parents withdrew him in October 2005 and he did not

attend school for the remainder of that school year.[18] Ex. R-68; Tr. I:258; II:31. Because of his lack of attendance for a good part of the prior school years, the stay-put IEP remained appropriate for him. Tr. III:138.

59. On or about August 31, 2005, Father filed a child complaint with DESE alleging that the District had failed to conduct annual IEP meetings for Student. Ex. R-20 at 259; Tr. I:258-59.

60. In September, October and December 2004 and March, April and June 2005, the DESE appointed three-member panel held an 18-day due process hearing with respect to the Father's January 2004 due process request. Father was represented by legal counsel, Stephen Walker, during that process. On or about August 18, 2005, the three member panel issued its decision. A panel majority, consisting of Kenneth Chackes and Marilyn McClure, found – in part – in favor of the parents, including ordering a change in the placement of Student to a private setting such as Sherwood or PBM. Panel Exhibit 3. A separate majority consisting of Chairperson Chackes and Dr. Terry Allee found – in part – for the District. Panel Exhibit 3. Dr. Allee also wrote a dissent with respect to the portions of the decision issued in favor of Parents. Panel Exhibit 3.[19]

61. In or about September, 2005, the District filed a Complaint in the United States District Court for the Western District of Missouri seeking judicial review of the adverse components of the Panel decision. Ex. R-63; *see also* Tr. I:17. Parents filed a counterclaim in which they sought, *inter alia*, judicial review of the parts of the administrative decision that were adverse to them. Ex. R-63.

62. Because of the parties' complaints seeking judicial review, Student remained in stay-put and, therefore, the District did not implement the relief ordered by the Panel Majority in August 2005. Tr. II:161. During the pendency of the case, Parents never took any action to seek judicial enforcement of the relief ordered by the two-member Panel majority in the August 2005 administrative decision. Tr. III:135.

63. On or about September 19, 2005, the District provided Parents with written notification of an IEP meeting for Student for October 3, 2005, to be held at the High School Counselor's office. Ex. R-21 at 264; Tr. I:43-44, 260. Dr. Quick's office, which is where meetings had been held in the past, was not in the high school. Tr. I:260-61. The District decided to hold the meeting at the high school because of the number of people involved and so that teachers could participate and then return to class. Tr. I:261. In part, that location was chosen so that the time that staff were removed from instructional responsibilities was reduced. Tr. I:261-62.

64. In response and on or about September 29, 2005, Father corresponded with Dr. Quick and stated that his "medical disabilities" prevented him from attending meetings on school property but also indicated that the police station might be too small. Ex. R-21 at 268; Tr. I:262;

[18]Student attended PBM for 30 days that fall. He was then home-schooled. Tr. VI: 113.

[19] As noted, Panel Member Dr. Terry Allee served on the Hearing Panel in the earlier case. Panel Member Rand Hodgson, former advocate for Parents, was called as a witness by the Parents.

III:167. On or about September 30, 2005, Father again corresponded with Dr. Quick and objected to the District holding meetings without his attendance. Ex. R-21 at 269; Tr. I:263. He again asserted that he was unable to attend meetings on school property because of a medical condition. Ex. R-21 at 269; Tr. I:263.[20] On or about September 30, 2005, Dr. Quick corresponded with Father and explained to him the reasons for holding the meeting on school property, including the fact that Father had attended a conference for his daughter there during the 2004-05 school year. Ex. R-21 at 270; Tr. I:45-49, 263. Dr. Quick also offered Father the ability to participate in the meeting by telephone. Ex. R-21 at 270; Tr. I:45, 263. On or about September 30, 2005, the District provided Parents with an additional notification of meeting for an IEP meeting to be held on October 10, 2005 at the High School Counselor's office. Ex. R-21 at 271; Tr. I:263-64.

65. In or about October, 2005, Father withdrew Student from the Lathrop R-II School District and provided him with home schooling. Ex. R-68. Tr. I:185-186, 249-251; II:34-35; VI:101-102, 114.

66. On or about October 10, 2005, the District convened Student's multidisciplinary team to review existing data as part of Student's required three-year re-evaluation. Ex. R-22; Tr. II:12-14. A review of existing data is held to gather information about a student, assess where that student is and determine if evaluation is necessary. Tr. II:12. A review of existing data is part of and can constitute the three-year reevaluation. Tr. II:13. If the district and parent agree to conduct standardized testing, that also could be completed. Tr. II:12. The Parents did not attend or participate in the meeting, in person or by phone, although they had an opportunity to do so. Ex. R-21, 264-265, 270-271; Tr. I:49, 262, 264; II:13. The team attempted to contact Parents by phone but was unable to do so. Tr. I:44-45. Parents also did not provide the team with any existing data or other input. Tr. II:13. The team determined that a "full" re-evaluation, with assessment, was not necessary and would not change Student's categorical disability. Tr. II:14. Because standardized assessments do not provide a true and accurate picture of Student due to his autism, the team concluded that it did not need to conduct any such assessments. Tr. II:14.

67. Subsequent to the review of existing data meeting, the District provided Parents with a copy of the Review of Existing Data documentation that included a written notice describing the team's conclusions and determinations and notified Parents of their right to request re-evaluation with assessment. Ex. R-22 at 275-79; Tr. II:14-16; III:149-50, 243-45. The District also provided Parents with the annual copy of the procedural safeguards. Tr. II:16.[21] Parents never requested that the District complete a re-evaluation with assessment in response to that form. Tr. II:15-16.

[20]Father did not enclose a letter from a medical provider with his correspondence. Tr. I:263. Dr. Quick, however, had learned of Father's alleged disabilities during the course of the 18 day hearing referenced in FF#60. Tr. I:40. Dr. Quick also had some awareness of a disability claim mentioned in DESE's ruling on one of Father's Child Complaints. See FF #45. On April 11, 2003, Dr. Quick was subpoenaed to testify in a commitment proceeding against Father to keep him confined involuntarily in a state mental hospital so Dr. Quick had notice of mental issues then . Tr. V: 54; 262-266.

[21]At hearing, Dr. Quick testified that the IDEA as it exists since 2004 requires that a district provide the parents with only an annual copy of the procedural safeguards. Tr. II:6.

68. On the same date, October 10, 2005, the District also convened Student's IEP team to review and revise Student's IEP. Ex. R-23 at 281; Tr. I:14-15, 17, 130. The Parents did not attend that meeting. Tr. I:70; II:17. The October 2005 IEP included goals and objectives in the following areas: telling time, money, shopping, following directions, reading comprehension, writing, social skills, sensory, adaptive behavior independence, recreational movement, hygiene, language, and time. Ex. R-23. The present level of the IEP noted Student's lack of attendance as well as the progress he was making in spite of that lack of attendance. Ex. R-23. The IEP included a behavior plan and sensory diet and provided for placement and services consistent with the November 2003 stay-put IEP. Ex. R-23; Tr. I:130-31.

69. The District provided Parents with a copy of the October 10, 2005 IEP on or about October 28, 2005. Ex. R-23; Tr. I:71-73; II:17-18. The IEP noted that it could not be implemented without parent and District agreement. Ex. R-23; Tr. I:16. Subsequent to that date, Father did not communicate a willingness to override stay-put or change the IEP. Tr. II:18. As a result, the District never implemented the 2005 IEP. Tr. II:18.

70. On or about October 10, 2005, Dr. Quick corresponded with Parents regarding the Review of Existing Data and IEP meetings. Ex. R-22 at 280; Tr. I:73; II:15-16. In that letter, Dr. Quick stated that the team had attempted to telephone Parents at home, but the line was not in service.[22] Ex. R-22 at 280. Dr. Quick also informed Parents that the team was able to convene without them because the District previously had provided two meeting notifications. Ex. R-22 at 280. Dr. Quick enclosed the annual copy of the IDEA procedural safeguards that the District was required to provide. Ex. R-22 at 280. Finally, Dr. Quick reminded Parents that Student remained in stay-put. Ex. R-22 at 280; Tr. II:16. Subsequent to the letter, Parents never indicated a willingness to override stay-put so that the October 2005 IEP could be implemented. Ex. R-23 at 281; R-24 at 335; Tr. II: 16, 162.

71. On or about October 20, 2005, Father corresponded with Dr. Quick and said if a re-evaluation was done for [Student], Father requested an independent evaluation at public expense. Ex. R-24 at 328; Tr.I:79; II:24-25. The letter did not indicate that Parents wanted the District to conduct additional assessments. Ex. R-24 at 25; Tr. I:79; II:15, 25; Tr. IV:11. On or about October 28, 2005 and in response to Parents request for an independent evaluation, Dr. Quick corresponded with Parents and noted that, because Student's team decided no further assessment was necessary as part of the 2005 re-evaluation, there was "no basis on which [Parents could] seek an independent evaluation." Ex. R-24 at 333; Tr. I:84-86; II:27-28. That letter again stated that Parents had a right to request that the District conduct additional assessments. Ex. R-24 at 332; Tr. II:27-28. Dr. Quick also provided Parents with a copy of the District's Board policies relating to independent evaluations and referenced the previously provided IDEA procedural safeguards. Ex. R-24 at 332-33. After that time, Father never presented any outside evaluations to the District and requested payment. Tr. II:28.

72. On or about October 24, 2005, the District provided Parents with a written notice of action refusing Parents' television interview request for a change of placement. Ex. R-24 at

[22]Dr. Quick gave a contradictory answer later when he testified the telephone number for Parents was either busy or nobody answered. Tr. IV: 20. The Parents contend that the phone numbers on the 2005 IEP and the 2007 IEP were the same (and were wrong). Tr. I: 44;91. *See also* Ex. P-C at 35A.

331; Tr. II:26-27. The District refused the requested change of placement because that placement was considered too restrictive and did not offer Student the opportunity for integration. Ex. R-24 at 331; *see also* Ex. R-24 at 335; Tr. II:28.

73. During the 2006-07 school year, Student did not attend the Lathrop R-II School District. Ex. R-68; Tr. II:30-31, 33. Per Parents, Student was home-schooled at the time.[23] Tr. I:60. Accordingly, the District and Student's IEP did not prepare an IEP for him. Tr. I:59.

74. In early August 2006, Parents requested an IEP meeting, although Student was not enrolled in the District, and requested that the meeting not be held on school property. Ex. R-27 at 342, 344; Tr. II:32, 34-35. At the time, the District did not know if Student would attend the 2006-07 school year. Tr. II:33. On or about August 21, 2006, Dr. Quick responded to Parents' request for a meeting. Ex. R-27 at 345; Tr. II:35. In that letter, Dr. Quick informed Father that Student was considered a home-schooled student and a privately schooled student for purposes of IDEA. Ex. R-27 at 345; Tr. II:35, 46. Dr. Quick also informed Father that, because Student was home-schooled, the District had no obligation to develop an IEP for him. Ex. R-27 at 345. Finally, Dr. Quick informed Father that, if Student re-enrolled, the District would conduct an IEP meeting but that, because of the pending federal court case, Student remained in stay-put. Ex. R-27 at 345.

75. On or about August 21, 2006, Dr. Quick again corresponded with Parents and enclosed a notification for a meeting to be held at the high school counselor's office on August 24, 2006. Ex. R27 at 346-47; Tr. II:47. In that letter, Dr. Quick inquired as to Student's educational status and noted that Student was not in attendance at the District. Ex. R-27 at 346. Dr. Quick further noted that Student remained subject to stay-put and, if Student re-enrolled, the District would begin implementing the stay-put IEP. Ex. R-27 at 346. In addition, Dr. Quick explained to Parents that the meeting would not be held off-campus because Father had recently attended at least one conference at the high school for his daughter without difficulty, and that during the recent due process hearings and depositions, staff did not observe anything that would suggest that Father's medical diagnoses prevented him from attending a meeting at the high school. Ex. R-27 at 346. Further, Dr. Quick's letter again gave Parents the opportunity to participate by telephone. Ex. R-27 at 346. Parents did not attend the meeting on August 24, 2006. Tr. II:47.

76. On or about September 7, 2006, the District provided the Parents with an additional notification for meeting for September 18, 2006 at the high school counselor's office. Ex. R-28 at 350. They did not attend. Tr. II:47.

77. On or about September 27, 2006, the District provided the Parents with yet another notification for a meeting to be held on October 10, 2006 at the high school counselor's office. Ex. R-28 at 352. The Parents did not attend. Tr. II:54. On or about October 10, 2006, the District provided the Parents with another notification for a meeting for October 24, 2006 also at the high school counselor's office. Ex. R-28 at 354. The Parents did not attend the meeting and never enrolled Student for the 2006-2007 school year. Ex. R-68; Tr. IV:16.

[23]Father's testimony indicated that the first part of the home- schooling was targeting a reduction in Student's behaviors. He also said: "We don't necessarily teach the regular course and we're not required to." Tr. VI: 114-118.

78. On October 23, 2006, as part of the litigation referenced in FF#61, the District attorney, Teri Goldman, deposed Joseph E. Becker, a licensed clinical social worker. Ex R-54 at 1497-1561. Mr. Becker began seeing Mother and Father for counseling in 2003. He testified to the following:

(a) He diagnosed Father as having major depression recurrent with psychotic features and paranoia, a diagnosis that has not changed over time. Mr. Becker indicated that Father had ideations of suicide and homicide: "He felt like killing people and he was having urges to kill people." *Id*. at 1506-1508; 1530.

(b) Mr. Becker also described the panic attacks experienced by Father – triggered by certain places and people. Father has told Mr. Becker that Dr. Ken Quick is a trigger for panic attacks. *Id.* at 1508-1509. *Father reported to Mr. Becker that he has called Dr. Quick a son-of-a-bitch. Id*. at 1509.

(c) He was aware that Father had been committed by a judge to a state hospital for a period of time "because of his homicidal behavior according to the witnesses." *Id*. at 1513-1514.

(d) Father is a danger to himself or others at times. *Id.* at 1515.

(e) Mr. Becker thought Father had problems with "the office people" at the school so he recommended that he stay off school property to avoid running into the office people. *Id.* at 1538-1539.

(f) He has never diagnosed Mother with any psychological disorder.[24] *Id*. at 1543. Mr. Becker knew of no reason that she could not attend Student's IEP meetings. *Id*. at 1554.

(g) He has never discussed with Father the option of attending IEP meetings by telephone conference rather than be in the same room with Dr. Quick. *Id.* at 1553.

(h) When District counsel inquired if there was anything about Father that has not been asked that he thought is important to know, Mr. Becker answered:

> No. I just think the man has a very, very bad case of depression, and I think it is severe., and I think that he could be pushed to kill himself or maybe possibly kill somebody else, or kill somebody else and himself, too. But, you know, I think that he would have to be severely pushed. I think that it is a possibility. *Id*. at 1552.

[24]Father also testified there was no medical reason that mother could not attend IEP meetings. He said that she wants "to take care of the home stuff and let me take care of the business end of things." Tr. VI: 108.

79. On or about February 12, 2007, the United States District Court for the Western District of Missouri reversed and remanded the decision of the August 2005 administrative decision based on a change in the burden of proof by the U. S. Supreme Court. *See Lathrop R-II Sch. Dist. v. [Student]*, 2009 WL877670 at *1 (W.D. Mo. 2009).

Student's Educational History Covering January April 22, 2007-April 22, 2009[25]

80. On or about August 14, 2007, Father re-enrolled Student in the Lathrop R-II School District.[26] Ex. R-68; Tr. I:185-186, 249-251; VI:101-102, 114. Student attended the 2007-08 school year in its entirety. Ex. R-68; Tr. II:57. Because of his lack of attendance for the prior two years, the stay-put IEP continued to be appropriate for him. Tr. III:138-39.

81. On or about September 6, 2007, the District provided Parents with a notification for an IEP meeting to be held on September 27 at the high school counselor's office. Ex. R-27 at 348-49.

82. On or about September 27, 2007, the District convened Student's IEP team. Ex. R-28 at 356; Tr. II:53. Because Parents did not attend, the District had to reschedule the meeting. *See* Ex. R-27 at 356-5; R-27 at 352; Tr. II:53-54.

83. On or about September 27, 2007, the District provided Parents with a notification for a meeting for October 9, 2007. Ex. R-28 at 391.

84. On or about October 9, 2007, the District convened Student's IEP to review and revise his IEP. Ex. R-29 at 394; Tr. I:59-60, 87-88; II:55; III:194-95. The Parents did not attend in person or by phone. Ex. R-29 at 394-95; Tr. I:70. The present level of the IEP noted the progress that Student had made in spite of his lack of attendance. Ex. R -29 at 397. The October 2007 IEP included goals and objectives in the following areas: telling time, money, shopping skills, following directions, reading comprehension, writing, social skills, labeling, emotions, language, social language, sensory, adaptive behavior independence, recreational movement, and hygiene. Ex. R-29. Some of those goals were considered to address transition. Tr. III:195. The IEP provided for special education services, language therapy, adaptive physical education and occupational therapy consistent with the stay-put IEP. Ex. R-29 at 426. The draft IEP included a behavior plan. Ex. R-28 at 389-90.

85. Because Student had not attended school for almost two full years at the time the October 2007 IEP was developed, the stay-put IEP continued to be appropriate for him. Tr. III:138-39. [27]

[25]This time frame covers the applicable two year statute of limitations to this case. As noted later in the opinion, we find no basis for an exception to the two year statute of limitations.

[26]As noted in our Findings of Fact, Student attended just one semester in the District from August 2004-August 2007. Except for a brief time at PBM, Student was home-schooled during his absence from the District.

[27]Dr. Quick, however, did testify that the stay-put IEP was not appropriate for Student in 2007-2008; 2008-2009 and 2009-2010 school years because of the progress that Student had made. Tr: I:36-38.

86. The District provided Parents with a copy of the September draft and October 2007 IEPs on October 9 and 12, 2007, respectively. Ex. R-28 at 392; R-29 at 394; Tr. I:88-89; Tr. II:54. The District also provided Parents with another copy of the IDEA procedural safeguard and reminded Parents that the District could not implement a new IEP, without agreement, because Student remained in stay-put. Ex. R-28 at 392; Tr. I:88; II:54; Tr. III:30-31.

87. On or about March 12, 2008, Father filed a second Due Process Complaint with regard to Student alleging, in part, that the District denied Student a FAPE by refusing transportation. Ex. R-30 at 440-46; Tr. II:55-57. After the request was filed, the District and Father held a telephone conversation and the District agreed to provide transportation. Tr. II:56. The parties, thus, were able to resolve that Due Process Complaint and the District began providing Student with transportation based on a partial override of stay-put. Ex. R-30 at 466-67; Tr. I:127; II:57-58; VII:255; Ex. R-30. Prior to that time, the District had offered transportation as a related service to Student, but it was not included in the IEPs because Parents refused that transportation and chose to bring Student to school. Tr. II:56.

88. On or about March 17, 2008, the first due process Panel, consisting of Chackes, McClure and Allee, issued their Decision on Remand. Panel Exhibit 4. In that remand decision, Panel Members Chackes and McClure concluded that their original decision would stand and they continued to rule in favor of the parents with respect to the issues on which they originally found in favor of the parents. Dr. Allee again filed a separate dissenting statement. Panel Exhibit 4.

89. On or about April 18, 2008, the District filed a Complaint in the United States District Court for the Western District of Missouri requesting judicial review of the Panel Majority's March 17, 2008 remand decision. *See Lathrop*, 2009 WL877670 at *1. Parents filed counterclaims. *Id.* Because of the continued pendency of these complaints, Student remained in stay-put.

90. In April 2008, Father informed the District's counsel that Mr. Walker remained his attorney. Ex. R-30 at 464.

91. On or about May 20, 2008, the District corresponded with Parents regarding Student's progress reports. Ex. R-31 at 469. Tr. II:58-59. The District provided Parents with quarterly progress reports on Student's IEPs goals as required by IDEA. Tr. II:59.

2008-2009 School Year

92. During the 2008-09 school year, Student attended the Lathrop R-II School District for the entire school year. Ex. R-68.

93. On or about August 26, 2008, the District provided Parents with a notification for a meeting for September 5, 2008 to review existing data as part of Student's three-year re-evaluation at the high school counselor's office. Ex. R-32 at 470-71; Tr. I:168; II:61-62. The District decided to have the meeting at the new high school to allow for participation of all the necessary people. Tr. II:62. On or about September 5, 2008, the District provided Parents with a

second notification for a meeting at the high school counselor's office for September 15, 2008 for a review of existing data and to review and revise Student's IEP. Ex. R-32 at 473. Parents did not respond to those notifications. Ex. R-32 at 470-74.

94. On or about September 15, 2008, Student's multidisciplinary team convened and conducted the review of existing data. Ex. R-32 at 477-82. Parents did not attend, in person or by telephone. Tr. II:63; Ex. R-32 at 477-482. The team determined that no additional data was necessary for purposes of the three-year re-evaluation and sufficient information existed to determine that Student continued to be a student with a disability under the IDEA. Ex. R-32 at 482. The review of existing data constituted the District's three-year re-evaluation of Student. Tr. II:65. The District provided Parents with the documentation of the review, including the notice of action informing Parents that they could request additional assessment. Ex. R-211 at 476, 482; Tr. II:64; III:150. The District also provided Parents with a copy of the IDEA procedural safeguards. Tr. II: 64; III:150; Ex. R-32 at 476, 482. After the District provided Parents with the review of existing data documentation, the District never received a parent request to assess Student using standardized tests. Tr. II:64.[28]

95. On or about September 15, 2008, the District provided Parents with a second notification for an IEP meeting to be held on October 8, 2008 at the high school counselor's office. Ex. R-3at 483; Tr. II:66-67.

96. On or about September 29, 2008, Father filed a third Due Process Complaint in relation to Student. Ex. R-33 at 485-491; Tr. II:68.

97. On or about October 1, 2008, Dr. Quick corresponded with Parents to remind them of the IEP meeting scheduled for October 8, 2008. Ex. R-34 at 502; Tr. II:69. In that letter, he offered them the option of participating by telephone or to have the IEP meeting at the Clinton County Alternative School in Plattsburg, Missouri. Ex. R-34 at 502; Tr. II:69. That alternative school is on the property of the Lathrop School District. Tr. II:69. The District offered that location thinking that it would be an acceptable place for all involved parties and because the District wanted Father to attend in person. Tr. II:71. Parents did not indicate that would be an acceptable location. Tr. II:69.

98. On or about October 8, 2008, the District convened Student's IEP to review and revise his IEP. Ex. R-35 at 507; Tr. I:89; II:70-72. The Parents did not attend, in person or by telephone. Ex. R-35 at 507; Tr. II:67, 72-73. The present level of the IEP that was developed noted Student's progress since the development of the prior IEP in the fall of 2007. Ex. R-35 at 509. The IEP included a behavior plan as well as numerous accommodations and modifications. Ex. R-35 at 518-19. The IEP included measurable goals in telling time, money, shopping skills, following directions, reading comprehension, writing, social skills, answering social questions, identifying emotions, speech and language, answering questions, sensory, independence in

[28]Parents' Exhibit at 30 purports to be a letter dated September 4, 2008 from Father to Dr. Quick asking for an independent evaluation. Tr. II:65-66. The District did not receive that letter. Tr. II:65-66. The letter does not indicate that it was hand-delivered to Dr. Quick or anyone acting on his behalf. Tr. II:66. Moreover, the letter is dated on a date that was prior to the team's review of existing data. Tr. II:66. The District did not receive any written communication in relation to the review of existing data after September 15, 2008. Tr. II:66.

adaptive skills, recreational movement, and hygiene.[29] Ex. R-35 at 520-31. The IEP provided for special education and related services, including language and occupational therapy, consistent with the services provided in the stay-put IEP. Ex. R-35 at 532; Tr. I:133.

99. The October 2008 IEP also included a transition page for Student. Ex. R-35 at 540-41; Tr. II:73. However, the IEP team was significantly restricted in developing the transition component of the IEP due to Parents refusal to attend meetings and/or override stay-put. Tr. II:73-75. The District preferred to obtain the involvement of outside agencies in the process but, because that would require parental consent, the District was unable to get outside agencies involved. Tr. II:73-75; III:195-196; VII:248. The team discussed Student's strong computer skills and suggested that he be able to provide Brailled documents for blind students. Tr. II:74. The District was unable to do that as a result of stay-put. Tr. II:74.

100. On or about October 8, 2008, the District provided Parents with a notification of a resolution session meeting for October 14, 2008, that was required by Parents' September 29, 2008 due process request. Ex. R-36 at 544; Tr. II:77. The District proposed holding the meeting off-school property at the Clinton County Alternative School. Ex. R-36 at 544-48; Tr. I:135-36; II:77. Parents did not attend and did not participate by phone. Tr. II:77-78.

101. On or about October 10, 2008, the District provided Parents with a copy of the October 8, 2008 IEP. Tr. II:73; Ex. R-35 at 507. Subsequently, Parents did not correspond with the District regarding the content of the IEP and the Parents did not communicate any intention to override stay-put so that the IEP could be implemented. Tr. II:73.

102. On or about October 15, 2008, Dr. Chris Blackburn, the District's Superintendent, corresponded with Father regarding the reasons the District needed to hold IEP meetings on school property. Ex. R-36 at 550; Tr. I:139; II:78. In that correspondence, she provided multiple possible locations on school property and also offered telephone participation to the Parents. Ex. R-36 at 550.

103. On or about October 22, 2008, Father withdrew his third due process complaint and, on or about October 29, 2008, filed a fourth due process complaint that was almost identical to the third in an attempt to obtain a different chairperson. Ex. R-33 at 501, R-37 at 551-559; Tr. II:68, 80. On or about December 15, 2008, the chairperson of the fourth due process case dismissed the case due to Father's failure to respond to the District's sufficiency challenge. Ex. R-37 at 572, 573, 590.

104. On or about November 3, 2008, the District provided the Parents with a notification for a resolution meeting in relation to the most recently filed due process request. Ex. R-37 at 561. The District proposed holding that meeting at the high school conference room or the school board meeting room. Ex. R-47 at 561.

105. On or about November 3, 2008, Father filed a fifth due process complaint on behalf of Student. Ex. R-38 at 591-598; Tr. II:81.

[29]The goals in the draft IEP were substantially similar (other than changes to the percentages) to the goals proposed in the previous IEPs submitted to Parents while in stay-put status. Tr. I: 68.

106. On or about November 5, 2008, Father corresponded with Dr. Blackburn regarding the scheduled resolution meeting and stated that he could not attend any meetings on school property. Ex. R-37 at 564.

107. On or about November 10, 2008, the District provided Father with notification of a resolution meeting to be held in response to his November 3, 2008 due process request. Ex. R-37 at 599-601. The District scheduled that meeting at the high school conference room or the Board of Education office. Ex. R-37 at 599-601.

108. On or about November 6, 2008, the DESE corresponded with Father regarding his numerous due process filings on behalf of Student and his other son. Ex. R-39. In that correspondence, DESE noted that, on November 5, 2008, Father contacted the Department to question whether he could file and withdraw the various cases in an attempt to obtain a different Chairperson. Ex. R-39 at 613. As noted by DESE, "[t]he provision on reappointment of Chairperson upon re-filing was put into place to prohibit repeated filings and withdrawals to obtain a particular Chairperson. The actions you inquired about are precisely the actions that that the reappointed provision is intended to prevent." Ex. R-39 at 613.

109. On or about January 2, 2009, Father filed a sixth due process complaint against the District on Student's behalf. Ex. R-40 at 6221-33. DESE assigned Patrick Boyle to serve as the Panel Chair. Ex. R-40 at 630. After Father utilized DESE's substitution procedures to request substitution for Mr. Boyle, DESE assigned Pamela Wright to serve as Chair. Ex. R-40 at 630.

110. On or about January 8, 2009, the District filed a Motion to Consolidate the pending November 3, 2008 and the January 2, 2009 due process requests. Ex. R-40 at 635. However, on or about January 13, 2009, Father withdrew his November 3, 2008 due process complaint. Ex. R-38 at 611.

111. The following is a chronology of key facts in the January 2, 2009 proceeding:

(a) After Stephen Walker entered his appearance on behalf of the Parents on February 4, 2009, Chairperson Wright held a Pre-Hearing Conference with the parties by telephone conference to discuss the issues in the case as well as to set hearing dates. The Chair indicated a willingness to accommodate the Parents' request to hold the hearing at a location other than school property. The attorneys agreed to hearing dates of April 21-24, 2009 at City Hall. Mr. Walker also agreed to file an amended complaint by February 13, 2010. Ex. R-40 at 690.

(b) On February 13, 2009, Mr. Walker filed Petitioners' Supplementation of Issues. Ex. R-40 at 692.

(c) On March 4, 2009, the Chair issued a Scheduling Order stating, *inter alia*, the issues to be decided on by the Hearing Panel. Ex. R-40 at 719-722.

(d) On April 6, 2009, Mr. Walker filed a Motion for Continuance via e-mail. The District opposed the Motion. The Chair denied the Motion on April 8, 2009.

(e) As a result of not getting the requested continuance, the Parents withdrew their (sixth) due process complaint against the District but refiled on April 22, 2009 (the seventh and current due process complaint on behalf of Student). Ex. R-62 at 1884-1891.

Events Subsequent to the Filing of the Due Process Complaint on April 22, 2009

112. On or about September 11, 2009, the United States District Court for the Western District rendered its decision with respect to the parties' respective complaints filed in that court. Ex. R-63 at 1995; Tr. I:176. The District Court granted the District's Motions for Summary Judgment and for Judgment on the Pleadings. Ex. R-63. More specifically, the District Court held that the Panel Majority of Chackes and McClure erred in holding that the District denied Student a FAPE through the 2002 and November 2003 IEPs and in concluding that the IDEA required baseline data. Ex. R-63. The District also found that the Majority of Chackes and McClure erred in finding that the District's 2002 and 2003 IEPs did not adequately address Student's behaviors. Ex. R-63. The District Court further held that the Panel Majority erred in ordering the District to change Student's placement to a private school such as PBM or Sherwood because no such remedy was necessary or available, since the District complied with the IDEA and the record did not support the Panel Majority's finding of animosity. Ex. R-63. Further, the District Court held that all counterclaims asserted by Parents were without merit. More specifically, the District Court affirmed the Panel's decision that the District had not violated Parents' right of participation and that Parents were not entitled to reimbursement for or compensation for private education. Ex. R-63. The District Court specifically held that Parents had pled no facts proving that either Mother or Father a disability as defined by Section 504. Ex. R-63 at 2019. In denying Parents' counterclaims alleging that the District failed to immediately adopt and comply with the 2004 Panel decision, the District Court reasoned that the IDEA's stay-put provision "negates these claims." Ex. R-63 at 2018. As noted by the Court, "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." *Id.*

113. On or about October 10, 2009, Parents appealed the District Court's September 11, 2009 decision to the United States Court of Appeals for the Eighth Circuit. That matter remains pending and oral argument occurred on June 17, 2010. Ex. R-64.

114. On or about October 26, 2009, the District held Student's annual IEP meeting at the District's high school. Parents again did not attend in person or by telephone. Tr. II:127; *see also* Ex. R-67 at 2047; Tr. II:125-26.

Due Process Hearing Testimony from October 27, 2009-March 24, 2010

Dr. Ken Quick

115. Both parties called Dr. Quick to testify. Tr. I:31, 173. At the time of his testimony, he had been employed as the District's special education director for ten years. Tr. I:174. He has worked in the field of public education for at least thirty-six years. Tr. I:174. Dr. Quick has a bachelor's degree, a master's degree, a specialist degree and a doctorate in educational administration. Tr. I:174. Dr. Quick testified very credibly, *inter alia,* to the following:

(a) The November 11, 2003 IEP was Student's stay-put IEP that the District implemented from January 2004 to the time of hearing in 2010. Tr. I:32-37, 103-104 229-230; II:16, 18, 26, 128, 162, 164-165. Although not obligated to do so, the District continued to convene Student's IEP team on an annual basis during the years that Student was in attendance to provide services that would build on the progress Student was making. Tr. II:18-19; Tr: II:276-277. In developing Student's IEPs after January 2004, the District believed that it was bound by stay-put to write future IEPs that were close in content to the stay-put IEP. Tr. II:19. Had the parties not been in stay-put, the District would have modified the IEPs even more. Tr. II: 19-20. More specifically, the team had discussed decreasing the speech and language therapy identified in the stay-put IEP. Tr. II:19-20. Although bound by the stay-put IEP, the District provided Student with instruction above and beyond the stay-put IEP because Student progressed beyond those levels. Tr. II:128-129; VII:245. Given the number of years Student was in stay-put, " it would have been a disservice to Student had [the District] stayed strictly to the goals and objectives of the stay-put IEP." Tr. VII:246. Dr. Quick further testified that there has never been any "unofficial or secret" IEPs or IEP meetings. Tr. VII:253.

(b) Student has progressed since 2004, including an increase in academic abilities, and that he has been able to communicate with his paraprofessional, maintain focus, complete assignments and de-escalate from an agitated state. Tr. II:20-21. He further testified that "even with the extended period of time that [Student] was absent…he's always managed to come back and pick up where he left off and to move forward." Tr. VII:259. Despite the District's mandate to "stick to" the stay-put IEP, Student has received a FAPE in the District during the relevant time period. Tr. VII:246-248.

(c) Father attended and was able to effectively participate in several IEP meetings on District property between 2000 and 2002 without incident. Tr. I:197-199; II:131. In addition, after the Superintendent limited Father's ability to be on school property, the District always gave him permission to come onto school property for IEP meetings. Tr. I:205-215; III:148. The District also provided Parents with the opportunity to participate by telephone, but they declined to do so. Tr. I:216, 263; Tr. II:32, 127; *see also* Ex. R-5 at 112; R-26 at 341; Ex. R-27 at 345. Even after Father represented to the District that he had a medical condition that prevented him from coming onto school

property to attend Student's IEP meetings, he did go onto school property on at least two separate occasions. Tr. III:166.

(d) The District has provided Parents with copies of Student's IEPs since 2004, all required quarterly progress reports, and copies of the procedural safeguards. Tr. II:6, 132-136, 140. The District has never held "unofficial" IEP meetings or prepared "unofficial" IEPs for Student, Tr. II:133-135, and during the relevant time period, the District provided three required notices of action. Tr. II:134.

(e) Even though the District has had time periods in which it was without an occupational therapist, the missed therapy time had been and was being provided via compensatory services. Tr. II:89-93. After May, 2004, the District always employed a speech language pathologist or speech implementer, and that Student was not owed any compensatory speech-language time. Tr. II:93-95; VII:240.

(f) The District was not required to conduct a Functional Behavioral Assessment for Student during the relevant time, but the District had and continued to collect behavioral data. Tr. II:139; III:189. The District employed a behavioral consultant to assist with behavioral issues for Student. Tr. II:139; III:189. Dr. Quick noted that the District Court's September 11, 2009 decision found Student's stay-put IEP to be appropriate in relation to his behavior. Tr. II:139; s*ee also,* Ex. R-63 at 2011-2016. Furthermore, based on what staff provided Student during the relevant time, the District had always been able to manage Student's behaviors and he was able to progress in spite of those behaviors. Tr. VII:259.

(g) Student's behaviors increased in or around the time that Father filed various legal proceedings and resulted in Student going to school in a "highly-agitated state." Tr. II:7-9. His behaviors increased at school as the instant due process hearing came closer, but the staff were able to manage those behaviors. Tr. II:11.

(h) In preparing Student's IEPs, information from the day-to-day data that the teachers collected was a better indicator of Student's present level and IEP needs that what standardized testing could provide. Tr. III:159. Dr. Quick also testified that the Parents never requested a re-evaluation with assessment after the two reviews of existing data. Tr. VII:252.

Karen Westhues

116. Ms. Westhues, who has taught for over twenty-years, served as Student's special education teacher and case manager since he re-enrolled at the start of the 2007-2008 school year. Tr. IV:66, 136, 190. She has a bachelor's degree in elementary education, a master's degree in reading, and cross-categorical teaching certification in the areas of mild to moderate disabilities and early childhood special education. Tr. IV:136-137. She testified very credibly as follows:

(a) Staff understood that because of stay-put, the goals had to be similar but could increase by difficulty and changing the percentages. Tr. IV: 147; 166. Although Student mastered some of his "stay-put" goals, it would have been unfair to Student to just stop working with him. Tr. IV:184. The District kept daily performance records, and that she reviewed these to prepare Student's progress reports, which were sent to the Parents at quarterly intervals. Tr. IV:148-149, 182. He has made progress in the years that she has worked with him. Tr. IV: 148.

(b) She invited the Parents to participate in several IEP meetings, including one off District property, but that they would not come. Tr. IV:105-107. She has never had an IEP meeting when parents failed to show. Tr. IV: 190. She thinks that parents have valuable information that could help in preparing goals and objectives for the IEPs. If Parents had attended, the IEPs created would have been better. Tr. IV: 105.

(c) She testified regarding this conversation with Father: "I told him that, you know, come to the meeting and you can change [the IEP draft]. He had the copy in hand and he just told me he rejected it all. And where do you go from there? And he wouldn't come to the meeting." Tr. IV: 191.

(d) She also described on one occasion, Father participated in a meeting for Student's sibling at City Hall but, despite that meeting's location, Father was not able to conduct himself appropriately. Tr. IV:150. She testified: "if we hadn't been between them, he would have hit her {Teri Goldman}. *Id.*

(e) The District was able to utilize the behavior plan from the stay-put IEP to effectively address Student's behaviors. Tr. IV:151. Parents were also sent Student's Target Behavior Sheets on Fridays along with his work samples. Tr. IV: 102.

Vickie Malott

117. Vickie Malott was employed by the District as Student's paraprofessional. Tr. VII:75-76. Ms. Malott has a bachelor's degree in speech education, certification to teacher secondary education, and is working on her master's degree in counseling. Tr. VII:76-77. In addition, Ms. Malott has had formal training in autism and has access to various autism consultants. Tr. VII:77-78. She testified very credibly to the following:

(a) She assisted Student with academic, physical, social and emotional tasks and activities. Tr. VII:80. Student's day generally began with sensory integration, and then proceeded to academic instruction in math, reading and language skills for the remainder of the morning, until lunch. Tr. VII:81-83. She provided the morning academic instruction one-to-one, under the supervision of Ms. Westhues. Tr. VII:82.

(b) Student participated in a general education art class three days per week with non-disabled peers, and that he also participated in a cooking class, life skills class, P.E., occupational therapy, and speech therapy throughout his week. Tr. VII:83-84.

(c) With respect to Student's functioning, she testified that while he may appear to below-functioning, her day-to-day dealings with Student have led her to believe that his functioning really isn't "that minimal," but "a little higher." Tr. VII:86-87. Ms. Malott testified that, in her opinion, Student was appropriately served within the District, and that it would not be appropriate for Student to be in a regular education classroom all day. Tr. VII:92-93.

(d) With respect to Student's behavior, Ms. Malott testified that she and other District staff, as well as the outside consultants that the District has hired, have on an ongoing basis discussed Student's behaviors, their causes, and strategies and interventions that could be used to address those behaviors. Tr. VII:132-133.

(e) With respect to Student's progress, Ms. Malott testified that Student's "skills are continuing to increase," and he made progress on his IEP goals during the time she has worked with him. Tr. VII:120, 134. He made growth in the use of verbal language. Tr. VII:124. For example, in 2007, he "was silent when people would greet, that there would be no verbal response," but that "he has moved now to even greeting someone that is down the hall" and, in addition, he has gone from one-word utterances to being able to use complete sentences. Tr. VII:102, 125. In the area of reading comprehension, Student moved from a second grade level to a fourth grade plus level, and was able to move from answering multiple choice reading questions to filling in the blank questions. Tr. VII:121, 178. Student also progressed from telling time from the hour and half hour to the minute. Tr. VII:177. Ms. Malott also testified extensively about Student's social progress, and that he learned to respect other peoples' boundaries, could initiate a permission request, and learned to tolerate changes. Tr. VII:123-124, 182; *see also* Ex. R-43-45. Student, however, would have been better served if he had not been tied to the stay-put [IEP] all these years. Tr. VII: 136.

(f) Ms. Malott testified that records relating to Student's ability to focus have been taken since he re-enrolled in the District in the fall of 2007, and were provided to the Parents after they requested them. Tr. VII:118-119. Parents have never sought clarification as to that information. Tr. VII:119. Examples of Student's work product also have been sent home on a weekly basis. Tr. VII:112.

(g) Ms. Malott testified that, due to stay-put principles, "from the moment [she] began with Student, until [the present time], [she has been] working from the exact same IEP." Tr. VII:149.

(h) She has met Father twice when he has come to school to pick up Student. Tr. VII: 112-113. Father has never called her to inquire about Student's progress. *Id*.

(i) Ms. Malott spoke with Mother regularly in the 07-08 school year when she would bring and pick up Student. Tr. VII:114. They shared on a daily basis how Student was doing and any problems that might exist. *Id*. Their conversations are always cordial. *Id*. at 115. Based on her many conversations with Mother, Ms. Malott thought mother could attend and effectively participate in Student's IEP meetings. Tr. VII:117.

Laura Carder

118. The District called Laura Carder, Student's occupational therapist, to testify. Tr. VII:189. Ms. Carder has been employed as an independent contractor to the District since January 2008 and served Student from that time, twice a week, for thirty minutes per session pursuant to his stay-put IEP. Tr. VII:190. In addition, Ms. Carder provided compensatory occupational therapy time to Student since October 2008, because the District was without a therapist during the first part of the 2007-2008 school year. Ms. Carder anticipated that Student's compensatory time would be provided "by the end of this year." Tr. VII:191-192. Ms. Carder testified very credibly to the following:

(a) Student does not require the 60 minutes per week of direct therapy specified in his stay-put IEP. Instead, but for stay-put, she would put him on a consult/monitor basis so that she could "provide the people that work with him information on how to help with his sensory processing difficulties." Tr. VII:194-195.

(b) From January 2008, when she began working with him, to the present, Student made progress, especially with his sensory processing issues and tactile defensiveness. Tr. VII:204.

(c) She could have provided compensatory services to Student during the past two summers, but he did not attend. Tr. VII:193.

(d) She has on occasion missed some sessions with Student, but that she made those up by coming in on another day of the week. Tr. VII:191; *see also,* Ex. R-51 at 1409-1410; Tr. II:89-90.

(e) Ms. Carder has not conducted any formal occupational therapy assessments of Student during her time in the District, and that such assessments would not give her any information she did not already have by working with Student. Tr. VII:194.

Lori Smith

119. Lori Smith, who the District employs as a speech-language pathologist, also testified on behalf of the District. Tr. VII:212-213. Ms. Smith has worked in that capacity for ten years, and is licensed through the Board of Healing Arts in Missouri and certified by DESE. Tr. VII:214. Ms. Smith testified very credibly on the following:

(a) Student received 150 minutes per week of language therapy services pursuant to his stay-put IEP, but that he currently did not need that amount of direct services because his paraprofessional, Ms. Malott, has been able to work on his language goals in the general "day-to-day." Tr. VII:216-220. In fact, Ms. Smith testified that

Student met a lot of his [language] goals and "60 wpm would be more appropriate at this point." Tr. VII:220.

(b) From August 2007 when Student re-enrolled in the District until 2010, there were no periods of time when there was a gap in Student's services due to the non-availability of a speech implementer or pathologist. Tr. VII:217.

(c) From August 2007 to 2010, Student made "good progress" with respect to his language skills. For example, Student is now able to "use his words" in the community to buy things, verbally describe action pictures and emotions, and verbally complete sentence stems. Tr. VII:219.

(d) She had not conducted any formal, standardized assessments of Student during her time in the District, and that such assessments would not give her any information she did not already have by working with Student. Tr. VII:221. Ms. Smith further testified that, in her opinion, "it would be very difficult to use a standardized instrument to get a measurement with Student." Tr. VII:221.

Testimony from Parents

120. Mother credibly testified regarding the following:

(a) She feels intimidated by the IEP process but she has attended IEP meetings more as an observer rather than as a participant. Tr. VII: 9;16-17. She is concerned that she might be pressured into agreeing into something that I don't fully understand. *Id* at 18. My husband is more capable of understanding the process. *Id*. at 20.

(b) She described three jobs that she has held since Student was born: McDonald's; Oakridge (direct patient care as well as helping with activities for the residents) and Pyramid – a home health care service working with patients in terms of housekeeping, laundry. Tr. VII: 13-15.

(c) Mother has a high school diploma plus 15 hours of college. Tr. VII:11.

(d) She has been on school property to deliver papers and to deliver and pick up the children.[30] Tr. VII: 15-16.

121. As the following indicates, Father's testimony had mixed credibility:

(a) We totally reject his statements that Student taught himself: to read (by watching crawler at bottom of TV): ABCs; how to tell time; to add, subtract, multiply and divide --- all before he entered *any* school.[31] Tr. V: 13.

[30]As noted earlier, Mother's testimony that she felt banned from going on school property was not credible. She testified that she had a piece of paper banning her but she conceded that it was not included in Petitioner's Exhibits.
[31]The above is clearly at odds with PLEP section in his IEP when he started with the District at age 9. Ex. R-1 at 4-6.

(b) We also do not believe his statements that Student has regressed in terms of his skills as well as behavior. Tr. V: 21. He is wrong when he alleges that Student is bored with school. *Id.*

(c) We accept Father's testimony that he is receiving Social Security disability benefits, in part, as a result of major depression.[32] Tr. V: 31. He also confessed to having had homicidal and suicide tendencies for which he still sees doctors. *Id*.

(d) During a discussion on the record about objection by Ms. Goldman to a question by Father's attorney regarding the source of the above disability, Father interjected this inappropriate comment: *"How about I just beat {Dr. Quick's} ass for you?"* Tr. V: 32. (January 6, 2010)

(e) Earlier Findings of Fact clearly rebut his false statement that the District never gave him procedural safeguards until the last three or four months before this hearing started. Tr. V:40.

(f) He filed his various due process complaints himself, without the assistance of an attorney. Tr. V:75, 129.

(g) He admitted that the District provided quarterly progress reports consistent with the stay-put IEP. Tr. V: 41, 50. He also testified that he received the District's documentation from the 2005 and 2008 reviews of existing data, but did not know if he had received any notices of action. Tr. V:51. He wanted the District to conduct additional IQ testing, but could not identify any additional assessments he desired. Tr. VII:55.

(h) Father testified that he felt intimidated at IEP meetings because he was "outnumbered, sometimes as many as ten to fifteen to one." However, he later conceded that Student's IEP team never actually consisted of ten to fifteen District employees. Tr. V:79, 88, 96-97, 120, 124, 139, 142, 143.

(i) He admitted that the District offered him the opportunity to participate in Student's IEP meetings via telephone conference call, and further testified that he did not believe he had ever taken advantage of that offer and that he "won't participate by telephone." Tr. V:118, 120; VI:17. He claimed that telephone participation would be frustrating because he wanted to offer evaluations "of his own," and that it would be "rather hard to explain that over a telephone." Tr. V:36-27. Yet, Father admitted that he "doesn't believe" that from January 2004 to the present he has ever offered his own evaluations to the District or that he has even obtained such independent evaluations. Tr. VI:11; VII:61.

[32]More specifically, he stated that "the major depression is the kind of umbrella thing of it, yeah. It involves extreme anger when – what's the words?—injustice. I don't tolerate injustice. It angers me. And I can go off the end of the handle." Tr. V: 169.

(j) Father testified that he "never would decline to attend any meeting that they would allow me to attend if it was at a place that I could go." Tr. VI:76. However, he also admitted that, on at least two occasions when the District honored his request to have meetings off of school property, he nonetheless failed to attend. Tr. V:137, 169; *see also* Ex. R-11 at 193-194. Father further testified that he has been to at least one meeting on school property since he first alleged he had a medical condition that prevented him from being able to meet on school property.[33] Tr. V:140.

(k) Father stated that he never received correspondence from the District relating to an override of stay-put and that the District had never asked him if he wanted to override stay put. Tr. V:143-144; VI:51. However, when showed specific documents indicating the District's desire to work with the Parents to obtain their consent to override stay-put, Father then testified that he did not remember whether he had or had not received such communication. Tr. V:146-148.

(l) Remarkably, he gave this nuanced explanation as to his outburst toward Ms. Goldman referenced by Karen Westhues in her testimony (See FF#116d): "I was simply arguing a fact with you. I mean, if you want to consider that anger, that's fine. I consider it emphasis or the passion of speaking. Not, necessarily anger." Tr. VI: 11.

122. Even though the due process hearing was conducted at a neutral site, Father still failed to act appropriately as evidenced by the following:

(a) During the course of the hearing on October 30, 2009 when Mr. Walker had finished his Redirect Examination of Dr. Quick the following exchange took place between Father and his own counsel:

Mr. Walker: I have no further questions – oh, I'm sorry.

Father: That's bullshit.

Mr. Walker: No, it's not.

Father: Yes, it is.

Mr. Walker: Do we need to talk?

Father: No, we don't need to talk. Do whatever you want to do.

The Chair then recessed the hearing. Tr. IV. 57-58. Father left the hearing and mother sat with their counsel the rest of the day. [34]

[33]The local Police Chief accompanied him. Tr.V:140. Father also had what seemed to be a convenient memory lapse when he could not recall if he went on school property for the Special Olympics. Tr.V: 139.

[34]Under cross-examination by Ms. Goldman on January 8, 2010, he denied that this exchange was the reason that he left the hearing. Tr. VI: 10. He also said that he stopped some medication that contributed to his earlier angry outburst at the January 6, 2010 hearing. *Id.; see FF#121(d).* Even though we observed first hand Father's extreme

(b) On March 23, 2010, this outburst by Father, who was acting pro se, occurred:

Father:	Well, I will have to know how to allocate my time. I guess that's just {Student's} tough luck, isn't it.
Ms. Goldman:	It's no different from me deciding how to use my –
Father:	I wasn't talking to you.
Ms. Goldman:	-- time. That you and Mr. ---
Father:	I wasn't talking to you. I wasn't talking to you. Although you may be running this damn thing, I'm sure. You want to call your cop? Go ahead. Tr. VII: 137.

(c) After the following eruption by Father on March 23, 2010, he and his wife left the hearing (and did not return the rest of that day or the next day):

Father:	I'm glad that you think it's funny, you sonofbitch (directed at Dr. Quick). You want to get your ass kicked? Do you want to go get your cop? You want to get your cop?
Chairperson Allee:	Probably.
Father:	Go right ahead.
Chairperson Wright:	Do you want me to?
Father:	You can kiss my ass.
Chairperson Wright:	We'll take --- {a break}
Father:	No. We're taking off. Hell with this. You've made up your mind. She won't answer a question straight. You're full of shit.
Chairperson Wright:	Keep recording this (directed at court reporter).
Father:	Yeah. Keep recording, keep recording that I'm not allowed to get an answer. They let them go off on a tangent, talk, talk, talk, talk. Now as far as the rest of it, I'm leaving.

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anger directed at Ms. Goldman and Dr. Quick, we note that they comported themselves very professionally at all times in the hearing.

> I ain't going to get it fair, and by golly, they're going to know it down in Jeff City. I hope you enjoy misleading people. In fact, you {meaning Mother}, you go up to the school and get {Student}, I don't want him anywhere near them (sic) people.[35] Tr. VII: 161-162.

CONCLUSIONS OF LAW

The Hearing Panel makes the following Conclusions of Law:

The Parties

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

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

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

Due Process Complaints and The IDEA's Burden Of Proof

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

5. The Student and Parents filed the due process complaint that initiated this matter on April 22, 2009. The complaint alleges the District violated the IDEA by: failing to hold IEP and re-evaluation meetings at a place agreeable to the Parents; holding "unofficial" IEP meetings where "unofficial" IEPs were developed; failing to provide copies of all required notices of action, progress reports and IEPs; failing to provide speech and occupational therapy services as required under the stay-put IEP; improperly relying on stay-put to avoid the development of a new IEP and failing to conduct Functional Behavioral Assessment and collect data so that an appropriate BIP could be developed. They also seek exception to the governing two year statute of limitations. The burden of proof in an administrative hearing arising under the IDEA is properly placed upon the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49,

[35]Dr. Quick testified as follows the next day (after Father told Mother to go pull Student out of school): "I'm kind of disturbed with the fact that Father is acting out in anger, and he has done so in the past, and that it's not Father that it hurts, it's {Student}. It robs {Student} of his education." Tr. VII: 251.

126 S.Ct. 528, 537 (2005). Thus, the burden of proof in this case rests with the Petitioner. The U. S. Supreme Court's reference is to the burden of persuasion, which means that the Student and his Parents lose at the conclusion of the case if the evidence on both sides is evenly balanced. The standard of proof in this administrative proceeding, as in most civil cases, is proof by a preponderance of the evidence. *Tate v. Department of Social Services*, 18 S. W. 3d 3, 8. (Mo. App. E. D. 2000).

Free Appropriate Public Education

6. The IDEA, its regulations and the *State Plan for Part B of the Individuals With Disabilities Education Act* (2007), ("State Plan") constitute regulations of the State of Missouri which further define the rights of Petitioner and his Parents and regulate the responsibilities of educational agencies, such as the District, in providing special education and related services to children with disabilities.

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

8. The IDEA requires that a disabled child be provided with access to a "free appropriate public education." ("FAPE") *See Board of Education of the Hendrick Hudson Central School District, Board Of Education, Westchester County v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982). The term "free appropriate public education" is defined by 34 C.F.R. § 300.17 as follows:

"...the term 'free appropriate public education' means special education and related services that--
(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA, including the requirements of this part;
(c) Include preschool, elementary school, or secondary school education in the State involved; and,
(d) Are provided in conformity with an IEP that meets the requirements of §§300.340--300.350."

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

9. The FAPE requirement is satisfied if the child with a disability is provided with "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Likewise, the educational program must be provided at public expense and in the least restrictive environment. *Rowley*, 458 U.S. 176 at 203-204, 102 S.Ct. 3034.

10. The IDEA is designed to enable children with disabilities to have access to a free appropriate public education which is designed to meet their particular needs. *O'Toole by O'Toole v. Olathe District Schools Unified School District No. 233,* 144 F.3d 692, 698 (10th Cir. 1998). The IDEA requires the District to provide a child with a disability with a "basic floor of opportunity. . . which [is] individually designed to provide educational benefit to the handicapped child." *Rowley,* 102 S.Ct. 3034, 3047. In so doing the IDEA does not require that the District "either maximize a child's potential or provide the best possible education at public expense," *Rowley,* 102 S.Ct. 3034, 3049;)*; Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed 2d 1090 (1998) and *A.W. v. Northwest R-1 School District*, 813 F.2d 158, 163-164 (8th Cir. 1987). Likewise, the IDEA does not require the 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*, 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.*, 135 F.3d 566, 569. *See also*: *Tucker,* 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).

The IDEA's Statute Of Limitations

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

"§ 300.507 Filing a due process complaint.

(a) General.

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

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

"§ 300.511 Impartial due process hearing.

(e) Timeline for requesting a hearing. *A parent or agency must request an impartial hearing on their due process complaint within two years of the date the*

parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

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

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

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

[emphasis added].

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

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

13. The Missouri State Plan for Part B of the IDEA ("State Plan") also provides for a two year statute of limitations, with the same exceptions as set forth in Conclusions of Law ("CL") #11 and 12. State Plan at 64. *See also Strawn v. Missouri State Board of Education*, 210 F.3d 954 (8th Cir. 2000).

14. The relevant time period in this case is limited to the period beginning on April 22, 2007 and ending on April 22, 2009 for the following reasons:

A. Petitioners filed their due process complaint on April 22, 2009.

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

C. There is no evidence on the record that the District withheld information from the Parents that was required under this part to be provided to them. The record clearly shows that the District repeatedly provided the Parents with appropriate copies of the

Procedural Safeguards Notice: at least nine times between 2004- 2008. The District also provided an appropriate and timely Notification of Meeting form for each meeting to be held with the Parents. Petitioners bear the burden of proof on this issue, *Schaffer ex rel. Schaffer v. Weast*, *supra.* And they have failed to meet that burden. Since there is no "exception" to the IDEA's statute of limitations, all issues that occurred before April 22, 2007 are dismissed. *See Fern v. Rockwood R-VI School District,* 2007 WL 1655673 (E. D. Mo. 2007).

Procedural Compliance with IDEA

15. An IEP does not violate the IDEA (a) if the procedures set forth in the IDEA are followed and (b) the IEP is formulated to enable the child to receive educational benefits. *Rowley,* 102 S. Ct. at 3034. The *Rowley* standard continues to be applicable, and not a higher standard, for determining FAPE under IDEA. *M. M. ex rel. L.R. v. Special School District. No. 1*, 512 F. 3d 455, 461 (8th Cir. 2008). Substantive violations of IDEA result in the denial of FAPE but procedural violations do not necessarily equate to a denial of FAPE. *See, e.g., A. K. ex rel. J. K. v. Alexandria City Sch. Bd*., 484 F. 3d 672, 684 (4th Cir. 2007, *reh'g denied*, 497 F. 3d 409 (4th Cir. 207), *cert. denied*, 128 S. Ct. 1123 (2008).

16. An IEP is a written statement that must include, *inter alia,* the child's present level of academic achievement and functional performance, the child's special education needs, measurable annual goals, a procedure for progress reports, and any supplemental aids and services needed. 20 U. S. C. Section 1414 (d)(1)(A); *M. P. v. Independent School District No. 721*, 326 F. 3d 975, 977 n.1 (8th Cir. 2003). It is prepared jointly with school staff and parents, and is reviewed annually. *M.P.* , 326 F.3d at 977, n.1.

17. The IDEA provides that parents of a child with disabilities must be afforded "an opportunity . . . to participate in meetings with respect to the identification, evaluation, and educational placement of the child." 20 U. S. C. Section 1415(b)(1). *See also Schaffer v. Weast*, 546 U. S. 49, 53 (2005) ("Parents and guardians play a significant role in the IPE process.")

18. IDEA regulations require school districts to "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[.]" 34 C. F. R. Section 300.322(a). This includes early notification of meetings to ensure parental participation. 34 C. F. R. Section 300.322 (a)(1). School districts 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).

19. The same IDEA regulation also contemplates 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 300.328 (related to alternative means of meeting participation). 34 C. F. R. Section 300.345 (c). Section 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."

20. The IDEA regulations also provide that an IEP meeting "may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as –(1) Detailed records of telephone calls made or attempted and the results of those calls; (2) Copies of correspondence sent to the parents and any responses received; and (3) detailed records of visits made to the parent's home or place of employment and the results of those visits. 34 C. F. R. Section 300.345(d).

21. Section 1415 of IDEA provides in cases alleging a procedural violation, FAPE is lacking only if the procedural inadequacies (I) impeded the child's right to a free public education; (II) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE or (III) caused a deprivation of educational benefits. 20 U. S. C. Section 1415 (f)(3)(E). *See also* 34 C.F.R. Section 300.513 (a)(2). Minor technical procedural violations do not mandate a finding of denial of FAPE. *Independent Sch. Dist. No. 283, 88 F. 3d 556, 557 (8th Cir. 1996).*

22. We conclude that the Parents were not denied the right to participate meaningfully in the IEP and/or re-evaluation process between April 22, 2007-April 22, 2009. The District took reasonable steps to ensure parental participation but the District received very little, if any, cooperation from the Parents.

23. We conclude that the District did not hold "unofficial" IEP meetings and adopt "unofficial" IEPs for Student.

24. The District provided copies of all notices of action, progress reports and IEPs as required by IDEA.

Stay Put Compliance with IDEA

25. IDEA contains the following "stay put" provision that is applicable to this case:

> [e]xcept as provided in subsection (k)(7) of this section, 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 . . . until all such proceedings have been completed.

20 U.S.C. Section 1415(j); *see also* 34 C.F.R. Section 300.518. Missouri's stay put language is very similar. *See State Plan* at 75.

26. While IDEA does not define the phrase "current educational placement," courts have generally interpreted the phrase to mean the placement contained in the child's last implemented IEP. *L. M. Capistrano Unified School Dist., 556 F. 3d 900, 902-903 (9th Cir. 2009).*

27. We conclude the Student's November 2003 IEP became the stay- put IEP when Father initiated his first due process action in January 2004. *Lathrop R-II School District v. [Student]* 2009 WL 2982645 at*12 (W. D. MO. 2009).

28. We conclude that the District provided the speech and occupational therapy services as required under his stay- put IEP. *See Neosho R- V School District v. Clark*, 315 F. 3d 1022, 1027 (8th Cir. 2003)(To prevail on a IDEA claim for a failure to implement an IEP, party must show substantial or significant provisions of the IEP were not implemented.)

29. We conclude that the District did not improperly rely on the stay-put provisions to avoid the development of a new IEP for Student. The District met its obligation to conduct an annual review of Student's IEP by meeting at least yearly between April 22, 2007-April 22, 2009 and developed revised IEPs. *See Letter to Watson*, 48 IDELR 284 (April 12, 2007) *but compare Kuszewski v. Chippewa Valley Sch. Dist*., 56 Fed. Appx. 655 (6th 2003) (held that a school district has no duty to annually update IEPs during the pendency of stay-put).

30. The District was not required to conduct a re-evaluation with assessments, including a Functional Behavioral Assessment. *Lathrop R-II School District v. [Student]* 2009 WL 2982645 at*9-12 (W. D. MO. 2009) (holding Student's stay-put IEP was appropriate with respect to addressing his behaviors); *Letter to Anonymous*, 48 IDELR 136 at *2 (OSEP 2007) (Review of existing data alone can constitute a re-evaluation); In Re Student with a Disability, 109 LRP 16438 (NY SEA 2009)(finding that the lack of a FBA did not cause a denial of FAPE to a student who successfully responded to current classroom interventions).

Other Issues

31. Because the Student and Parents failed to show beyond a preponderance of evidence that FAPE was denied, we decline to address issues set out in FF#28 (c) and (e).

DECISION

The Student and Parents filed the due process complaint that initiated this matter on April 22, 2009. The complaint (as amended) alleges the District violated the IDEA by: failing to hold IEP and re-evaluation meetings at a place agreeable to the Parents; holding "unofficial" IEP meetings where "unofficial" IEPs were developed; failing to provide copies of all required notices of action, progress reports and IEPs; failing to provide speech and occupational therapy services as required under the stay-put IEP; improperly relying on stay-put to avoid the development of a new IEP and failing to conduct Functional Behavioral Assessment and collect

data so that an appropriate BIP could be developed. They also seek exception to the governing two year statute of limitations. The Student and Parents contend the alleged IDEA violations resulted in a denial of FAPE for which they seek an unspecified remedy.

Statute of Limitations

We take the issues slightly out of order by first addressing the statute of limitations. As described in detail in our Conclusions of Law #11-13, there is a two year statute of limitations period under IDEA, with two exceptions. Student and Parents presented no evidence to establish that the District made specific misrepresentations that the District had resolved the issues forming the basis of the instant due process complaint. Instead, they appeared, prior to and at hearing, only to have contended that the District withheld information it was required to provide under Part B of the IDEA, including copies of IEPs, procedural safeguards, and notices of action. Notably, however, at hearing, attorney Walker apparently waived the argument that the limitations period should be tolled because the District failed to provide copies of IEPs and notices of action. Tr. I:55. He specifically acknowledged that the second exception should be invoked only because the District did not provide appropriate procedural safeguard notices prior to April 22, 2007. Tr. I:55.

Not only did the Parents fail to satisfy their burden of proof with respect to the statute of limitations issue, the evidence presented by the District conclusively established that the District provided the Parents with all required documents including, but not limited to, IDEA procedural safeguards, IEPs, and meeting notifications. *See, e.g.*, Tr. I:70-73; 88-89; 257; II:6; 16; 28; 54; 64; 139-140; III:245-246; VII: 235-236; Ex. R-1 at 1; R-4 at 96, 100; R-5 at 106, R-8 at 181; R-9 at 188, 191; R-11 at 194, 199; R-17 at 243, 245; R-19 at 253-254; R-22 at 280; R-24-331, 333; R-28 at 392.

Moreover, Father acknowledged that he received the procedural safeguards and "glanced at" District forms that notified him where to obtain additional procedural safeguards. Tr. V:72, 108.[36] In addition and significantly, throughout much, if not all, of the relevant time period, the Parents had a parent advocate and/or were legally represented by attorney Walker. Ex. R-3 at 47; R-4 at 48; R-14; R-30 at 464; Tr. V:73, 91, 96. Finally and most importantly, the Parents continued to exercise the vast majority of their due process rights during the relevant time frame by their continued filing of due process requests and child complaints and by their written requests for IEP meetings and independent evaluations. Accordingly, the evidence was overwhelming and almost undisputed that the District provided the Parents with all required information and documentation and the Parents' argument in this regard is clearly frivolous.[37] *See Fern v. Rockwood R-VI School District*, 2007 WL 1655673 (E. D. Mo. 2007)(Court ruled against the Plaintiffs-- who coincidentally Mr. Walker also represented-- because of a total lack of evidence that they were not aware of their rights or had been mislead in any way by the Defendant School District).

The Parents totally failed to carry their burden of proof on the statute of limitations period and all allegations prior to April 22, 2007 are dismissed. Thus, the only time frame for our consideration is April 22, 2007-April 22, 2009, which covers two years prior to the filing date of the Due Process Complaint.

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[36] In addition, Father, at hearing, specifically stated that [despite his counsel's argument in the amended complaint] that the statute of limitations should be tolled, "it was [his] understanding that the hearing could only go back two years" and that, accordingly, he did not include in his exhibits documents that related to events prior to 2007. Tr. VI:112, 123.

[37] This position is also supported by Father's patently false statement that he had not received procedural safeguards over the years but had only received them in the last three or four months before the hearing began. Tr. V:40.

Procedural Compliance

Our consideration of this issue begins with IDEA itself. As noted in our Conclusions of Law #15-21, IDEA and its accompanying regulations contain a myriad of procedural safeguards to ensure that parents are involved in the formulation, review and revision of their child's IEP. Parents allege three procedural violations: (1) failing to hold IEP and re-evaluation meetings at a place agreeable to the Parents; (2) holding "unofficial" IEP meetings where "unofficial" IEPs were developed and (3) failing to provide copies of all required notices of action, progress reports and IEPs. We address each alleged procedural violation in turn.

Parental Participation Issue

The Parents allege that by refusing to hold the IEP meetings at a place designated by them such as City Hall or the local police station, the District violated 34. C. F. R. Section 300.322(a)(2). Father claimed because of a medical disability he could not go on school property and therefore, the meetings needed to be conducted at a neutral site such as City Hall or the local police station.

Notably, neither the statute nor regulations define what is meant by a mutually agreed upon time or place. *See* 34 C.F.R. § 300.322(a); *see also Houston Indep. Sch. Dist.*, 31 IDELR 74 (SEA Texas Nov. 6, 1998); *Madera (CA) Unified Sch. Dist.*, 33 IDELR 136 (OCR Aug. 31, 1999). Moreover, as noted in the *Houston* case,

> The IDEA does not require that [IEP] meetings be scheduled at convenient times for the parent. It requires that they be scheduled at a mutually agreed on time and place. Since the IDEA does not specify the procedures to be used, it is assumed that the parties will negotiate and reach a mutually agreeable time and place for conducting the [IEP] meeting or will make other arrangements for parent participation. How that occurs is left up to the parties to decide. The only requirement is that the parents be given the opportunity to participate at the [IEP] meeting by attempting to arrange a mutually agreed on time and place.

31 IDELR 74, at *7. Further, the IDEA does not require that school districts consult with parents prior to sending out a meeting invitation or notification. *Id.; see also Madera*, 33 IDELR 136, at * 4-5 (where district suggested different times for IEP meeting other than one originally proposed, offered the parent an opportunity to participate via telephone conference call, and where parent declined the telephone option, the district sent copies of relevant documents, OCR found that district sought to provide mutually convenient IEP meeting).

To ensure that parents are accorded the opportunity to participate, the LEA must provide parents with notice of the time, date and purpose of the meeting in advance of that meeting. 34 C.F.R. § 300.322(b). However, "[a] meeting may be conducted without parent in attendance if the public agency is unable to convince the parents that they should attend." §300.322(d). *See also E.P. v. San Ramon Valley Unified Sch. Dist.*, 48 IDELR 66 (N.D. Cal. 2007) (finding that the district was justified in holding an IEP meeting without parents after it made good faith attempts to schedule the meeting at a mutually agreeable time and place, but parents continued to refuse to attend). If the LEA conducts a meeting without the parents present, the LEA must have a record of its attempts to arrange that meeting. *Id.* If neither parent can attend, the LEA should offer other methods to ensure parental participation, including conference telephone calls. 34 C.F.R. §300.322(c). *See also School Board of Lee County v. E. S.*, 561 F. Supp.2d 1282, 1302 (M. D. Fl. 2008) (held no procedural violation when mother participated by phone albeit with a bad connection and had no school reports prior to the call).

We recognize the interactive process constructed by Congress in IDEA and its regulations did not occur here. We conclude, however, more than a preponderance of the evidence demonstrated that the District fully complied with IDEA meeting participation requirements and provided the Parents with ample opportunity to participate. Thus, the Parents

failed to satisfy their burden to show that the District violated their rights of participation. More than a preponderance of the evidence showed that the District provided the Parents with the requisite written notices of team meetings. In addition, the evidence overwhelmingly showed that the Parents consistently were offered the opportunity to participate by telephone which they consistently declined. Even assuming that Father's position that he could not attend meetings on school property is accurate, the District offered him alternative participation by phone. As noted in the DESE child complaint decision, the Parents were "given ample opportunity to participate, either at the school or by telephone conference. Ex. R-7 at 169; Tr. I:228.

We question whether Father's medical disability prevented him from attending meetings on school property. While he sought IEP meetings away from school property in 2003, he cited no medical reasons for the request in his letters. He also failed to bring up the issue in his first due process complaint (and its amendments) in January 2004, a few months after DESE had found against him on that issue in its child complaint issue. Father also indicated a willingness to go on school property to attend Special Olympic events as well as to attend a meeting for one of his other children. Finally, as detailed in our Findings of Fact, the Hearing Panel observed first hand Father's inability to conduct himself appropriately during the due process hearing (which was spread out over three different months), thus belying his contention for meetings to be off-site to minimize his potential for explosive behavior allegedly caused by his medical condition.[38] In addition to the three incidents during the due process hearing (one of which was directed at his own counsel), there was also a meeting at City Hall in January 2009 for Student's sibling when Father became very angry towards District counsel. Tr. IV:150.

[38] A very troubling aspect of Father's angry departure from the hearing on March 23, 2010 was his stated intention (directed to Mother) for Student to be removed from school. One of Student's IEP goals is developing better social skills. His absence from school denies him integration with other students --- something he was also denied (except for one semester) between 2004-2007 when Student was home-schooled. *See Slama v. Independent Sch. Dist. No. 2580*, 259 F. Supp2d 880, 885 (D. Minn. 2003)(Court criticized parents for removing student from school and keeping her at home when the parents became angry after the district assigned a new aide to help student.)

There was no evidence that Mother was not capable of attending and participating in Student's IEP meetings -- on school property or off-site. In fact, Father testified that Mother does not have a medical condition that would prohibit her attendance; and that she is not incapable of attending or participating but simply that "she doesn't want to be involved in [the meetings] and that she "wants nothing to do with it." Tr. V:111; VI:108. The Parents basically argue a procedural violation by putting the District in this impossible situation --- Mother refuses to participate and Father is willing to participate but on ***his*** terms and conditions. We cannot believe Congress contemplated this scenario when it set a framework for a collaborative IEP process.

The Parents' refusal to partner with the District on upgrading the stay-put IEP was detrimental to Student. Karen Westhues, a very experienced special education teacher, testified that parents have valuable information that could help in preparing goals and objectives for IEPs. She said if the Parents had attended the meetings, the IEPs created would have been better. Tr. IV:105. Ms. Westhues also testified that she had never had an IEP when parents failed to attend. Tr. IV: 190. She expressed her frustration: "I told [Father] that, you know, come to the meeting and you can change [the IEP draft]. He had the copy in hand and he just told me that he rejected it all. And where do you go from there? And he wouldn't come to the meeting." Tr. IV: 191. (emphasis added).

We also heard from Vickie Malott, who worked with Student daily as his paraprofessional, that Father never contacted her to inquire about Student's progress. Tr. VII: 112-113. She also testified that the District sent data collected after Student re-enrolled in the fall of 2007 to Parents regarding their son's ability to focus but Parents have never sought clarification. Tr. VII: 118-119.

In sum, we conclude as did the 2004 due process panel, the District Court and DESE that the District fully respected and did not violate the Parents' rights of participation at any time. If the collaborative process envisioned by Congress broke down in this case, it was the fault of the Parents, not the District.

Other Procedural Issues

We also find that the District did not hold "unofficial" meetings. Rather, the evidence showed that the District properly provided the Parents with written notification of all meetings and that, after the requisite two notices, the District properly held meetings without the Parents in attendance. Those meetings were not "unofficial" but were properly scheduled and held. The fact that stay-put precluded implementation of the IEPs developed after November 2003 did not convert those IEP meetings into "unofficial" ones and the Parents presented no evidence or law to support that contention. Finally, any staff meetings conducted to discuss Student's progress or lack of progress do not constitute "unofficial" meetings for which Parents can complain. *See, e. g., Buser v. Corpus Christi Independent School*, 51 F.3d 490 (5th Cir. 1995).

Finally, the Parents' contention that the District failed to provide them with copies of Student's IEPs, notices of action and progress reports is also without merit and the Parents also failed to meet their burden on this issue as well. The evidence at hearing was conclusive that the District provided copies of each IEP (multiple times) to Parents and in a timely manner. Ex.R-23 at 281; R-24 at 335; R-28 at 392; R-29 at 394; R-34 at 506; R-35 at 507; R-36 at 550; Tr. II:54, 71-73; III:30-31. The November 2003 stay-put IEP states that the District will provide the Parents with progress reports on a quarterly basis. *See* Ex. R-6 at 160; *see also* Tr. V:41. The evidence at hearing conclusively demonstrated that the District timely provided the Parents with

all required progress reports. Tr. II: 59, 85; IV:102, 149; VI:41, 42; Ex. R-31 at 469; R-41 at 756-780, Parents Exhibit A.

Stay-Put Compliance

The next area of complaint by Parents is that the District violated the stay-put provision of the IDEA by: **(**1) failing to provide speech and occupational therapy services as required under the stay-put IEP; (2) improperly relying on stay-put to avoid the development of a new IEP and (3) failing to conduct Functional Behavioral Assessment and collect data so that an appropriate BIP could be developed. We address each alleged violation in turn.

Alleged Failure to Provide Required Speech and OT Services

The Parents failed to present any evidence on this issue and, therefore, failed to satisfy their burden of proof. More importantly, the District's evidence demonstrated that the District had provided all required compensatory services in speech-language and was in the process of doing so with respect to occupational therapy. Further and significantly, the evidence was undisputed that Student continued to receive a FAPE even during the times when he was without such therapies.

With respect to occupational therapy, Dr. Quick credibly testified that the District had and was providing compensatory services. Tr. II:89-93; *see also* Ex. R-51. Laura Carder, Student's current occupational therapist, also testified that she was providing such services. Ms. Carder anticipated that all of Student's compensatory time would be made up by the end of the year if Student attended.[39] Tr. VII:191-93. *See Neosho R- V School District v. Clark*, 315 F. 3d 1022, 1027 (8th Cir. 2003)(To prevail on a IDEA claim for a failure to implement an IEP, party must show substantial or significant provisions of the IEP were not implemented.)

[39] At the time she testified the Parents had stormed out of the hearing, with Father directing the Mother to pull Student out of school. Thus, Ms. Carder added the condition "if Student attended."

As to speech-language therapy, Dr. Quick testified that the District did not owe Student any compensatory services in that area and the Parents offered no evidence to refute that testimony. Thus, the Parents failed to meet their burden of proof on that issue. Significantly, Lori Smith, the District's contracted speech-language pathologist in 2010, testified that Student no longer requires the 150 minutes per week of language therapy provided for in his stay-put IEP. Tr. VII:216-220. In fact, Ms. Smith testified that Student had met a lot of his [language] goals, and that accordingly, "60 wpm would be more appropriate at this point." Tr. VII:220. Furthermore, Ms. Smith testified that, from August 2007 to the time of her testimony, there were no gaps in Student's language therapy services due to the non-availability of a speech implementer or pathologist. Tr. VII:217.

Given the uncontroverted evidence at hearing, we find that the Parents' allegation that the District failed to provide Student with all required speech and occupational therapy services is without merit.

Alleged Failure to Update Stay-Put IEP

Parents posit that the District violated the stay-put provision of IDEA when it failed to develop new (and more expansive) IEPs and submit same to the Parents for their consideration while the first due process case has been pending in the federal courts. Put another way, Parents think the District should have prepared and offered real "razzle-dazzle" or "ideal" type IEPs in lieu of the November 2004 stay-put IEP rather than the moderately revised IEPs submitted by the District.

As discussed below, we question the legal duty to do more than the District did in this case but equally important, we find the only IEP agreeable to these Parents would have included placement at PBM. *See e.g.*, Tr. I:119; FF#53. The Parents' near total refusal to cooperate with

the District over the last several years indicates to us that they saw PBM as the only viable option for their child.

The U. S. Court of Appeals, Sixth Circuit addressed this issue by holding that student's IEP did not have to be updated on annual basis while litigation was pending. *Kuszewski v. Chippewa Valley Sch. Dist*., 56 Fed. Appx. 655 (6th Cir. 2003). In *Smith v. The James C. Hormel School of the Virginia Institute of Autism*, 2009 WL 4799738 (W. D. Va. 2009), the Court stated the following regarding a district's duty once stay-put applied: the [district's] hands were tied with respect to its ability to . . . *revise* [Student']s IEP. *Id*. at *14. (emphasis added)

In *C. P. v. Leon County School Board of Florida*, 483 F. 3d 1151 (11th Cir. 2007), the parent of student 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*. In this case, the parties had met to discuss possible alternative placements which the Court found met the "review" mandate under Section 1414(d)(4)(A). Put another way, the district did not have to actually propose a new IEP.

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. [40]

We conclude even under the OSEP view that the District had to convene an IEP team annually to review and propose needed revisions to Student's stay-put IEP, the District satisfied its obligations in the 2007 and 2008 IEPs tendered to the Parents. Throughout stay-put status, the District has continued to hold annual IEP meetings and did so in an effort to reach agreement with the Parents to override stay-put. Tr. II:18-19; Tr: II:276-277. In conducting those annual meetings which the Parents declined to attend, the District attempted to remain consistent with the November 2003 IEP. Tr. I:32-37, 229-230; II:16, 18, 26, 128, 162, 164-165; Tr. IV:105-107, 147-148, 157. Although the goals/objectives and other IEP components remained similar to the stay-put IEP components, those IEPs clearly continued to offer FAPE to Student. In years subsequent to January 2004, Student's areas of need remained the same but he continued to progress in those areas such as the team was able to update both the present levels of performance of the subsequent IEPs as well as to increase the goal and objective challenges.[41] Tr. II:18-19; Tr: II:276-277; IV:147-148, 157. Had the Parents attended and participated in the post-January 2004 meetings and cooperatively engaged in the process, it is likely that the subsequent IEPs would have further changed.

Because of the Parents' refusal to participate in subsequent meetings, the District clearly was hampered in its ability to prepare the transition components of Student's IEP once he turned sixteen. Under the IDEA, a district must obtain parental consent before inviting outside agencies to IEP meetings that will address post-secondary transition planning. *See Letter to Gray*, 50

[40] Agency interpretations of a regulatory nature must be given deference. *See e.g., Federal Exp. Corp v. Holowecki*, 128 S. Ct. (2008)("an agency is entitled to deference when it adopts a reasonable interpretation of its regulations, unless its position is plainly erroneous or inconsistent with the regulation."(internal citations omitted).

[41] We believe more progress could have been made if Student had not been pulled out of school for five of the six semesters between 2004-2007 as well as the failure of the Parents to enroll Student in ESY after summer 2003. TR.I: 242-245.

IDELR 198 (OSEP 2008). In this case, because of the Parents' lack of cooperation and decided unwillingness to even discuss an override of stay-put,[42] the District was severely restricted in developing this aspect of Student's IEPs. *See* Tr. II:73-75; III:195-196; VII:248.

Alleged Failure to Conduct FBA and Collect Data so that an Appropriate BIP Could Be Developed

It is axiomatic that the IDEA requires school districts to conduct triennial evaluations unless the LEA and parent agree to waive that reevaluation. As noted by the District throughout the course of this hearing, a re-evaluation can consist only of the statutorily required review of existing data. As noted in *Letter to Anonymous,* 48 IDELR 136 (OSEP 2007):

> Question 3: May a review of extisting data alone, with the finding that no additional data are needed, constitute a re-evaluation in toto?
>
> Response: Yes….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. 34 CFR § 300.305(d)(1). Under these circumstances, the public agency is not required to conduct an assessment unless requested to do so by the child's parents. 34 CFR § 300.305(d)(2). If the parents do not request an assessment, then the review of existing data may constitute the reevaluation. *Id.* at *2.

In this case, it is undisputed that the District conducted reviews of existing data in 2005 and 2008 and that the team, in those years, decided that existing data was sufficient and that no assessment was necessary. Subsequently, the District sent the Parents notices informing them of the team's decisions and their right to request additional assessment. Ex. R-32 at 476, 482; Tr. II:64; III:150. After the 2005 and 2008 reviews, the Parents admittedly never requested additional assessment or re-evaluation with assessment. Tr. V:150-156; III:150; VII:49, 252.

[42] As noted earlier, the only override that would have been acceptable to the Parents involved placement at PBM.

Although the Parents did request an independent evaluation after the 2005 review of existing data, they did not request additional assessment. Ex. R-24 at 328, 332-333; Tr. III:150-51; V:150-56; VII:252. In response, Dr. Quick corresponded with the Parents and explained the difference between an independent evaluation and the right to request additional assessment for purposes of reevaluation. Ex. R-24 at 328, 332-33. Thereafter, the Parents did not request additional assessment.[43] Tr. III:150-51; VII:252. After the September 15, 2008 review of existing data, the Parents presented no credible evidence[44] that they even requested an independent evaluation from the District.

Because the District conducted reviews of existing data in 2005 and 2008, it fulfilled its statutory obligation to conduct triennial reevaluations of Student and the Parents failed to satisfy their burden on this issue.

Similarly, the District was not required to conduct a Functional Behavioral Assessment ("FBA") of Student during the relevant time and the Parents never requested one. Under the IDEA and its implementing regulations, an FBA is required only when the District implements a disciplinary change of placement and the IEP team determines that the misconduct was a manifestation of the student's disability. *See* 34 C.F.R §300.530(f). In addition, when a disciplinary change of placement occurs and the IEP team determines that the misconduct was not a manifestation of the student's disability, the student "must receive, *as appropriate*, a functional behavioral assessment." 34 C.F.R.§530(d)(1)(ii) (emphasis added); *see also Alex R. v. Forrestville Valley Community Unit Sch. Dist #221*, 375 F. 3d 603 (7th Cir. 2004), *cert. denied*,

[43] Even ***if*** the Dissent is correct that the Parents did not understand the difference between an independent evaluation and assessment, they could have consulted their counsel who was representing them in the ongoing federal court action. We also note in *School Board of Lee County v. E. S.*, 561 F. Supp.2d 1282, 1303 (M.D. FL. 2008) the Court found no procedural violation with District failing to respond to parent's vague request for "independent evaluations."

[44] Parent Exhibit C, at page 30, is a September 4, 2008 letter from Father to Dr. Quick, in which he requests "independent evaluations" after receipt of the District's notification of meeting for the 2008 review of existing data. However, Dr. Quick credibly testified that did not remember receiving the letter. Tr. I:83; FF#92.

543 U.S. 1009(2004). Since January 2004, the District has not imposed a disciplinary change of placement. Tr. VI:110-111. Accordingly and contrary to the Parents' contention, the District had no obligation to conduct an FBA during the relevant time.

Furthermore, the testimony at hearing was conclusive that the District was able to properly manage Student's behaviors without any additional formal assessments beyond the FBA that was conducted in 2002, and the BIP that was thereafter developed. Tr. VII:259. The District utilized Student's stay-put behavior intervention plan, continued to consult with behavior specialists pursuant to the stay-put IEP, and throughout the relevant time period, Student's behavior did not impede his ability to receive a free appropriate public education and make meaningful progress. Ex. R-6; Tr. II:139; II:189; IV:151; VII:132-133. *See, e.g., In re Student with a Disability,* 109 LRP 16438 (NY SEA 2009) (finding that the "lack" of an FBA did not cause a deprivation of educational benefits, and that the evidence showed that the student successfully responded to current classroom interventions, and to the extent that she had exhibited interfering behaviors, those behaviors had subsided); *see also Lathrop R-II Sch. Dist. v. XXXXX ex. rel. Z. X.*, 2009 WL2982645 at *9-12 (W.D. Mo., 2009) (holding that Student's stay-put IEP was appropriate with respect to addressing Student's behaviors); Ex. R-63 at 2011-2016; Tr. II:139.

Accordingly, we conclude that the District was not required to conduct a re-evaluation with assessment, including a functional behavioral assessment, during the relevant period.

CONCLUSION

We conclude by a 2-1 majority: (a) the IDEA's two year statute of limitations applies and the relevant time period is April 22, 2007 through April 22, 2009; (b) Petitioner failed to carry his burden of proof on his claim of procedural violations under IDEA; and (c) Petitioner failed to carry his burden of proof on his claim of violations of the stay-put provisions under IDEA.

Because the Petitioner failed to show beyond a preponderance of evidence that the District failed to provide FAPE, we decline to address issues (c) and (e) (set out earlier in the Findings of Fact section) dealing with remedies if FAPE had been denied to Student.

ORDER

The Due Process Complaint filed by the Petitioner is dismissed and judgment is entered against Petitioner and judgment is entered in favor of Lathrop R-II School District.

APPEAL PROCEDURE

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

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

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

Dated this 2nd day of July, 2010.

/s/
_____
Pamela S. Wright, Chairperson of the Hearing Panel

/s/
_____
Dr. Terry Allee, Panel Member

Signed (Dissenting Opinion)

_____
Rand Hodgson, Panel Member

CERTIFICATE OF SERVICE

Copies of the foregoing Opinion were mailed via certified mail, return receipt requested (and by electronic mail to Mr. XXXXX and Ms. Goldman) via regular US Mail to Dr. Allee, Mr. Hodgson and Ms. Bruner on this _____ day of July, 2010:

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_____
Pamela S. Wright

Dissenting Opinion on the vs. Lathrop R-2 School District

June 30, 2010

I have received the majority decision which was emailed to me yesterday afternoon. After talking with the hearing chair, there will be no extensions and she is requesting a copy of the dissention decision by noon Thursday date. I did receive the Finding the Fact last week, but the conclusions of law was on Tuesday, June 29th. This is a very unique case where the same IEP has been in place for the young man since late 2003. There was also a previous hearing in 2004-2005 that dealt with previous issues. However, the petitioner has made this very clear for this hearing and the panel, and I will go through some of the Findings the Facts and decisions that I disagree with because of the time constraints. Because of the approaching deadline, we did not have an opportunity to discuss the 55 page decision amongst the panel or the opportunity to deliberate as we normally do.

Finding the Fact #19. Part of what made this hearing so unique and difficult is that the father has a disability that affects him participating in the IEP process on school property. The second issue that made this hearing difficult is the issue of representation. The hearing started with an attorney representing the parents. Because of the chair's decision, the attorney was forced to step out and the hearing ended up without representation for the final two days. No post-hearing briefs from that attorney or Findings of Fact and Conclusions of Law from the plaintiff. Also on the 2nd last day of the hearing, the plaintiff was upset, left the hearing, not to return. There was no representative for the plaintiff at all on the last day. Due to financial issues from the plaintiff (there was previous testimony to the plaintiff having very limited finances, the evidence shared that he received SS), the panel had previously been consulted about request for

extension for one week for the hearing. When in fact, one additional month extension was given for briefing. When the request was originally turned down, the plaintiff had to move forward without his representation. This posed a problem and thus, questionable procedures that took place.

I spoke to the chair about a concern for security because Mr. disability can affect his judgment. He could hurt himself and had done so previously. Evidence shows that he previously had been hospitalized and that there had been a lot of bad history with the school district and himself, in particular, the Superintendent, Director of Special Education.

Mrs. had previously testified that she was intimidated by the process and or by the personnel and would not feel comfortable in an IEP meeting and a hearing by herself. I believe the panel should have granted the extension to have the representation available for the hearing to go on without any prejudice on any party. As it was, the chair granted an extension for briefing on the final day. I have done many hearings and never have run into anything remotely like this left disturbing and uncomfortable feelings. My understandings was this was not about the attorney advancing funds. I do believe Mr. Walker did offer that and Mr. confronted t he panel about the security being outside the hearing room. It obviously upset him and set him off. Mr. belief was that the chair and the superintendent of the school district were involved together ^^^^ This would certainly upset anyone.

Finding of Fact # 19, 20, 21, 22 all discussed above.

LIST OF ISSUES

Finding of Fact # 28 clearly identifies the issue the panel had to decide and my disagreement stems with 28A, which includes the IEP by the parents to be unofficial IEPs and failing to hold IEP meetings and tri-annual reevaluations at a place agreeable to parents.

#28BB - improperly relying on Stay-Put to avoid the development of a new IEP

C – failing to conduct a functional behavior assessment

C - Lack of FAPE and that the parents did not materially contribute to that process (parental participation)

#53 – the location of an IEP off-campus at a police station on May 18, 2004

#66 – parental participation in IEP and meetings with parents.

Those are the main underlying dissenting issues that I have and now I will explain them.

Plaintiffs claim of improper unofficial IEPs, changing on the stay-put IEP and lack of tri-annual evaluations. Evidence reflects that the young man did not have any comprehensive evaluations done by the school, although the parent requested so several times from 2002 to the time of the hearing itself. From the time the child was transferred into the school, to his years there, it was testified by school district personnel that he made some progress and changes throughout that 8 year period of time. However, the school chose not to test and even had the reevaluation meeting at a location that the father could not or should not attend. There was no data or progress shared with the parents that had taken place outside of the same progress report on the old goal. The facts were plain in the case that the school was made aware of the father's disabling condition sometime between 2003 to 2005 at the latest. During the first hearing that had taken place with the school district, the school had denied previously that they had received anything from doctors, written letters, and documentation to Mr. impairment. Mr. testified that he did attend meetings for the IEP process in the police station and the building where the hearings themselves took place. He was able to participate at those locations. At least at the hearing in 2005, the school knew to include the parents to participate in the process. There was also evidence given to have a teleconference (300.322 refers to that section.) Even if

Mr. did not have a disability, the school was still responsible to have the meeting at a convenient place and time for the . And I do believe that evidence shows thought he hospitalization and the doctor's report, he truly was disable. Even during the hearing, there was evidence brought forth of the disability which included severe depression. And it was obvious to the panel. However, the school district had the wrong number and later on, the could not afford to use minutes on their cell phone for a teleconference. It was simple to resolve this to have the meeting in the community center where the hearing took place. At most, it was ½ mile from the school or at the police station with the same proximity, but the district chose not to provide those things and to ignore a place that could service the IEPs, the reevaluations, and the meetings that needed to take place between the school and parents as had been done in 2004. (police station) The communication broke down between the school and plaintiff when there were no annual IEPs held where the parents can participate.

Testimony was given by the school that IEP goals and measurements for such goals, which are required, were changed drastically by every discipline that was involved in the IEP process. Thus, parents used the term, unofficial IEP because the actually IEP that they were implementing during the last two years, was not the same Stay-put that had originally been processed in 2003. The school district also claims that the reason IEPs weren't updated or changed and tri-annual evaluations didn't take place or rather just the RED (review existing meeting) was because parents did not participate and come to the school for meetings. I believe the school district had an obligation, because of Mr. disability, to meet at a site that as they had done previously so the parents could attend and adjust the Stay-put IEP as needed. When these statues were written for Stay-put, I can't believe anyone had in mind that IEP would not change for seven years. This would certainly discriminate and be harmful towards the child.

The district never did send what they believe to be appropriated drafts or any changes of such Stay-put IEPs for the plaintiff to even consider.

#28B I have addressed the need of relying on Stay-put and failure to conduct a reevaluation and functional behavior assessment because this young man had significant behaviors that impaired him. Although the district had on its staff, autism or behavioral specialists to specifically address this item, yet none of them were involved in this and the behaviors continued to impair in the stay-put IEP from 2003 to present day. I believe the evidence in the present level of performances of the latter IEPs show the increase of serious behaviors t hat impact on the child's progress. Obviously, if a functional behavior assessment is not done, how would you address the behavior intervention plan?

28 C – Because the parents did not have a chance to participate in the IEP process because of their location, no change in the IEPs took place. The Stay-put continued. Dr. Quick, Special Education Director, and Karen Westhues, both repeatedly testified that the reason the district did not implement or suggest other changes was because the parents did not show up to the school for the IEPs. I believe that the evidence is clear in showing their disregard in the belief of Mr.

disability or need to accommodate that disability. This is problematic in itself. For people with disabilities, i.e., parent, appropriate accommodations and modifications need to be made to involve and include those people in the IEP process. We certainly wouldn't deliberately exclude people, and nor are we allowed to, by the IDEA requirements. However, testimony is clear, that is exactly what was done. During the last couple of years, because of transitional services, the district also offered another school building approximately 10 miles away to have an IEP meeting for transitional purposes. But the argument was the same as of earlier: it wasn't convenient for the staff to hold the IEP off school premises. There was no evidence brought that

the school district had staff that was disabled and couldn't attend the meetings because of their disabilities, rather just inconvenience.

#66 - The parents requested and used the term independent educational evaluation rather than reevaluation although it was quite clear they didn't know the difference between them. The evidence shows that the district was well aware of that and used it as a technicality to avoid the 's request.

On pages 23- 27, there is hearing testimony from Dr. Quick and Karen Westhues. Underlying within all hearings is the credibility of all witnesses. During this testimony of both above. I had discussion with the chair about the credibility and if they understood the questions and answers that were not pertinent, answering questions given by the plaintiff attorney, Mr. Walker. Mr. Quick seemed to delay on this timed hearing. Everything that was asked, he couldn't recall, couldn't remember, or didn't know. I believe the panel questioned his credibility at the hearing itself. I was shocked at the decision that they were credible. I would disagree with the contention that either one of those witnesses were credible in the hearing. It was very obvious to me that the intention was to take up the time of the plaintiff because the chair had imposed time limits on the parties; 16 hours arbitrarily. Mr. Quick spent a great deal of time in the witness chair. It looked deliberately like he was stalling during the hearing. I find Karen Westhues not credible because of her lack of understanding in the way she testified. She didn't understand and even get the simplest questions that the panel asked her, along with everyone else. She kept referring to Mr. Quick, as he was directing them to do and not do certain things throughout the IEP process when the parents were not attending. However, she was the case manager who was supposed to know these things. It was extremely difficult to get direct answers and the process was very beleaguering.

To sum up my issues, whether Mr. had a disability or not, which I believe to be so, reflected in the record is deposition that clearly shows his disability again. But even if he didn't have a disability, IDEA regulations 300.322 requires certain things that the school district didn't provide. Even if you believe dad doesn't have a disability, the lack of participation of the school district in the last two years is alarming. #2 is the intent of Stay-put and for the district must make a reasonable calculation to accommodate free and appropriate public education in the IEP. I don't believe they ever suggested this to the parents. The district does have an obligation to provide an appropriate IEP. The parents could waive that part of stay-put to amend it as the statue allows. In fact, this was done through the transportation issue, but the evidence shows that had to file due process just to get that waived. Another issue is the the lack of functional behavioral assessment that is an issue of every IEP. It is alarming to go eight years without doing anything or making any documentation for progress. The final issue: the school district changing stay-put making goals, IEP, different goals, changing behavior goals, collections different, sending information home - all of that is in the respondent's evidence book and has been admitted and speaks to verify that those things had been done. There is no case law in the 8th circuit to deal with some of these questions. But I believe that the district did not provide a free appropriate public education during the time period of question for .

This will conclude my dissent on the vs. Lathrop R-2 School District.

Respectfully submitted,

Rand Hodgson