



Petitioner's Grandmother has been employed by the District as a Parent Educator for twenty-three years. (Tr. Vol. 3, p. 168).

4. The District is a Missouri public school district which is located in Jackson County, Missouri. During school year 2008-09 the District had an enrollment of approximately 17,200 students. (Missouri School District Directory).

5. The Petitioner and Parents were represented by Mr. Stephen Walker, 212 East State Road 73, Suite 122, Saratoga Springs, Utah.

6. During this proceeding the District was represented by Ransom A Ellis, III, Ellis, Ellis, Hammons & Johnson, P.C., The Hammons Tower, 901 St. Louis Street, Suite 600, Springfield, Missouri.

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

Pamela Wright	Hearing Chairperson
Dr. Patty Smith	Panel Member
Vicky Teson	Panel Member

8. During all times relevant to this proceeding the following persons were employed by the District and have provided educational services to the Petitioner:

Dr. David McGehee	Superintendent of Schools
Jerry Keimig	Director-Special Education Services
Kerry Boehm	Principal
Karen Merrigan	Special Education Coordinator
Debbie Campbell	Special Education Coordinator
Kelly Lee	Autism Spectrum Disorder Specialist
Stacey Martin	Autism Spectrum Disorder Specialist
Ashley Furnell	Early Childhood Teacher
Heather Smith	Early Childhood Teacher
Hollie Temple	Early Childhood Special Education Teacher
Jill Jones	Speech/Language Pathologist
Trisha Morris	Occupational Therapist
Beth Bruce	Physical Therapist
Pat Armstrong	Examiner
Cheri Gutekunst	Examiner

### **Time Line Information and Procedural Background**

9. The Due Process Complaint was filed by the Parents with the Department of Elementary and Secondary Education (“DESE”) on April 14, 2009. (DEX 21, p. 138).<sup>1</sup> DESE assigned this matter to Hearing Chairperson Pamela S. Wright.
10. On April 23, 2009, the parties conducted a Resolution Meeting which was unsuccessful. (DEX 21, p. 140). On May 7, 2009, the District requested that the time lines in the case be extended through October 31, 2009. On May 15, 2009, the District filed its Response to the Due Process Complaint. (DEX 21, pp. 141-147).
11. On June 2, 2009, the Hearing Chairperson conducted a Pre-Hearing Conference with the parties. (DEX 21, p. 153). During the Pre-Hearing Conference, the parties discussed the issues to be presented to the Hearing Panel, procedural matters concerning the holding of the hearing and the date of the hearing.
12. On June 16, 2009, Petitioner filed his Amended Due Process Complaint. (DEX 21, pp. 148-152). On July 13, 2009, the District filed District's Response to Petitioner's Amended Due Process Complaint. (DEX 21, pp. 157-162).
13. On July 2, 2009, the Hearing Chairperson issued a Scheduling Order which set forth the issues to be heard by the Hearing Panel and set the date for the due process hearing, among other matters. (DEX 21, pp. 153-156). Pursuant to a joint request of the parties, the deadline for issuing the decision in this case was set at October 31, 2009. (DEX 21, p. 153).
14. The due process hearing in this case was held in Lee's Summit, Missouri on October 6 through 8, 2009. Over the objection of Petitioner, each party was granted 12 hours to present evidence supporting its position. Questioning by the Hearing Panel members did not count against the time limits. Part of the discussion regarding the admission of exhibits also did not factor into the time limits. Petitioner used all of his allotted time. The District did not use all of its time.
15. Petitioner and the District exchanged exhibits prior to the hearing in compliance with the IDEA Regulations, 34 C.F.R. § 300.512. During the due process hearing, the following exhibits were offered into evidence, some of which were not admitted as noted:

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<sup>1</sup> The transcript contains three volumes, one for each day of the due process hearing. Citations to the transcript refer to the volume and page number. Petitioner's Exhibits are referred to as PEX and the appropriate letter. The District's Exhibits are referred to as DEX followed by the appropriate number.

A. Petitioner's Exhibits ("PEX") -- PEX A-D; PEX G-S; PEX T-OO were admitted. The following Petitioner's Exhibits were not admitted: C.1; E, E.1, F, S.1, S.2, PP & QQ over the objections of Petitioner. (Tr. Vol. 3, pp. 244-281).

B. District Exhibits ("DEX") -- DEX 1-8; DEX 9, pp. 83-97, 99, 101-102; DEX 10-18; DEX 19, pp. 123-132; and, DEX 20-21 were admitted. Petitioner objected to the admission of: EX 8 at pages 81a & b and 82; EX 9 at pages 96-100; EX 19 and EX 20.

16. On October 12, 2009, the District requested that the time lines in this case be extended through January 4, 2010. Thereafter, the Hearing Chairperson extended the time lines for mailing the decision in this case through January 4, 2010. The opinion is issued within the current timeline.

17. Witnesses for the Petitioner included: District employees Karen Merrigan & Kelly Lee; ABA expert Jessica Royer and supervisor of Petitioner's home-based program; paternal grandmother of Petitioner; and Father of Petitioner. Respondent called District employee, Jill L. Jones.

### **The Issues Heard by the Hearing Panel**

18. In her Scheduling Order dated July 2, 2009, the Hearing Chairperson identified the issues to be submitted to the Hearing Panel. (DEX 21, pp. 153-154). These issues are as follows:

Issue No. 1. Did Lee's Summit R-VII School District ("the School District") violate the procedural requirements of the IDEA in its development of the March 23, 2009 IEP for [the Petitioner]? If so, did the conduct: (1) impede the [Petitioner's] right to a free appropriate public education; (2) significantly impede the Parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to [the Petitioner]; or (3) cause the [Petitioner] to suffer deprivation of an educational benefit? And if so, to what extent does such conduct constitute an affirmative defense for the School District for any conduct found to violate IDEA or the State Plan?

Issue No. 2. Is [Petitioner's] March 23, 2009 IEP reasonably calculated to provide him with a free appropriate public education?

Issue No. 3. If the [Petitioner's] March 23, 2009 IEP was not reasonably calculated to [provide him with] educational benefits, what conduct, if any, of [Petitioner's] Parents materially contributed to the failure to develop an adequate IEP?

Issue No. 4. If the [Petitioner] prevails on one or more of the issues above, what are the appropriate remedies?

## **BACKGROUND FACTS**

### **First Steps Program – July 27, 2008-March 26, 2009**

19. Prior to March 27, 2009, when the Petitioner turned three (3) years of age, the Petitioner received services from the First Steps Program in a home-based program. Petitioner's First Steps Program was set out in an Individualized Family Service Plan ("IFSP") which was developed by the First Steps Program on or around July 23, 2008. (DEX 3, pp. 36-46). Petitioner's IFSP indicates that Petitioner's Primary Eligibility Reason was "Confirmation Of Developmental Delay" and his Diagnosis Code/Description was "315/Specific Delays In Development." (DEX 3, p. 36). At that time, Petitioner also had a medical diagnosis of "autism." There is no evidence on the record that Petitioner's Parents complained to First Steps that its Primary Eligibility Reason or its Diagnosis Code/Description were too general or incorrect or that they were unhappy about the nature and extent of the First Steps educational program being provided to Petitioner.

20. The first contact the District had with the Petitioner was when he was referred to the District by the First Steps Program on September 10, 2008. (DEX 1, p. 1). The First Steps Initial Referral Form indicates that "[Petitioner] was referred for a special education evaluation from First Steps due to concerns in the areas of motor and communication." (DEX 1, p. 1; Tr. Vol. 1, pp. 244-245).

21. On September 10, 2008, the District conducted a First Steps Transition Meeting concerning the Petitioner. (Tr. Vol. 1, pp. 245-247). Present at this meeting were: Petitioner's Father and Grandmother; from the District, Karen Merrigan, Kelly Lee, Ashley Furnell, Jill Jones and Trisha Morris; and from First Steps, Stacy Hall and Laura Snyder. (DEX 2, p. 3; Tr. Vol. 1, p. 246). During the meeting, Petitioner's Father and Grandmother were provided with a written Agenda, (DEX 1, p. 2) and provided releases to allow the District to gather information concerning Petitioner. (DEX 2, pp. 6-7). Petitioner's Team discussed his strengths and weaknesses and Petitioner's Father was also asked to provide screening information regarding Petitioner by completing a Parent Input/Contact Form-Screening Information. (DEX 2, pp. 8-9; Tr. Vol. 1, pp. 246-247). Petitioner's Father completed the form and returned it to the District on or about December 20, 2008. (DEX 2, pp. 8-9; Tr. Vol. 1, p. 247).

22. During the Transition Meeting on September 10, 2008, Petitioner's Father provided the District with several reports concerning Petitioner. (Tr. Vol. 1, pp. 249-251). These documents included:

A. A Physical Therapy Evaluation from First Steps dated May 17, 2007. The Evaluation indicated that Petitioner was not walking or crawling at age 13 months. His gross motor skills approximated at the 6 month level, with a scattering of scores reaching the 8 month level. (DEX 3, pp. 10-11).

B. An Occupational Therapy Assessment from Triality Tots dated May 17, 2007. This Assessment showed that Petitioner's fine motor skills were at the 10-11 month range at a time of chronological age of 14 months. (DEX 3, pp. 12-14).

C. A Developmental Therapy Assessment by Cathy Harris dated May 25, 2007. She concluded that in all three areas evaluated – cognition; social/emotional and adaptive development – Petitioner displayed scores that fell above the 50% ability for a child with his chronological age of 14 months. (DEX 3, pp. 15-17).

D. Therapy Progress Notes from October, 30, 2007 through September 6, 2008. (DEX 3, pp. 18-25).

E. A Speech-Language Evaluation from Summit Speech Therapy, dated January 23, 2008. The Evaluation showed language comprehension skills to be functioning at the 6 months age level and language expression skills to be functioning at the 3 month age level for a combined total language age of 4.5 months for Petitioner who had a chronological age of 1 year, 9 months at the time of testing. (DEX 3, pp. 26-29).

F. An Initial Observation and ABLLS-R prepared by Jessica Royer, dated May 2, 2008. (DEX 3, pp. 30-35).

G. Petitioner's First Steps IFSP dated July 23, 2008. (DEX 3, pp. 36-46).

23. On January 9, 2009, Karen Merrigan telephoned Petitioner's Mother. During this conversation, Petitioner's Mother indicated that Petitioner started receiving speech-language therapy services that week. (Tr. Vol. 1, p. 263). Ms. Merrigan asked Petitioner's Mother for an updated copy of the ABLLS, if she had one. Petitioner's Mother directed Ms. Merrigan to call Sara Sinclair, who was working with Petitioner, for the information. (DEX 19, p. 123; Tr. Vol. 1, pp. 263-264). Ms. Merrigan made two unsuccessful attempts to reach Ms. Sinclair by telephone on January 9 and January 20, 2009. (DEX 19, p. 123).

24. On January 21, 2009, Karen Merrigan telephoned Petitioner's Father to arrange a meeting to review Petitioner's existing data as a part of an initial evaluation of Petitioner and to see if he could provide a copy of an updated ABLLS for the Petitioner. (DEX 19, p. 123; Tr. Vol. 1, pp. 265-266). During this call Ms. Merrigan suggested three possible dates for the review of existing data meeting. (DEX 19, p. 123).

25. On January 22, 2009, Petitioner's Father emailed Ms. Merrigan and agreed to have the review of existing data meeting on January 30, 2009 at 2:30 p.m. (DEX 4, p. 47). At that time, Petitioner's Father also provided the District with a copy of Petitioner's most recent ABLLS-R, dated January 2009. (DEX 4, p. 47; DEX 8, pp. 78-81; Tr. Vol. 1, p. 252). Father also provided the District with a video depicting Petitioner in a church setting, designed to show how he functioned outside the home. (Tr. Vol. 2, pp. 178-179).

26. On January 23, 2009, Karen Merrigan sent the Parents a Notification of Meeting form for the Review of Existing Data Meeting scheduled on January 30, 2009. (DEX 5, p. 48; Tr. Vol. 1, p. 257).

### **Review of Existing Data Meeting on January 30, 2009**

27. On January 30, 2009, Petitioner's IEP Team met to review the Petitioner's existing data. Present at this meeting were: Petitioner's Father and Grandmother, Advocate Rand Hodgson, Jessica Royer, Karen Merrigan, Jill Jones, Ashley Furnell and Kelly Lee. (DEX 5, p. 51; Tr. Vol. 1, pp. 258-259). Mr. Hodgson is known as an outspoken advocate for parents of children with disabilities. (Tr. Vol. 3, pp. 73-74). Ms. Royer is an employee of Partners in Behavioral Milestones ("PBM"). Ms. Royer indicated that she shares information with public schools at evaluation and IEP meetings when she sees a need. She said the same is also true for Mr. Hodgson. (Tr. Vol. 3, p. 73-74). Prior to the meeting District staff had reviewed the information that had been provided by Petitioner's Parents and providers. During this meeting:

A. The Petitioner's IEP Team determined that additional assessments needed to be performed in the areas of Motor, Speech/Language, Cognitive/Intellectual, Academic, Social/Emotional/Behavioral and an Observation needed to be completed. (DEX 5, pp. 49-51; Tr. Vol. 1, pp. 258-259). A Summary of Existing Data/Evaluation Plan was provided to Petitioner's Father. (DEX 5, pp. 49-51).

B. Karen Merrigan reviewed the Evaluation Plan with Petitioner's Team. (DEX 5, pp. 49-51; DEX 19, p. 124; Tr. Vol. 1, pp. 259-260). Petitioner's Team discussed each test that was going to be administered to the Petitioner. (Tr. Vol. 2, p. 63).

C. Petitioner's Father did not express concerns about the areas that had been selected for the evaluation or suggest other areas that he felt should be evaluated. (Tr. Vol. 2, pp. 62-63).

D. Additional information concerning the Petitioner's current functioning was provided by Petitioner's Father and Jessica Royer. (DEX 19, p. 124). Petitioner's Father, Jessica Royer, Rand Hodgson and the other persons with Petitioner's Father did not make suggestions for additional tests to be performed during Petitioner's evaluation. (Tr. Vol. 1, pp. 259-260; Tr. Vol. 2, p. 242).

E. A completed Description of Areas to be Assessed and Known Tests to be Used Form was provided to Petitioner's Father and discussed by Petitioner's IEP Team. (DEX 5, p. 52; DEX 19, p. 124; Tr. Vol. 1, pp. 259-260).

F. A Notice of Action which requested parental consent for the initial evaluation of the Petitioner was prepared and provided to Petitioner's Father. (DEX 5, pp. 53-54; DEX 19, p. 124; Tr. Vol. 1, pp. 260-261; Tr. Vol. 2, p. 242). On January 30, 2009, Petitioner's Father signed the consent form, but did not sign "Section 2" of the Consent Form which would have waived the ten (10) day time requirement. (DEX 5, p. 54; DEX 19, p. 124; Tr. Vol. 1, pp. 261-262; Tr. Vol. 2, pp. 242-243).

G. A meeting to review the results of Petitioner's additional assessments and an Evaluation Report was scheduled for March 6, 2009 at noon. (DEX 19, p. 124).

H. The Student's Father was provided a copy of the Procedural Safeguards by Karen Merrigan. (DEX 19, p. 124).

28. On February 27, 2009, Petitioner's Father sent an email message to Karen Merrigan which contained an updated Present Level of Performance prepared by Miranda Bonney, Petitioner's speech/language pathologist. (DEX 6, pp. 55-56; Tr. Vol. 1, pp. 266-267).

29. On March 2, 2009, Karen Merrigan responded to Petitioner's Father by email. In this email, Ms. Merrigan reconfirmed that Petitioner's IEP Team would meet on March 6, 2009 at noon to review his evaluation information. Ms. Merrigan also asked Petitioner's Father to "pencil in" March 23 at 11:00 a. m. for an additional meeting if needed. (DEX 7, p. 57; Tr. Vol. 1, pp. 267-268).

30. Prior to March 6, 2009, District personnel reviewed existing data, conducted assessments and observations as a part of the Petitioner's evaluation process. The following assessments and observations were performed:

A. On February 18, 2009, District Autism Spectrum Disorder Specialist Kelly Lee conducted an observation of Petitioner in his home. The observation centered on the social/emotional/behavioral areas of the evaluation. (DEX 8, pp. 70-71; PEX R, pp. 50-51; Tr. Vol. 1, pp. 269, 271-272; Tr. Vol. 2, pp. 243-248). During the observation, Ms. Lee determined not to administer the PEP-3 test. Ms. Lee explained this decision as follows:

"If I would have sat that little boy down and tried to assess him for a number of hours, it could have caused anxiety. It may not have yielded his current abilities placing

him in a new setting, in a new environment, with new materials and a new person, and I didn't feel like that was best for his interests."

(Tr. Vol. 2, p. 109, lns. 23-25; p. 110, lns. 103). Ms. Lee also determined during her observation that the Petitioner usually only engaged in socialization activities at church. (Tr. Vol. 2, p. 265).

B. On February 24, 2009, Speech/Language Pathologist Jill Jones performed an observation of Petitioner in his home. (DEX 8, pp. 60-63; PEX Q, pp. 46-49; Tr. Vol. 1, pp. 269, 271; Tr. Vol. 3, pp. 288-292).

C. On February 26, 2009, District Examiners Pat Armstrong and Cheri Gutekunst administered the Bayley-III Scales of Infant Development to the Petitioner in his home. Speech/Language Pathologist Jill Jones observed the assessment. The use of the Bayley allowed the District evaluators to observe and detail Petitioner's behavior, cognitive abilities, receptive language, expressive language and gross motor skills. (DEX 8, pp. 65-68; PEX P, pp. 42-45; Tr. Vol. 1, pp. 269-270).

D. On March 4, 2009, District Occupational Therapist Trisha Morris conducted an observation of Petitioner at his home to review his fine motor skills. (DEX 8, pp. 73-74; PEX S, pp. 52-53; Tr. Vol. 1, pp. 269, 273).

#### **Evaluation Meeting on March 6, 2009**

31. On March 6, 2009, Petitioner's IEP Team met for an Evaluation meeting that lasted 90 minutes. (Tr. Vol. 1, p. 278). Petitioner and his Parents were represented at the meeting by Petitioner's Father and Grandmother, Rand Hodgson (Advocate for Petitioner), Jessica Royer (PBM), Sara Sinclair (PBM) and Ana Neises (PBM). District personnel who attended the meeting included Karen Merrigan, Kelly Lee, Ashley Furnell, Heather Smith, Trisha Morris and Beth Bruce. (DEX 8, pp. 77, 82; Tr. Vol. 1, pp. 275-278). During this meeting:

A. District personnel provided a complete review of the assessments and observations contained in the Evaluation Report, including the following:

(1) Karen Merrigan reviewed the communication section of the Bayley III which had been completed by Jill Jones. (DEX 8, p. 82). Jill Jones was unable to attend the meeting and Ms. Merrigan, who is certified as a speech/language pathologist (Tr. Vol. 1, p. 242; Tr. Vol. 3, pp. 301-302), discussed the observations and findings for Ms. Jones. (Tr. Vol. 2, p. 252; Tr. Vol. 3, p. 158).

(2) District personnel shared the results of the Cognitive area of the Bayley III. Rand Hodgson and Jessica Royer inquired about the type of questions asked in this

portion of the evaluation. (DEX 8, p. 82; Tr. Vol. 1, p. 278; Tr. Vol. 2, pp. 252-254; Tr. Vol. 3, pp. 158-159).

(3) Occupational Therapist Trisha Morris discussed her observations of Petitioner's fine motor skills. (DEX 8, p. 82; Tr. Vol. 1, p. 278; Tr. Vol. 2, p. 254; Tr. Vol. 3, p. 160).

(4) Physical Therapist Beth Bruce discussed her observations of Petitioner's gross motor skills and Ms. Merrigan reviewed the results of the gross motor skills assessment on the Bayley. (DEX 8, p. 82; Tr. Vol. 1, p. 278; Tr. Vol. 2, p. 254).

(5) Autism Specialist Kelly Lee discussed her in-home observation of the Petitioner which focused on Petitioner's social/emotional/behavioral skills. (DEX 8, p. 82; Tr. Vol. 1, p. 278; Tr. Vol. 2, p. 254; Tr. Vol. 3, p. 159).

(6) Cheri Gutekunst discussed her observations of Petitioner's receptive and expressive language from the administration of the Bayley Scales. (DEX 8, pp. 81a-81b; Tr. Vol. 1, pp. 278-279).

(7) According to Ms. Merrigan, the District recognized in running the Bayley's, the District could not identify Petitioner as having autism. (Tr. Vol. 1, p. 35) She also acknowledged that the District did not run any assessments that would determine whether the Petitioner had autism. (Tr. Vol. 1, pp. 35, 39, 44, 55-56).

B. The parents were provided draft copies of the following documents at the March 6, 2009 meeting:

(1) The February 18, 2009 observation conducted by District Autism Spectrum Disorder Specialist Kelly Lee. (DEX 8, pp. 70-71; PEX R, pp. 50-51; Tr. Vol. 1, pp. 269, 271-272; 274-275; Tr. Vol. 2, p. 65).

(2) The February 24, 2009 observation conducted by Speech/Language Pathologist Jill Jones. (DEX 8, pp. 60-63; PEX Q, pp. 46-49; Tr. Vol. 1, pp. 269, 271, 274-275; Tr. Vol. 2, p. 64).

(3) The February 26, 2009 report concerning the administration of the Bayley-III Scales of Infant Development. (DEX 8, pp. 65-68; PEX P, pp. 42-45; Tr. Vol. 1, pp. 269-270, 274-275; Tr. Vol. 2, p. 64).

(4) The March 4, 2009 observation by Occupational Therapist Trisha Morris of Petitioner at his home to review his fine motor skills. (DEX 8, pp. 73-74; PEX S, pp. 52-53; Tr. Vol. 1, pp. 269, 273-275; Tr. Vol. 2, p. 65).

C. Petitioner's Team decided that Petitioner would qualify for an educational diagnosis of Young Child with a Developmental Delay ("YCDD") based on his depressed scores in the areas of communication and physical skills. (DEX 8, pp. 76, 82; Tr. Vol. 2, pp. 254-256). The District almost always assigns a YCDD educational diagnosis for children [with disabilities] in Petitioner's age range. (Tr. Vol. 1, pp. 28-29). YCDD covers almost all of the 16 categories [in the State Plan]. (Tr. Vol. 2, 18). An educational diagnosis of autism is more particularized for a child with autism than YCDD. (Tr. Vol. 2, p. 103). The District had sufficient information to identify Petitioner as a child eligible for services under the disability category of autism. (Tr. Vol. 2, pp. 10-11).

D. Neither Jessica Royer nor Rand Hodgson made suggestions concerning the conclusions of the evaluation during the meeting. (Tr. Vol. 1, pp. 284-285). Jessica Royer commented during the meeting "on how thorough our observations/evaluations were." (DEX 8, p. 82; Tr. Vol. 1, pp. 285-286; Tr. Vol. 2, p. 74; Tr. Vol. 2, pp. 257, 317).

E. During the meeting, Petitioner's Father did not state that he wanted Petitioner to receive a different educational diagnosis. (Tr. Vol. 2, pp. 66-67; Tr. Vol. 2, pp. 104-105).

F. Petitioner's Team agreed to meet again on March 23, 2009 to prepare the Petitioner's initial Individualized Education Plan. ("IEP"). (DEX 8, p. 82; Tr. Vol. 1, pp. 286-287).

G. A copy of the completed Evaluation Report for Petitioner was sent to Petitioner's Parents on April 17, 2009. (DEX 15; Tr. Vol. 1, p. 325).

32. When the determination of Petitioner's educational diagnosis was made, the District staff considered all the information provided by Petitioner's Parents and Jessica Royer, as well as the information obtained through observation and testing conducted as a part of the evaluation. Jessica Royer testified that her concern about a child's educational diagnosis comes down to the question of what services the child will receive. (Tr. Vol. 3, p. 89). Whether Petitioner was determined to have an educational diagnosis of "Autism" or "Young Child With Developmental Delays," the program of special education and related services would be developed to meet his individual needs. (Tr. Vol. 1, pp. 302-303; Tr. Vol. 2, pp. 301-303). Kelly Lee testified:

". . . the most important thing was to make sure that we had an appropriate IEP that was developed that met his needs. And regardless of whether he was diagnosed with Other Health Impaired, YCDD or Educational Autism, when it all shakes down, that IEP should look exactly the same, because the goals and objectives, and present levels are not based on a diagnosis."

(Tr. Vol. 2, p. 303, lns 2-9).

33. Petitioner's evaluation was completed on March 6, 2009, less than sixty (60) days after Petitioner's Father provided written consent for the evaluation. (DEX 5, pp. 53-54).

### **IEP Meeting on March 23, 2009**

34. On March 23, 2009, Petitioner's IEP Team met to develop his initial IEP. Present at this meeting for Petitioner were: Petitioner's Father and Grandmother, Rand Hodgson (Advocate), Jessica Royer (PBM), Sarah Sinclair (PBM) and Anna Neises (PBM). Present at the meeting from the District were: Karen Merrigan, Stacey Martin, Ashley Furnell, Heather Smith, Jill Jones, Beth Bruce, Trisha Morris and Kerry Boehm. (DEX 9, pp. 83, 95; Tr. Vol. 1, p. 293). Prior to the IEP Meeting on March 23, 2009, the District staff had not prepared a draft IEP. During the IEP meeting the following occurred:

A. Petitioner's IEP Team discussed the draft of the Present Levels of Academic Achievement and Functional Performance. (DEX 9, pp. 96-97). The draft had been provided to Petitioner's Parents more than a week before the IEP meeting, having been mailed the Friday before Spring Break. (DEX 9, pp. 96-97; Tr. Vol. 1, p. 288; Tr. Vol. 3, p. 305). Jessica Royer and Petitioner's Grandmother recalled having a copy of the draft at the IEP meeting. (Tr. Vol. 3, p. 115; Tr. Vol. 3, pp. 186-187). The Present Levels section of the IEP states that Petitioner "has a medical diagnosis of autism." (DEX 9, p. 85). The Present Levels section also includes concerns expressed by the Parents for their child: receptive and expressive language skills as well as some stemming activities, more particularly hand-flapping. (DEX 9, p. 85).

B. Petitioner's Father was provided with draft copies of the evaluation information because the evaluation report had not been completed --- it still needed to be proofed and spell-checked. (Tr. Vol. 2, pp. 59-60). There was no difference in substance between the draft presented on March 23, 2009 and the final evaluation report sent to the Parents on April 17, 2009. (Tr. Vol. 2, pp. 59-60).

C. During the meeting, Jessica Royer and Rand Hodgson "stated they would provide a list of play schemes, oral motor exercise [the Petitioner] has been doing; current OT/PT reports; vocabulary [the Petitioner] is currently working on as well as the consonant sounds he has been successful with." (DEX 9, p. 95; Tr. Vol. 1, pp. 303-304; Tr. Vol. 2, p. 59). Ms. Royer also shared that Petitioner is very sedentary and is difficult to motivate. (DEX 9, p. 95).

D. Petitioner's IEP Team discussed and adopted goals for Petitioner in the areas of physical therapy, speech/language therapy, occupational therapy and special instruction. Some of the goals were in draft form that were not mailed to Petitioner's parents in advance of the meeting and were not distributed to the participants during the

meeting, making it more difficult for the Father and his representatives to follow the discussion. (Tr. Vol. 3, pp. 176-177).

(1) Kelly Lee helped develop the initial draft goals covering the observations that she had made of the Petitioner during the District's evaluation of him. (Tr. Vol. 2, pp. 261-262). In the development of the goals on his IEP, Ms. Lee's objective was to encourage the Petitioner to express his wants and needs, including requesting help. (Tr. Vol. 2, p. 262). A comparison of the bullet points on Ms. Lee's observation of the Petitioner (DEX 8, pp. 70-71) with the goals in his completed IEP (DEX 9, pp. 86-89) shows that Ms. Lee used her observation to formulate the goals. (Tr. Vol. 2, pp. 261-264). Ms. Royer also offered input on Petitioner's communication goals, with changes made based on her suggestions. (Tr. Vol. 1, p. 181; 303).

(2) Jill Jones prepared draft speech/language goals from the information they had received, including the ABBLS and the observations made during Petitioner's evaluation. (DEX 9, p. 99; Tr. Vol. 3, p. 303). During the IEP meeting, Ms. Jones discussed the proposed goals with Petitioner's IEP Team and made changes to the draft, which are noted on the exhibit. (DEX 9, p. 99; Tr. Vol. 3, pp. 303-316). The Team developed eight articulation and language goals for Petitioner's IEP -- Goals 6-11 and 14-15. (DEX 9, pp. 87-89).

(3) None of the goals incorporated in the IEP for Petitioner contained baseline information. (Tr. Vol. 1, p. 170). Almost all the goals have checked the box that says "other" how progress will be taken. (Tr. Vol. 1, pp. 174-176). The goals in the IEP were for a one year period. (Tr. Vol. 1, p. 162). The goals, however, were likely to be revised and adjusted as Petitioner, age 3, met them in less than the one year period. (Tr. Vol. 2, pp. 168, 180); (Tr. Vol. 3A, pp. 122-123). The District does not write methodology into the goals because the methodology may need to be changed. (Tr. Vol. 1, p. 302).

E. Petitioner's IEP Team discussed and adopted accommodations for inclusion in his IEP including sensory strategies, repeated instructions, frequent reinforcers, extended wait time, adult support as needed and the use of visual supports. (DEX 9, p. 95). Many of these accommodations could be used to assist the Petitioner to transition into the District's educational program. (Tr. Vol. 2, pp. 72-73).

F. Petitioner's IEP Team discussed and determined the Service Minutes in the IEP. (DEX 9, p. 95; Tr. Vol. 1, pp. 297-302). During the IEP meeting:

(1) It was determined that Petitioner would receive a total of seven hundred twenty (720) minutes per week. (Tr. Vol. 1, p. 299). He would get services 3 hours per day over 4 days per week (Tr. Vol. 1, p 103-104).

(2) Petitioner was also scheduled to receive related services from three different providers for a total of one hundred fifty (150) minutes per week. (Tr. Vol. 1, pp. 299-300). The minutes for the related services would be deducted from the regular service minutes or the STARS service minutes depending upon whether Petitioner attended the program in the morning or the afternoon. (Tr. Vol. 1, pp. 300-301).

(3) Petitioner's Father, Jessica Royer and Rand Hodgson did not request that Petitioner receive additional service minutes. (Tr. Vol. 2, p. 58).

G. Petitioner's IEP Team discussed and determined Petitioner's placement. The Team considered five (5) separate Early Childhood placements and determined that the appropriate educational placement for Petitioner was "Part-time early childhood/part-time, early childhood special education." (DEX 9, pp. 93, 95). At no time during the meeting did Petitioner's Father and Grandmother, Jessica Royer or Rand Hodgson state that Petitioner was not ready to come to work at school. (Tr. Vol. 3, p. 316). The Team further noted that this placement would provide Petitioner with one-on-one instruction as well as time with non-disabled peers. (DEX 9, p. 95). In this placement:

(1) For a portion of the school day, Petitioner would be in an early childhood (regular education) classroom with teacher Ashley Furnell. The early childhood class is a "blended class" with students who have diagnoses like autism and ADD who attend with non-disabled peers who are generally Title I students. (Tr. Vol. 1, pp. 306-307). At the time of the hearing, Ms. Furnell had six (6) students in her classroom. (Tr. Vol. 3, pp. 331-332).

(2) Generally, there are a combined 18 students, with two teachers and three or four paraprofessionals to assist in the two regular education classrooms. (DEX. 19, pp. 125-127); Tr. Vol. 3, pp. 180-181). They are often broken down into smaller groups except during snack and circle time when the two rooms are together. (DEX 19, p. 127).

(3) For a portion of the school day, Petitioner would be in an early childhood special education (STARS) classroom with teacher Heather Smith. This classroom contained students who required more intensive instruction. (Tr. Vol. 1, p. 307).

(4) As explained to the Father and Grandmother during their tours of the classrooms, the students in the part-time Early Childhood Special Education Program all have individual goals and copious data is taken across all settings and logged into a notebook or clipboard for later analysis. There is a master schedule showing what each child is scheduled to be doing at all times. The tasks each child works on depends the needs, abilities and goals for that particular child. (DEX 19, pp. 125-132).

H. The STARS program was developed by Stacey Martin and Kelly Lee from a program used in the public schools in Seattle, Washington. (Tr. Vol. 2, p. 266). Every

component of the program is individualized according to each child's needs. (Tr. Vol. 2, pp. 267, 270). These individual strategies include the use of visual strategies, visual supports, sensory strategies, fundamentals of applied behavioral analysis, Picture Exchange Communication System and discrete trial teaching. (Tr. Vol. 2, pp. 267-269). The STARS program also utilizes the ABLLS-R as a guide to review and guide a student's programming. (Tr. Vol. 2, p. 269). The STARS program classrooms usually have no more than four students, (Tr. Vol. 2, p. 314), and have served students with more severe needs than those exhibited by the Petitioner. (Tr. Vol. 2, pp. 319-320).

I. Petitioner's Team did not develop a Behavior Intervention Plan ("BIP") with the IEP. (Tr. Vol. 1, pp. 187-188). There is no documentation indicating that the District was going to do a functional behavior assessment for this child. Vol. 2, p. 194). Petitioner's reported and observed behaviors were met in the program provided by the District by addressing Petitioner's sensory needs throughout the day and providing social and sensory modifications in his IEP. (Tr. Vol. 2, pp. 307-308). "[F]rom the get-go when he arrives on the first day, they're going to be observing those behaviors to see what the function is, if it's sensory related, if it's because he wants to escape the task, . . . whatever that function might be." (Tr. Vol. 2, p. 308, lns. 10-14).

J. District staff indicated that Petitioner could be assigned to the afternoon session of the Early Childhood program based on his zip code and bus schedule. (Tr. Vol. 2, pp. 76-77). Jessica Royer indicated that the Petitioner worked better in the morning so District staff indicated they would look into scheduling him to attend the morning session. (DEX 9, p. 95; Tr. Vol. 1, pp. 297-298; Tr. Vol. 2, pp. 58-59). Because Petitioner would be entering an established class late in the school year, developing a schedule was difficult, especially when scheduling related services. (Tr. Vol. 1, pp. 298-299).

K. The transition of Petitioner into school was not discussed. No formal transition plan was included in the IEP. (Tr. Vol. 1, pp. 198-200). They recognized that there could be transition problems going from the home program to a public school program (as well as transitioning from one part of his proposed schedule to another on a frequent basis) for which a [formal] plan could have been created for that situation. (Tr. Vol. 1, pp. 198-200). However, prior to a student beginning school, the District staff works to insure that the student's transition into the school is successful (Tr. Vol. 1, p. 304), including such things as having the child walk through the school; might provide a visual schedule; providing the student and parents with a "social story" comprised of "pictures of what to expect, pictures of people and pictures of . . . the area that he might have play time." (Tr. Vol. 2, p. 311). The information requested in Finding of Fact # 34 (C) from Ms. Royer was also designed to help with transition.

L. A Notice of Action was prepared which indicated that Petitioner qualified for special services and that the District proposed an initial placement. (DEX 9, pp. 101-

102). The placement that had been discussed was "Part-time early childhood/part-time, early childhood special education." (DEX 9, pp. 93, 95). Petitioner's Father signed the consent for initial services and the waiver of the ten (10) day time requirement at the close of the meeting attended by Rand Hodgson, Advocate for parents and Jessica Royer, supervisor of Petitioner's in-home program. (DEX 9, pp. 95, 102; Tr. Vol. 1, pp. 314-316).

M. The District provided Petitioner's Father with a copy of the Procedural Safeguards. (DEX 9, p. 95, Tr. Vol. 1, pp. 312-314).

N. The IEP meeting lasted approximately 90 minutes. (Tr. Vol. 1, p. 293).

35. In developing Petitioner's IEP, the IEP Team considered: (a) the strengths of Petitioner; (b) the concerns of the Parents for Petitioner's education; (c) the results of the evaluation of Petitioner; and, (d) the academic, developmental and functional needs of the Petitioner. (DEX 9, pp. 83-94).

36. At no time during the March 23, 2009 IEP did Petitioner's Father, or anyone acting on behalf of the Parents, state that:

A. The Parents rejected the placement proposed by the District or that they were revoking their consent to placement which was signed on March 23, 2009.

B. It was the intent of the Parents to enroll Petitioner in a private school at public expense or, as in this case, request that the District pay for Petitioner's home-based program.

37. Petitioner's IEP was completed prior to Petitioner's third birthday. (DEX 9, pp. 83-94) ; (Tr. Vol. 1, p. 317).

38. After the conclusion of the IEP Meeting on March 23, 2009, Petitioner's Father provided Karen Merrigan with a letter. In the letter Petitioner's Father states:

"At this point we are not requesting additional testing or observations to determine if other areas of deficiency would trigger eligibility. At this point it will be sufficient if the IEP team develops appropriate goals and provides appropriate services to treat all areas of his deficits (including social and cognitive).

We also believe that [the Petitioner] should be classified as a child with autism as opposed to a young child with developmental delays since this would better characterize him."

(DEX 10, p. 103; Tr. Vol. 1, pp. 315-318).

39. Following the conclusion of the IEP Meeting on March 23, 2009, Petitioner's Father and Sarah Sinclair (PBM) were provided with a tour of the Early Childhood Special Education and Regular Education classrooms by Jill Jones. (DEX 19, pp. 125-126). Later that day, Petitioner's Father emailed Karen Merrigan and asked if Petitioner's Mother could be given a tour of the classrooms on March 25, 2009. (DEX 11, Tr. Vol. 1, p. 319). On Wednesday, March 25, 2009, Jill Jones provided a tour of the Early Childhood Special Education and Regular Education classrooms to Petitioner's Grandmother. (DEX 19, pp. 127-129). Neither the Parents nor Petitioner's Grandmother indicated during these tours that they felt that the program they were being shown was inappropriate for the Petitioner. (Tr. Vol. 3, pp. 366-367).

### **Developments after the March 23, 2009 IEP Meeting**

40. The District provided Petitioner's Parents with a copy of Petitioner's completed IEP on March 25, 2009. (DEX 12, p. 105, ¶ 1; Tr. Vol. 2, p. 328). The IEP was provided to the Parents less than two (2) days following the conclusion of the IEP Meeting. Jessica Royer received a copy of the completed IEP from the Parents prior to providing the Parents with written information that was attached to their letter to the District's Superintendent, dated March 30, 2009. (Tr. Vol. 3, pp. 114-115).

41. On March 30, 2009, Petitioner's Parents wrote a letter to the Dr. David McGehee, the District's Superintendent. (DEX 12, pp. 105-107; Tr. Vol. 1, pp 320-321). In this letter the Parents make the following points:

A. The Parents state that they received a copy of Petitioner's IEP on March 25, 2009. (DEX 12, p. 105, ¶ 1).

B. The Parents state that they believe that the proposed twelve (12) hours a week in a classroom setting is inappropriate for Petitioner. (DEX 12, p. 105, ¶ 2).

C. The Parents state that they believe Petitioner needs to be served five hours a day, 5 days a week in a setting similar to the home setting he was in at that time with "low sensory, positive reinforcement, errorless teaching." (DEX 12, p. 105, ¶ 3).

D. The Parents state that they believe Petitioner should not receive more than two and one half (2½) hours a week of small group time with no more than five people. (DEX 12, p. 105, ¶ 3).

E. The Parents requested that the educational services provided to Petitioner be supervised by a Board Certified Behavioral Analyst. (DEX 12, p. 105, ¶ 3).

F. The Parents requested that baseline data be added and/or raised questions concerning seven (7) goals in the IEP; that changes be made to the present levels section of the IEP; that "skills" be added to the IEP; and that nine (9) accommodations or modifications be added. (DEX 12, pp. 105-107).

42. The Parents' letter dated March 30, 2009 does not:

A. Reject the placement proposed by the District. (DEX 12, p. 105). Nor does the letter state that Petitioner's Parents are revoking their consent to placement which was signed on March 23, 2009. (DEX 9, pp. 101-102).

B. State the intent of Petitioner's Parents to enroll Petitioner in a private school at public expense or, as in this case, request that the District pay for Petitioner's home-based program. (DEX 12, p. 105).

43. On April 6, 2009, Karen Merrigan responded to the Parents' letter. (DEX 114; Tr. Vol. 1, pp. 322-323). In that letter, Ms. Merrigan answers the questions raised by the Parents and enclosed a Notice of Action which addresses the remainder of the issues in their letter. (DEX 14, p. 110). The Notice of Action, which was attached to the letter, (Tr. Vol. 1, pp. 323-324), rejects the following requests made by Petitioner's Parents in their March 30, 2009, letter to the District's Superintendent:

A. That Present Levels of Performance be changed.

B. That the Accommodations/Modifications be changed.

C. That the educational services provided to Petitioner be supervised by a Board Certified Behavioral Analyst.

D. That the Goals in the IEP be changed.

E. That the District provide two additional hours of service to Petitioner daily.

F. That the District provide an additional school day for Petitioner.

44. The book, *Educating Children With Autism*, published by the National Research Council (October, 2001), is an authoritative text with respect to programming for children with Autism. (Tr. Vol. 2, pp. 230-231). In that text, the National Research Council recommends that autistic children receive twenty to twenty-five hours of programming per week which should take place in a variety of environments, including outside of school. (Tr. Vol. 2, pp. 232-233).

### **Home-Based Program, including Expenses**

45. Petitioner is currently receiving home-based ABA programming supervised by Jessica Royer at PBM. (Tr. Vol. 3, p. 100).

A. The implementers in the program are trained by Ms. Royer. (Tr. Vol. 3, pp. 100-101). At the time of the hearing, the program had three (3) implementers. (Tr. Vol. 3, p. 101). The implementers are hired by the Parents. (Tr. Vol. 3, p. 107). There is no established "approval process" for hiring the implementers. (Tr. Vol. 3, p. 109). There is no requirement that the implementers have a college or even a high school degree. (Tr. Vol. 3, p. 110).

B. The ABA program recommended for Petitioner is a minimum of twenty-five (25) hours during five (5) days per week for the entire year. (Tr. Vol. 3, p. 100). The program uses the ABBLS as a "curriculum guide." (Tr. Vol. 3, p. 156). Contrary to the representation made by the Parents (see e.g., DEX, p. 12), Petitioner did not receive 25 hours per week of ABA services. Based on an analysis of the time sheets included in PEX NN, pp. 124-150, Petitioner received one-on-one services of 54 hours in April; 74 hours of services in May; 102.75 hours in June; 91 hours in July and 88.5 hours in August. These monthly hours average 19.06 hours of services on a weekly basis. He receives paid services spread out over six days per weekly basis. (Tr. Vol. 3A, p. 106). Petitioner received educational benefit from the services received in the home-based program. (Tr. Vol. 3, pp. 57-59; 62-63).

C. Petitioner's home-based program usually only allows him to engage in socialization activities with non-disabled peers when he goes to church. (Tr. Vol. 2, p. 265).

D. Petitioner does not receive services from a Physical Therapist or an Occupational Therapist in his home-based program due to family budgetary concerns. (Tr. Vol. 3, pp. 112-113; 146).

E. Petitioner's Parents spent \$8364.49 on the home-based program from April-early September 2009. (PEX NN p. 124).

46. The Petitioner's Father participated in all meeting(s) concerning the Petitioner which were scheduled from September 2008 through March 23, 2009. The District took all reasonable steps to ensure that the Petitioner's Parents were present for these meetings, including but not limited to: (1) notifying the Petitioner's Parents of the meetings early enough to ensure that they would be available to attend the meeting; and (2) scheduling the meeting at a mutually agreed on times and places.

47. There is no evidence on the record that:

A. The District prevented the Parents from providing the notice required by the IDEA Regulations, 34, C.F.R. § 300.148(d)(1).

B. The Parents did not receive notice, pursuant to 34 C.F.R. § 300.504, of the notice requirement set forth in 34 C.F.R. § 300.148(d)(1).

C. Compliance with 34 C.F.R. § 300.148(d)(1) would likely result in physical harm to the Petitioner.

## CONCLUSIONS OF LAW

### The Parties

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

2. The Petitioner is now and has been a resident of the District during all times relevant to this due process proceeding, as defined by Section 167.020 RSMo. The Petitioner is now and has been during all times relevant to this proceeding, a "child with a disability" as that term is defined by the IDEA Regulations, 34 C.F.R. § 300.8 and Section 162.675 (1) 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 Burden of Proof

4. Petitioner filed the Due Process Complaint that initiated this matter on April 14, 2009. The Complaint alleges the District violated the procedural requirements of IDEA in the development of an IEP and secondly, that the March 23, 2009 IEP was not reasonably calculated to provide FAPE. For the alleged violations, they seek reimbursement for certain expenses incurred with a home-based educational program. The burden of proof in an administrative hearing arising under the IDEA is properly placed upon the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537 (2005). Thus, the burden of proof in this case rests with the Petitioner. The U. S. Supreme Court's reference is to the burden of persuasion, which means that the Student and his Parents lose at the conclusion of the case if the evidence on both sides is evenly balanced. The standard of proof in this administrative proceeding, as in most civil

cases, is proof by a preponderance of the evidence. *Tate v. Department of Social Services*, 18 S. W. 3d 3, 8. (Mo. App. E. D. 2000).

### **Free Appropriate Public Education**

5. 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.

6. 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.

7. 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.

8. 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.

9. 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 (10<sup>th</sup> 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 Respondents "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 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (8<sup>th</sup> Cir. 1998); that is "absolutely [the] best," *Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6<sup>th</sup> 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 (8<sup>th</sup> 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 (7<sup>th</sup> Cir. 1991).

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

11. If parents believe that the educational program provided for their child fails to provide FAPE, 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 (8<sup>th</sup> Cir. 1998); *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 610.

12. The IDEA requires that students with disabilities be educated in the least restrictive environment reflecting a strong preference that disabled students attend regular classes with non-disabled children and a presumption in favor of placement in the public schools. *T. F. v. Special School Dist. of St. Louis County*, 449 F.3d 816 (8<sup>th</sup> Cir. 2006).

The regulations of the IDEA, 34 C.F.R. §300.114(a)(2), define the term "Least Restrictive Environment" as follows:

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

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

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

### **Eligibility Procedures & Determination**

13. Petitioner's evaluation determined that he was eligible to receive special education and related services and determined his educational needs as required by the IDEA, its regulations and the State Plan. In compliance with the IDEA Regulations, 34 C.F.R. § 300.306(c), when the District made these determinations, it:

A. Drew upon information from a variety of sources, including appropriate tests, parent input, teacher recommendations, as well as information about Petitioner's physical condition, social or cultural background and adaptive behavior; and,

B. Ensured that information obtained from all of these sources was documented and carefully considered.

14. In Petitioner's evaluation, he was found to be eligible to receive special education and related services because he was a "Young Child with a Developmental Delay" ("YCDD") in communication and physical. Petitioner challenges this eligibility determination arguing that the proper eligibility determination for him should be "Autism." The YCDD eligibility determination for Petitioner was appropriate. In *O'Dell v. Special School Dist. of St. Louis County*, 503 F.Supp. 2d 1206, 1215 (E.D. Mo. 2007), the IEP Team educationally diagnosed a student with a medical diagnosis of "autism" as a "young child with a developmental disability." The Court rejected the arguments made by the parents<sup>2</sup> and concluded that "the IEP team was not required under the regulations to consider a specific disability diagnosis, but rather to consider [the student's] specific needs." *Id. See also, Pacht ex rel. Pacht v. Seagren*, 373 F.Supp.2d 969, 975 (D. Minn. 2005)(Once the District determines that a pupil requires special education, it must

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<sup>2</sup> Stephen Walker, counsel for Petitioner here, also represented the student in the *O'Dell* case.

address all of the pupil's needs "whether or not commonly linked to the disability category in which the pupil was initially classified."); 34 C. F. R. Section 300.300 (a)(3)(ii) ("services and placement needed by each child with a disability to receive FAPE must be based on the /child's unique needs and not on the child's disability").

### Procedural Compliance

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).

16. 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; 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).

17. 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 (8<sup>th</sup> Cir. 2003). It is prepared jointly with school staff and parents, and is reviewed annually. *M.P.* , 326 F.3d at 977, n.1.

18. The IEP proposed for Petitioner met the requirements of 20 U. S. C. Section 1414 (d)(1)(A) summarized in Conclusion of Law #17. The IEP for Petitioner was not deficient because it was developed without baseline or starting point data for the goals. *Lathrop R-II School District v. D. G.*, 2009 WL 2982645 at \*8 (W. D. Mo. September 11, 2009).<sup>3</sup>

19. The IDEA, its Regulations and the State Plan do not require a school district to prepare a draft IEP prior to the IEP Meeting with the parents of a child with a disability. *See also*, The Comments to the IDEA Regulations contained in the Federal Register, Vol. 71, No. 156 (August 14, 2006), p. 46678 (discouraging school districts from preparing a draft of an IEP in advance but if the districts do so, copies should be sent to the parents for their review.)

20. If a school district disagrees with the opinion of the parents and their experts, this difference of opinion does not necessarily mean that the parents were denied the right to

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<sup>3</sup> Counsel for Petitioner here also served as counsel for the Petitioner in the *Lathrop* case.

participate in the development of the IEP or that placement was pre-determined. *See e.g. P. K. ex rel. P. K. v. Bedford Cent. School District.*, 569 F. Supp. 2d 371 (S. D. N. Y. 2008).

21. Parents were not denied meaningful participation because some IEP team members may have had preparatory meetings prior to the IEP meeting with the parents. *A. G. v. Frieden*, 2009 U. S. Dist. LEXIS 24887 at \*25-26 (S. D. N. Y. March 25, 2009).

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

23. Contrary to the arguments advanced by the Petitioner, the District did not significantly impede the parents in participating in the development of Petitioner’s IEP and thus, we find there was no denial of FAPE in this case. Put another way, we conclude that the District complied procedurally with IDEA.

### **Substantive Compliance with IDEA**

24. IDEA does not specifically require a transition plan when a student is transferring from a private setting to a public school. *B. B. v. State of Hawaii, Department of Education*, 483 F. Supp 2d 1042 (D. Hi 2006)(citing numerous cases for its viewpoint) *But see, A. Y. and D. Y. v. Cumberland Valley Sch. Dist.*, 569 F. Supp.2d 496, 510 (M. D. Pa. 2008) (citing *In Re the Educational 510 Assignment of S.K.*, Spec. Educ. Op. 1769 (2006) for its holding that a student who had attended school in the District, then went to a private school for several years at District expense and was now being considered for re-enrollment in the District, should have had a transition plan in his proposed IEP).

25. A public school district is required to provide children with disabilities with "publicly funded education that benefits the student," *Fort Zumwalt*, 119 F.3d. at 613. "An individualized education program is appropriate under the IDEA if it offers instruction and supportive services reasonably calculated to provide some educational benefit to the student for whom it is designed." *Missouri Dept. of Elementary and Secondary Educ. v. Springfield R-12 School District*, 358 F.3d 992, 998, note 7, (8th Cir. 2004). *See also: Rowley*, 458 U.S. at 201, 102 S. Ct. 3034; *Blackmon*, 198 F.3d at 658-59; and *T.F. v. Special School Dist. of St. Louis County*, 449 F.3d at 820.

26. The District met the requirements of the IDEA Regulations, 34 C.F.R. § 300.324(a) when it developed Petitioner's IEP in that during that process Petitioner's IEP Team considered: (a) the strengths of Petitioner; (b) the concerns of the Parents for

Petitioner's education; (c) the results of the evaluation of Petitioner; and, the academic, developmental and functional needs of the Petitioner.

27. Contrary to the opinions of Parents' experts, Petitioner's proposed IEP developed in March 2009 was reasonably calculated to produce some educational benefit i.e., FAPE in the Least Restrictive Environment for Petitioner.

28. Because the Petitioner failed to show beyond a preponderance of evidence that the District did not provide FAPE either from a procedural or substantive standpoint, we decline to address issues (3) and (4) (set out earlier in the Findings of Fact section) dealing with the appropriateness of the home-based ABA program and the request for reimbursement. *See, e.g., C.G. and B.S. v. Five Town Community School District*, 2007 U.S. Dist. LEXIS 10310 at \*109 (D. Me. 2007), *aff'd* 2007 WL 1051650 (D.Me.); *W. S. and L. S. v. Rye City School District*, 454 F. Supp. 2d 134, 139 (S. D. N.Y. 2006); *M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ.*, 122 F. Supp.2d 289 (D. Conn. 2000).

### **DECISION**

The Petitioner alleges in his First Amended Due Process Complaint that the District failed to provide free access to public education ("FAPE") by failing to develop an IEP on March 23, 2009 that was reasonably calculated to provide educational benefit beginning on March 28, 2009 and continuing through the 2009-2010 school year. As a result, the Parents of Petitioner claim that they were forced to provide a home-based ABA educational program for their preschool child, whom they allege made educational progress with the program. They seek an order directing the District to reimburse them for the costs of the home-based program in the amount of \$8364.49. (Findings of Fact "FF" #45).

### **Educational diagnosis**

The Petitioner takes issue with the educational diagnosis reached at the Evaluation Meeting held on March 6, 2009. In the evaluation, Petitioner was found eligible to receive special education and related services because he was a "Young Child

with a Developmental Delay" ("YCDD") in communication and physical. (FF #31C).  
Petitioner challenges this eligibility determination arguing that the proper eligibility determination for him should be "Autism."

The YCDD eligibility determination for Petitioner was appropriate even though the District uses this educational diagnosis for most of its preschool children who qualify for special educational services. (FF#31C). As noted in the IDEA regulations, a child's unique needs, not the diagnostic label, will determine the special education services to be provided:

In evaluating each child with a disability under 34 C. F. R. Sections 300.304—300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.

34 C. F. R. Section 300.304 (b)(6).

In *O'Dell v. Special School District of St. Louis County*, 503 F. Supp.2d at 1215, the Court held "the IEP team did not err by not specifically focusing her IEPs upon the diagnosis of autism. Instead, the IEPs were constructed around [student's] educational abilities and limitations." *Id.* See also, *Pachl ex rel. Pachl v. Seagren*, 373 F.Supp.2d at 975 (Once the District determines that a pupil requires special education, it must address all of the pupil's needs "whether or not commonly linked to the disability category in which the pupil was initially classified.") Father did not raise this issue at the Evaluation Meeting on March 6, 2009 but waited to object to the YCDD diagnosis until after the March 23, 2009 IEP meeting when he gave a letter to the District. (FF#31(E); FF# 38).

### **Two Part Test for Reimbursement**

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

### **Procedural Compliance with IDEA**

We first address whether the District complied with the procedural requirements of the IDEA and if not, did a denial of FAPE result. The Parents' complaints consist of the following: (1) the goals and objectives in the IEP were deficient in that they contained no baseline data, were not measurable and were not sufficiently challenging for a one year period; (2) the District significantly impeded the parents' opportunity to participate in the decision- making process for the provision of FAPE; and (3) the District failed to develop a BIP for Petitioner's IEP.

An IEP 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 at 977 n.1. *See also O'Dell v. Special School District of St. Louis County*, 503 F. Supp. 2d at 1216) (Court affirmed the Hearing Panel holding that annual goals did not have to be stated with specificity.)

Petitioner's IEP contains 15 specific, measurable goals, all of which are geared to his particular needs. For example, Goal 8 dealing with Language provides that "[Petitioner] will increase receptive language skills by pointing to/giving/touching the named noun (2 sets of 25) or verb (2 sets of 8) in pictures in a field of 4 with 80% accuracy across one data week."<sup>4</sup> (DEX 9, p. 87). Progress is to be reported "2 times per annual IEP." (DEX 9, p. 92). If, as Petitioner contends that the goals will be met in less time than annually, IDEA requires the IEP team to meet and discuss updating his IEP. *See*, 20 U. S. C. Section 1414(d)(4). In view of Petitioner's age (he turned 3 a few days after the March 23, 2009 IEP meeting), it would be expected that the IEP team would meet on a more frequent basis than annually. (FF#34 (D)(3))

Contrary to Petitioner's argument, his IEP was not deficient because it was developed without baseline or starting point data for the goals. *Lathrop R-II School District v. D. G.*, 2009 WL 2982645 at\*8 (W. D. Mo. September 11, 2009). In *Lathrop*,

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<sup>4</sup> The Goal indicates that progress will be measured by checking two boxes: observation chart and data collection, respectively. Not all goals on the IEP have checked boxes but we do not see this omission as having any legal consequence.

the Court rejected the Hearing Panel's opinion that the IEPs were procedurally flawed for not containing baseline data. *Id.* The Court emphasized that IDEA requires only that IEPs set forth a 'statement of the present levels of educational performance' and 'measurable annual goals [and] objectives.' (citation omitted) *Id.*

One of the complaints regarding the parents' opportunity to participate in the decision-making process was that the District failed to provide a copy of the evaluation report in a timely manner. At the Evaluation Meeting held on March 6, 2009, the District provided draft copies of various observations and reports as noted in FF#31 (B) (1)-(4). At the IEP meeting on March 23, 2009, the District provided a draft of the evaluation information because the final report had not been completed --- it still needed to be proofed and spell-checked. (FF#34(B)). The District sent a final report on April 17, 2009. The Comments to the IDEA Regulations, Federal Register, Vol. 71, No. 156 (August 14, 2006), p. 46645, emphasize the lack of a deadline to send an evaluation report to parents:

The [IDEA] does not establish a timeline for providing a copy of the evaluation report or the documentation of determination of eligibility to the parents and we do not believe that a specific timeline should be included in the regulations because this is a matter that is best left to State and local discretion.

The District might have *ideally* mailed the final evaluation report to the Parents prior to the IEP meeting but there clearly is no procedural violation in the handling of the evaluation report.<sup>5</sup>

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<sup>5</sup> Similarly, the District might have *ideally* provided to the Parents and their representatives copies of the goals that were in draft form and discussed at the March 23, 2009 IEP meeting. (FF#34(D)). The failure to do so, however, is not a basis for a procedural violation under IDEA.

The Parents also complain that the IEP team members had meetings prior to the actual IEP meeting with Father and his advocates and that placement had been predetermined. Having preparatory meetings does not mean that parents have been denied meaningful participation. *A. G. Frieden*, 2009 U. S. Dist. LEXIS 24877 at \*25-26 (S. D. N. Y. March 25, 2009). There is a difference between being “open-minded” and being “blank-minded.” *Doyle v. Arlington County School Board*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992) A District can, and should have given some thought to an appropriate placement. *Id.* There is no predetermination just because the IEP team (other than Parents) disagreed with the Parents and decided on a different placement. *P. K. ex rel. P. K. v. Bedford Cent. School District*, 569 F. Supp.2d at 371. Significantly, the Father signed for initial services and the waiver of the ten (10) day requirement at the end of the IEP meeting attended by Rand Hodgson, Advocate for Parents and Jessica Royer, supervisor of the Petitioner’s in-home program. (FF#34(L)).

We conclude the District did not significantly impede the opportunity of the Petitioner's Parents to participate in the decision-making process in that:

A. Petitioner's Father participated in all meeting(s) concerning the Petitioner which were scheduled from September 2008 through March 23, 2009.

B. The District took all reasonable steps to ensure that the Petitioner's Parents were present for these meetings, including but not limited to: (1) notifying the Petitioner's Parents of the meetings early enough to ensure that they would be available to attend the meeting; and, (2) scheduling the meeting at a mutually agreed on times and places. The actions of the District met the requirements of the IDEA, its regulations, including 34 C.F.R. §300.322, and the State Plan.

C. Petitioner's Parents have prior experience with the special education processes, including the evaluation and preparation of IEPs for children with disabilities

in that Petitioner's older sister is a child with a disability, attends school in the District, has been evaluated by the District and has had an IEP throughout her educational career.

D. At all meetings concerning Petitioner, including the evaluation staffing and IEP Meeting on March 23, 2009, Petitioner's Father was accompanied by (1) his Mother, Petitioner's Grandmother, who has been employed by the District as a Parent Educator for twenty-three years and who had prior experience with the evaluation and IEP process for her granddaughter, Petitioner's older sister ; (2) Advocate Rand Hodgson; (3) Jessica Royer, an employee of Partners in Behavioral Milestones, a for-profit private educational program which was (and is currently) providing educational services to Petitioner and (4) Sarah Sinclair, an employee of PBM, who was providing educational services to Petitioner. Both Mr. Hodgson and Ms. Royer are knowledgeable concerning the evaluation process under the IDEA, the preparation of evaluation staffing reports and the preparation of IEPs for children with disabilities.

E. During all meetings, there was an open exchange of ideas and documents leading to the development of Petitioner's IEP. The District requested and received reports from the Parents described in detail in FF#22, 26, 28. The District staff also looked at a video supplied by the Father showing Petitioner's social interactions at church. (FF#25 ) At the Evaluation meeting held on March 6, 2009, the Parents received drafts of the observations and reports (prepared after visits by the District staff to the home-based program) generated after the Review of Existing Data Meeting on January 30, 2009. (FF#31(B)). Prior to the IEP meeting, the Parents were sent drafts of the Present Levels of Academic Achievement and Functional Performance ("PLEP"). ((FF# 34(A)). The Parents had not been sent drafts of the goals brought to the meeting by District staff, making it more difficult but not impossible to participate. (FF# 31(D)).

F. The District welcomed input from the Father and his representatives regarding modifications to the PLEP and to the goals. Jessica Royer and Rand Hodgson agreed to provide certain information regarding Petitioner's current status with his ABA programming such as play schemes, vocabulary, etc and related services. (FF#34(C)).

G. On March 23, 2009, Petitioner's Father considered and signed consent for placement of Petitioner in the program of special education and related services in his March 23, 2009 IEP. (FF#34L).

H. After the IEP meeting, the Father and Sarah Sinclair were provided a tour of the classrooms in which Petitioner would be placed. The Mother and Grandmother toured the same classrooms a couple of days later. (FF#39).

I. Petitioner's Parents were provided copies of the Procedural Safeguards at appropriate times during the process. (FF#34(L)).

J. The District provided Petitioner's Parents with a copy of the completed IEP within two days following the date of the IEP meeting. (FF#40).

Parents and their experts also expressed a major concern regarding the lack of a formal behavior intervention plan (“BIP”) in the IEP developed at the March 23, 2009 meeting.<sup>6</sup> IDEA does not require the inclusion of a BIP at any particular date. 20 U. S. C. Section 1414(d)(3)(B)(1) provides that the IEP team “shall in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavior interventions, strategies, and supports to address that behavior.” Thus, the IDEA regulations did not require the inclusion of a BIP in the March 23, 2009 IEP until Petitioner’s behavior actually impeded his own learning or the learning of others at his new school in the District. Petitioner was never in an environment comparable to what he would experience in the District; therefore, the District could not adequately assess whether Petitioner needed a BIP at the time the final IEP was prepared on March 23, 2009.

The District officials indicated that the staff would be monitoring his behaviors from the start of his enrollment to see what the function of the behaviors would be in the school setting. (FF#34 (I)). The IEP contains a starting point on his problematic behaviors by addressing his sensory needs throughout the day and providing social and sensory modifications. (FF#34(I)). We question whether Congress contemplated that IDEA requires a public school system to maximize every IEP for every child in trying to

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<sup>6</sup> This issue is generally treated as an alleged procedural violation rather than a substantive one as might be thought at first glance. *See, e.g., School Board of Independent School District No.11 v. Renollett*, 440 F. 3d 1007 (8<sup>th</sup> Cir. 2006).

cover for every contingency for that child. *See, e.g., Hartmann v. Loudoun County Board of Education*, 118 F.3d 966 (4<sup>th</sup> Cir.1997).

Several courts have sanctioned the approach contemplated by the District to deal with potential behavioral issues. In *Melissa S. v. School District of Pittsburgh*, 183 Fed. Appx. 184 (3<sup>rd</sup> Cir. 2006), the Court concluded that the Pittsburgh District followed the correct plan handling a new student's behavior. *Id.* at 188. After observing her outbursts early in the school year, the District personnel almost immediately began assessing her behavior. *Id.* When it became clear that that the student's behavior issues went beyond mere problems of adjusting to a new school, the District hired a consultant to look at her behavior, determine the causes and recommend a behavior plan. *Id.* The Court in *W.S. and L. S. v. Rye City School District*, 454 F. Supp.2d at 134 sanctioned a similar path followed by the School District for a kindergartener with autism transitioning from a private school to a public school. A Functional Behavioral Assessment was conducted by the District once the student's stereotypical behavior emerged. *Id.* at 141-142.

Petitioner cites *Neosho R-V Sch. Dist. v. Clark*, 315 F. 3d 1022 (8th Cir. 2003) in support of his argument for the inclusion of a BIP. Petitioner's counsel cited the same case for the same proposition in *Lathrop R-II School District v. D. G.*, 2009 WL 2982645 (W. D. Mo. September 11, 2009). Judge Fenner distinguished the *Clark* case wherein the IEP developed by the School District contained a requirement for the development of a BIP to be incorporated into the IEP but failed to do so. *Id.* at \*10. In effect, the District had violated its self-imposed obligation to develop a BIP even though one was not mandated under IDEA. *Id.*

Contrary to the arguments advanced by the Petitioner, the District (a) proposed an IEP that adequately stated the present levels of academic achievement and functional performance as well as measurable annual goals; (b) did not significantly impede the parents in participating in the development of Petitioner's IEP and (c) was not required to include a BIP in the IEP. We conclude that the Petitioner has failed to carry his burden of proof that the District committed any procedural violations and therefore, there was no denial of FAPE in this case.

### **Substantive Violations of IDEA**

We next consider whether the District complied with IDEA by proposing an IEP that was reasonably calculated to deliver FAPE or stated another way, whether the IEP was designed to confer some educational benefit: the second part of the *Rowley* test. *Rowley*, 458 U. S. 176, 102 S. Ct. 3034, 73 L. Ed.2d 690. We conclude that the IEP dated March 23, 2009 was reasonably calculated to provide the Petitioner with FAPE in the Least Restrictive Environment.

Petitioner alleges the IEP was defective for its omission of a transition plan to help him adjust from a home-based educational program to a public school classroom. IDEA does not specifically require a transition plan when a student is transferring from a private setting to a public school. *B. B. v. State of Hawaii, Department of Education*, 483 F. Supp 2d at 1042 (citing numerous cases for its viewpoint).<sup>7</sup> While a plan is technically not mandated under IDEA in these circumstances, we recognize a formal

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<sup>7</sup> This Court also analyzed the allegations of inappropriate PLEPS and annual goals and lack of adequate transition plan as potential substantive violations of IDEA.

transition plan would have provided a great deal of comfort for the Parents (and devoted Grandparents) in going forward with the educational plan proposed by the School District. Our job, however, is not to write into IDEA what might be beneficial – that determination is for legislators, not a Hearing Panel or courts.

The Petitioner further complains that he needed an ABA type program to make educational progress, not the eclectic approach proposed by the School District. An IEP otherwise appropriate i.e., conferring some educational benefit cannot be rejected over a disagreement regarding methodology. *Joshua A. by Jorge A. v. Rocklin Unified School District*, 2008 U. S. Dist. LEXIS 26745 (E.D. Ca. March 31, 2008) *aff'd*, 2009 U. S. App. LEXIS 5795 (9<sup>th</sup> Cir. March 19, 2009) (Parents argued 6 year old son with autism needed an ABA-based program to receive educational benefit but Court determined that the eclectic approach of the District was appropriate)<sup>8</sup>; *Gill v. Columbia 93 School District*, 217 F.3d 1027 (8<sup>th</sup> Cir. 2000) (parents were not entitled to dictate the use of the Lovaas method of instruction for their autistic child); *E. S. v Independent School District, No. 196*, 135 F.3d 566 (8<sup>th</sup> Cir. 1998) (FAPE not denied because the School District refused to mandate only the use of a certain methodology in the IEP for a dyslexic child); *Petersen v. Hastings Public Schools*, 31 F.3d 705 (8<sup>th</sup> Cir. 1994)(IEPs of hearing-impaired children upheld even though the particular sign language system was different than the one used by the students at home). We conclude that the District provided

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<sup>8</sup> In *Stanley v. M. S. D. of Southwest Allen County Schools*, 628 F. Supp.2d 902, 967 (N. D. Ind. 2008) , the Court cites the Joshua case for the proposition that the 2004 amendments to IDEA do not change that a parent-preferred methodology does not trump an acceptable school-proposed program.

credible testimony that the methodology employed by District is well-suited to achieve the goals and objectives set out in the IEP developed on March 23, 2009.

The persuasive weight of the evidence demonstrated that the program of special education and related services in the Petitioner's March 23, 2009 IEP was appropriate and was reasonably calculated to provide him with educational benefit and a free appropriate public education in the least restrictive environment as defined by the IDEA, and its Regulations, 34 C.F.R. § 300.17, and to provide Petitioner with educational benefit, in that:

A. Petitioner's IEP met the content requirements set forth in 34 C.F.R. §300.320.

B. The Present Levels of Educational Performance contained in Petitioner's IEP accurately reflected the information possessed by the District regarding the Petitioner's unique needs and present levels of performance and included a description of how the Petitioner's disability affected his involvement and progress in the general education curriculum as required by the Regulations of the IDEA, 34 C.F.R. § 300.320(a)(1)(i).

C. The goals and benchmarks contained in the Petitioner's IEP were appropriate and were reasonably calculated to provide him with a free appropriate public education and educational benefit.

D. The District properly considered the use of positive behavioral interventions and supports, developed accommodations and modifications as strategies to address Petitioner's behavior in compliance with 34 C.F.R. § 300.324(a)(2)(i).

E. The Service Minutes for special education and related services were appropriate: specialized instruction of 360 minutes in the regular classroom and specialized instruction of 360 minutes in the special education classroom, with pull-out for related services. The service minutes for the related services of Occupational Therapy (30 minutes weekly) , Physical Therapy (30 minutes weekly) and Speech/Language Therapy (90 minutes weekly) were appropriate and sufficient and were the amount required to assist the Petitioner to benefit from his program of special education and related services, in compliance with the IDEA, the Regulations of the IDEA, including 34 C.F.R. §300.34(a) and were therefore reasonably calculated to provide Petitioner with a free, appropriate public education and educational benefit.

F. The proposed placement for Petitioner which is contained in his March 23, 2009 IEP is an appropriate placement in the least restrictive environment as required by the IDEA and its Regulations, 34 C.F.R. § 300.114 in that Petitioner's placement, "Part-time early childhood/part-time, early childhood special education," ensures that to the maximum extent appropriate, Petitioner would be educated with children who were non-disabled.

G. The March 23, 2009 IEP provides accommodations to Petitioner such as: sensory strategies; repeated instructions for group time; frequent reinforcers; extended wait time; adult support and visual strategies.

### **CONCLUSION**

We unanimously conclude that the Petitioner has failed to carry his burden of proof to show that: (1) the District violated the procedural requirements of the IDEA in its development of the March 23, 2009 IEP for Petitioner; or (2) Petitioner's March 23, 2009 IEP is not reasonably calculated to provide him with a free appropriate public education. Because the Petitioner failed to show beyond a preponderance of evidence that the District did not provide FAPE, we decline to address issues (3) and (4) (set out earlier in the Findings of Fact section) dealing with the appropriateness of the home-based program and the request for reimbursement.

### **ORDER**

The Due Process Complaint filed by the Petitioner is dismissed and judgment is entered against Petitioner and judgment is entered in favor of Lee's Summit R-VII 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 4<sup>th</sup> day of January, 2010.

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Pamela S. Wright, Chairperson

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Dr. Patty Smith, Member of the Hearing Panel

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Vicky Teson, Member of the Hearing Panel

**CERTIFICATE OF SERVICE**

Copies of the foregoing Opinion were mailed via certified mail, receipt requested (and by electronic mail) to the attorneys and via regular U. S. Mail to Dr. Smith, Ms. Teson and Ms. Bruner on this 4<sup>th</sup> day of January, 2010:

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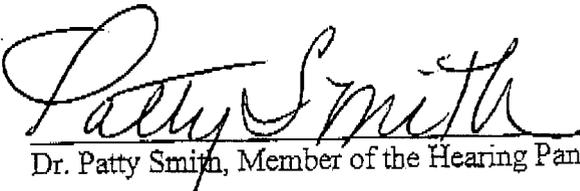
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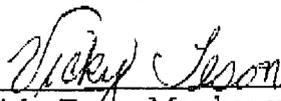
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Pamela S. Wright

Dated this 4<sup>th</sup> day of January, 2010.

  
Pamela S. Wright, Chairperson

  
Dr. Patty Smith, Member of the Hearing Panel

  
Vicky Teson, Member of the Hearing Panel

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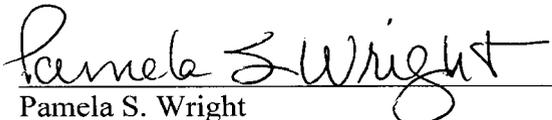
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