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

, on behalf of her son,	)	
	)	July 20, 2011
Petitioners,	)	
vs.	)	
	)	
EXCELSIOR SPRINGS 40	)	
SCHOOL DISTRICT,	)	
	)	
Respondent.	)	

DECISION

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

I. THE ISSUES

The following issues were presented to the Hearing Panel:

Issue Number 1. Was the proposed transfer process of Student from ABC'nD to Rainbow in violation of Petitioner's procedural rights under the IDEA and, if so, did this constitute a denial of FAPE?

Issue Number 2. Can Rainbow appropriately implement Student's IEP of March 24, 2010?

Issue Number 3. Was Rainbow able to appropriately implement Student's IEP of March 24, 2010, on September 30, 2010?

Issue Number. 4. In the event Rainbow can implement said IEP, is the March 24, 2010 IEP not reasonably calculated to provide Student a free appropriate public education ("FAPE") because it is so vague it could be properly implemented at either Rainbow or at ABC'nD?

Issue Number 5. In comparison to ABC'nD, does Rainbow provide Student with the least restrictive environment?

Issue Number 6. In the event the parties have not resolved issues concerning whether Respondent violated Student's rights under the IDEA by failing to make payments to Parent for transportation, or direct payments to ABC'nD, these issues will also be considered by the Panel.

II. FINDINGS OF FACT

The Hearing Panel makes the following Findings of Fact:

A. The Parties, Counsel and Hearing Panel Members

1. During all times material to this due process proceeding, the Student resided with his mother ("Mother"), within boundaries making him eligible to attend the Excelsior Springs 40 School District ("District" or "Respondent").

2. The District is a public school organized pursuant to Missouri statutes.

3. The Student and his Mother were represented at the hearing by Deborah S. Johnson, Esq., 9923 State Line Road, Kansas City, Missouri 64114.

4. The District was represented at the hearing by Shellie L. Guin, Esq., Guin, Martin, & Mundorf, LLC, 9237 Ward Parkway, Suite 240, Kansas City, Missouri 64114.

5. The Hearing Panel for the due process proceeding was: Richard H. Ulrich, Chairperson; Ralph Caraffa, Panel Member; and Debrah Stenner, Panel Member.

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

B. Procedural Background and Timeline Information

7. Mother, through counsel, requested due process ("Complaint") by filing a Complaint with the Missouri Department of Elementary and Secondary Education ("DESE") dated September 30, 2010, which was received by DESE that same day.

8. On or about October 1, 2010, DESE notified a person of his appointment to serve as Hearing Chairperson.

9. On or about October 1, 2010, Petitioner notified DESE that she was rejecting that person as the Chairperson.

10. On or about October 1, 2010, DESE notified Mr. Richard Ulrich of his appointment to serve as Panel Chair of the Hearing Panel, replacing the originally appointed Chairperson.

11. On or about October 4, 2010, Petitioner filed a Motion for This Panel to Enforce Stay Put Requirements.

12. On or about October 5, 2010, the law firm of Guin Martin & Mondorf, LLC, by and through Shellie Guin, Esq., entered its appearance on behalf of the Respondent.

13. On or about October 5, 2010, Respondent filed its Suggestions in Opposition to Petitioner's Motion to Enforce Stay Put Requirements.

14. On or about October 6, 2010, the Chairperson entered an Order that Student's educational placement remain at ABC'nD Autism Center ("ABC'nD"). The Chairperson granted the parties until October 14, 2010, to submit briefs on the issue.

15. On or about October 8, 2010, DESE notified Mr. Ralph Caraffa and Mr. Jerry Keimig of their appointments to serve on the Hearing Panel.

16. On or about October 11, 2011, the District filed an Answer to the Complaint.

17. On or about October 14, 2010, Petitioner filed a Brief in Support of the Chairperson's Stay-Put Order Dated October 6, 2010. Also, on or about October 14, 2010, the

District filed Respondent's Supplemental Suggestions in Opposition to Petitioner's Motion to Stay Put.

18. On or about October 15, 2010, the District filed its Reply to Petitioner's Brief in Support of This Chairperson's Stay-Put Order Dated October 6, 2010.

19. On or about October 15, 2010, an unsuccessful resolution session was held. Also, on or about October 18, 2010, Petitioner filed a Sur-Reply in Additional Support of the Chairperson's Stay-Put Order Dated October 6, 2010.

20. On or about October 22, 2010, a telephone conference was held in compliance with the Missouri State Board of Education Special Education Regulations ("State Plan"), Article V., G, pp 71 and 72, with the parties' attorneys and the Chairperson participating.

21. On or about October 27, 2010, the Chairperson entered an Order that the Stay Put IEP of March 24, 2010, remain in full force and effect.

22. On or about October 28, 2010, an Order was issued by the Chairperson defining the issues for the due process hearing and setting forth guidelines for the hearing which was scheduled for December 7, 8, 9, and 10, 2010. The Chairperson's Order also extended the decision deadline until February 1, 2011, at the request of Respondent.

23. On or about November 5, 2010, Petitioner filed a "Motion for an Order Requiring the District to Provide Petitioner with Copies of Student's Educational Records."

24. On or about November 9, 2010, the District filed "Respondent's Suggestions in Opposition to Petitioner's Motion for Order Requiring the District to provide Petitioners with Copies of Student's Educational Records."

25. On or about November 10, 2010, Petitioner filed Petitioner's "Reply Suggestions in Additional Support of her Motion for Order Requiring the District to provide Petitioners with Copies of Student's Educational Records." Also, on or about November 10, 2010, a telephone conference was held to discuss whether the District must provide copies of Student's educational records. The parties' attorneys and the Chairperson participated.

26. On or about November 12, 2010, the Chairperson issued an Order granting Petitioner the right to compare copies of Student's educational records provided by the District with the originals located at the District's administrative offices upon the arrangement of a mutually convenient time.

27. On or about November 22, 2010, Petitioner filed a Motion for Continuance of the hearing set to commence on December 7, 2010. Also, on or about November 22, 2010, the District filed a Motion for Summary Judgment and Suggestions in Support Thereof.

28. On or about November 23, 2010, the District filed "Respondent's Suggestions in Opposition to Petitioner's Motion for Continuance." Also, on November 23, 2010, Petitioner filed "Petitioner's Reply Suggestions in Additional Support of her Motion for Continuance of Due Process Hearing."

29. On or about November 24, 2010, the District filed Respondent's Sur-Reply to Petitioner's Reply Suggestions in Additional Support of her Motion for Continuance.

30. On or about November 30, 2010, the Chairperson entered an Order granting Petitioner's Motion for Continuance of the Due Process Hearing.

31. On or about December 4, 2010, Petitioner filed a "Motion to Extend Timeline" for an extension of the decision date to April 1, 2011.

32. On or about December 7, 2010, the Chairperson entered an Order extending the timeline for the decision to April 1, 2011, at the request of Petitioner.

33. On or about December 13, 2010, Petitioner filed a "Motion for Orders."

34. On or about December 13, 2010, Petitioner served a Subpoena Duces Tecum upon Rainbow Center for Communicative Disorders ("Rainbow").

35. On or about December 18, 2010, a telephone conference was held with the parties' attorneys and the Chairperson participating during which the parties resolved the issues identified in Petitioner's December 13, 2010, "Motion for Orders."

36. On or about December 20, 2010, an Order was issued by the Chairperson scheduling the due process hearing for March 1, 2, 3, and 4, 2011, and memorializing the parties' resolution of "Petitioner's Motion for Orders."

37. On or about December 23, 2010, the Chairperson entered an Order addressing Rainbow's objections to the December 13, 2010, Subpoena Duces Tecum served by Petitioner. The Chairperson's Order also provided that the commencement date of the filing of Respondent's Motion for Summary Judgment, for the purpose of triggering the timeline for response, was December 13, 2010.

38. On or about December 27, 2010, Petitioner filed a "Motion to Summarily Deny Respondent's Motion for Summary Judgment and Issue a Protective Order."

39. On or about January 7, 2011, the Respondent filed a "Response to Petitioner's Motion to Summarily Deny Respondent's Motion for Summary Judgment and Issue a Protective Order."

40. On or about January 10, 2011, Petitioner filed "Reply Suggestions in Additional Support of the Motion to Summarily Deny Respondent's Motion for Summary Judgment and Issue a Protective Order."

41. On or about January 13, 2011, the Chairperson entered an Order denying the District's Motion for Summary Judgment and denying Petitioner's Motion for a Protective Order.

42. On or about January 19, 2011, DESE notified Ms. Debrah Stenner of her appointment to serve on the Hearing Panel, replacing Jerry Keimig.

43. On or about February 9, 2011, Petitioner filed a Motion to Clarify Issue, seeking to clarify one of the issues for the due process hearing.

44. On or about February 10, 2011, the Chairperson entered an Amended Order regarding the location of the due process hearing.

45. On or about February 14, 2011, the Chairperson entered an Order in response to Petitioner's "Motion to Clarify Issue" adding an additional issue to the issues to be considered during the due process hearing.

46. Testimony was presented on March 1, 2, 3, and 4, 2011.

47. On or about March 8, 2011, the Chairperson entered an Order holding that the hearing would be concluded by a telephone conference.

48. On or about March 25, 2011, the Chairperson entered an Order setting the final date of the due process hearing on April 19, 2011 and provided details as to how the hearing would be conducted by telephone conference.

49. Final testimony in the hearing was presented on April 19, 2011. At the conclusion of the hearing, both parties requested leave to file post-hearing briefs. The request was granted upon assurance by the court reporter that the transcript would be completed no later than May 3, 2011. Upon agreement, the parties were granted until June 2, 2011, to file simultaneous post-hearing briefs. The timeline for the decision, upon request, was extended to July 5, 2011.

50. On or about April 20, 2011, the Chairperson entered an Order memorializing the briefing schedule and granting of the District's Motion to Extend the Timeline for the decision to July 5, 2011.

51. On or about June 3, 2011, Petitioner requested an extension for the filing of briefs to June 6, 2011. Said request was acceptable to the District and the Chairperson advised the parties that the request was granted.

52. On or about June 6, 2011, the Chairperson entered an Order granting the request to extend the date to file briefs to June 6, 2011 at 5:00 p.m. The decision date of July 6, 2011 remained.

53. On or about June 21, 2011, Respondent requested that the timeline for the decision to be extended to July 20, 2011. By order entered on June 21, 2011, this request was granted.

C. Background Facts

1. Student was born on August 13, 2004, and received in home services through First Steps. He has multiple diagnoses, including low cognitive functioning, autism, speech and language disorders, ADHD and PICA. Tr. 55:14-18; Tr. 1261:11-21; Respondent's Exhibits 4, 5 and 11 (R-4, R-5 and R-11).[1]

2. Student received early childhood special education services by attending ABC'nD Autism Center ("ABC'nD) beginning when he turned three years old. Tr. 869:9-20. He had already been in attendance at ABC'nD at that time. Tr. 1238:7-13. In August 2007, the Excelsior Springs School District ("District") became responsible for the provision of Student's early childhood special education services because he resided within District boundaries. Tr. 1233:4-8; R-10.

3. The District has approximately 350 special education students. Of those, less than ten are in private agency placements. Tr. 1218:12-21. Five percent of the District's general student population is diagnosed with autism. Tr. 12:19:17-23. There is more than one location at which a student may receive his/her IEP services within the same placement on the placement continuum. Once placement on the continuum is determined, movement between different locations within the same placement, whether inside the District or not, is handled as an administrative decision provided the applicable IEP is implemented.

4. In March 2007, which was Student's first IEP meeting upon turning three years of age, the District convened an Individualized Education Program ("IEP") meeting for Student at ABC'nD, which was very adversarial. The team maintained Student's placement as private separate school so that he could continue to attend ABC'nD. Tr. 1238:7; Tr. 1239: 21-24 – 1240:3.

5. Early childhood special education services range from age three to age five. A child becomes school age when he/she turns five after August 1 of that school year. Tr. 1053:8-17; Tr. 1382:17-23. A child's eligibility and placement must be separately determined when they become school age. The team must consider

[1] Throughout this decision, Petitioners' Exhibits shall be designated with the prefix "P" and Respondent's Exhibits shall be designated with the prefix "R".

least restrictive environment when determining school age placements. Tr. 1234:5 – 1235:4.

6. As Student approached school age services, a review of existing data meeting was scheduled in order to begin the process of re-evaluating the Student to determine school age eligibility.

7. Because Student was approaching school age services, a representative from the District and a contracted consultant, Mr. Dan Matthews, observed Student at ABC'nD for the sole purpose of determining whether Student could be served in the District. In March 2010, Mr. Matthews and Ms. Donna Thompson[2] observed Student at ABC'nD for such purpose. Ms. Thompson observed Student on March 10 and Mr. Matthews observed Student on March 17, 2010. Tr. 56:13 – 57:11; Tr. 1233:11 – 1234:4; Tr. 1235:9-17; R-8. The District was not considering location of services at Rainbow at this point in time. Tr. 1235:23-25.

8. Dan Matthews is the owner of a company called Summit Behavioral Services that provides ABA consulting services. Tr. 1041:15-20. In March 2010, he was contacted by Dr. Arnold[3] regarding Student. Tr. 1042:6-9. Dr. Arnold asked Mr.

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[2] Donna Thompson is the District's autism consultant as well as a school psychological examiner. Tr. 89:16-18; Tr. 1157:15-25; Tr. 116:10-18. Ms. Thompson has a bachelor's degree in psychology and a master's degree in educational research and psychology from the University of Missouri in Kansas City. She has had extensive training in the area of autism and positive behavior supports. She has attended a number of conferences that have focused on interventions including recent training on behavior interventions used with individuals who have autism through the Thompson Center, a center for autism and neurodevelopmentally challenged individuals based in Columbia, Missouri. The Thompson Center training included training in the areas of play and social skills, assessing behavior skills, discrete trial training, ABA, advanced ABA, and naturalistic environment. Tr. 1154:10-25; Tr. 1155:1-25; Tr. 1156: 1-3. She attends informational seminars provided on autism and behavior interventions at least two or three times a year. She has also had training with Project Access, a program through the University of Missouri to provide autism supports for students that attend school throughout the state. Tr. 1156:12-21. She received training through Project Access to become qualified as an in-district autism consultant and has been the in-district autism consultant for the District since the 2005-2006 school year. She is also certified as a school psychological examiner and conducts cognitive and intellectual evaluations of students that are being referred for possible extra support, as well as behavior rating scales. Prior to working for the District, she spent almost thirty years working with the Department of Mental Health, Division of Developmental Disabilities, in several positions including her most lengthy role as the supervisor of a multi-disciplinary team of professionals, psychologists, speech therapists, and occupational therapists that determines whether or not an individual child or adult has a developmental disability. Tr. 1157: 9-25; Tr. 1158:1-25; Tr. 1159:1-4; R-47.

[3] Dr. Karla Arnold, Ph.D is the District's Assistant Superintendent for Student Services. Tr. 36:15-18. She has held that position for 13 years. Tr. 1212:11-12. She oversees the District's special education programs. Tr. 1214:16-22. Dr. Arnold received a bachelor's degree in speech pathology/audiology from the University of Missouri in Columbia, a master's degree in educational administration from the University of Missouri in Kansas City, an educational specialist degree in educational administration from the University of Missouri in Kansas City, and a Ph.D. in educational administration from the University of Missouri in Kansas City. Tr. 1210:22-25, 1211:1-2. She worked as a speech therapist for the District from1981 until 1988. She then worked as a speech therapist in the

Matthews to observe Student at ABC'ND in order to determine whether Student was ready to return to the district. That was the only question posed by Dr. Arnold with respect to Student. Tr. 1042:14-22. Dr. Arnold made no mention of Rainbow before or after Mr. Matthews' observation. Tr. 1043:1-5; Tr. 1043:21 – 1044:1. After observing Student for approximately one and one-half hours, Mr. Matthews opined that Student was not ready to return to the District. Tr. 1043:6-20; Tr. 1050:13-18.

9. Ms. Thompson's responsibilities with the District include administering assessments, consulting with schools regarding behavior challenges, attending meetings regarding positive behavior supports, and consulting with counselors. Tr. 94:19 – 95:1. She works with students who have been placed by the District in private agencies. Tr. 1159:25 – 1160:2. Ms. Thompson observed Student for approximately one hour at ABC'nD on March 10, 2010 and completed a Classroom Observation Report. Tr. 95:14-16; R-10. The purpose of her observation was to determine whether it would be appropriate for Student to return to the District. There was no discussion about Rainbow at that point in time. Tr. 1174:4-14. During her limited observation, Student was sitting at a table with a peer model. He did not appear to notice the other student during the observation. Student required almost complete physical prompting in order to complete the activity being observed. Throughout the observation, Student went through the motions of other activities showing little enthusiasm or interest in what he was doing. He continued to require physical and verbal prompts and hand over hand assistance throughout the observation. Student did not utilize his picture schedule without prompting. He did not interact with or show interest in his classmates. On the positive side, Student displayed patience, and on one occasion complied with only one redirect, was more willing to allow adults to prompt him, and most of the activities he participated in were completed although with little enthusiasm or interest. R-10. Given the level and

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Liberty School District for two years, and then as a speech therapist for the Park Hill School District for three years. Subsequently, she worked for the Grandview School District for two years as a director of Title I or federal programs and as a process coordinator in charge of early childhood, including regular and special education. She then returned to the Excelsior Springs School District and is currently in her thirteenth year as the Assistant Superintendent in charge of Student Services. Tr. 1211:5-18, Tr. 1212:1-12. She has experience working with students with autism, cognitive delays and many other disabilities. Tr. 1212:20-23. She teaches Special Education Law at the University of Missouri as an adjunct professor. Tr. 125:6-9. Dr. Arnold has personally observed and is familiar with the programs and services offered by both Rainbow Center and ABC'nD. R-53; R-56; Tr. 84:2-6. Dr. Arnold worked directly with children with autism for 15 years and has worked with over 100 autistic children mainly at the elementary level. Tr. 1212:24 – 1213:15. Dr. Arnold maintains a high level of involvement in the district's placements at private agencies and attends all of their IEP meetings. Tr. 1216:1-5; Tr. 1224:5-14.

length of services he had been receiving from ABC'nD up to that time, Ms. Thompson expected him to better be able to actively participate in the activities that were presented to him. In Ms. Thompson's opinion, Student's participation should have been greater than what she observed. Tr. 1189:12 – 1191:4.

10. Following the observations of Student at ABC'nD in March 2010, it was recommended that Student's placement continue to be private separate school (day) facility. Tr. 57:4-11; Tr. 1236:10-17.

11. On March 8, 2010, ABC'nD sent out a notice of meeting for an IEP meeting scheduled for March 24, 2010. R-9. In attendance at that meeting were Parent, Karla Arnold (LEA representative), Sarah Feldmiller (teacher), Nancy Michael (individual interpreting evaluation results), Keenan Stump (speech language therapist), Megan Laurent (occupational therapist), Kathy Franks (process coordinator), Donna Thompson (autism consultant), Melinda Ritchey (process coordinator), Abby Turner (speech language pathologist), Gail Colvin (special education teacher) and an occupational therapist. Tr. 90:8-10; Tr. 1058:12-16; R-5 (last page).

12. On March 24, 2010, the IEP team met to develop Student's annual IEP. Student's IEP was drafted in advance by ABC'nD on its own form, and the team made only minor changes, including removing references that stipulated Student's services would be provided at ABC'nD. Tr. 1059:3 – 1060:1; Tr. 1060:18 – 1061:13. The services summary section of Student's IEP reflected that his minutes would change as of August 18, 2010, due to his reaching school age. This change in minutes was the result of a different length of day at ABC'nD for school-aged children than for pre-school children. There were no other changes to Student's IEP that were effective August 18, 2010. Tr. 1380:7 – 1381:13. Student's placement continued to be private separate school (day) facility, which is listed merely as separate school for early childhood services and as private separate school (day) facility for school age services. R-11. There was no discussion at this point in time about Rainbow. Tr. 1062:22-24; Tr. 1258:8 – 1259:7.

13. In June or July 2010, Dr. Arnold began to consider whether to change Student's location of services from ABC'nD to Rainbow. Tr. 1236:21 – 1237:4. Dr. Arnold made numerous attempts to contact Parent to discuss location of services, but Parent was nonresponsive. Dr. Arnold then informed ABC'nD, which in turn notified the Parent that she was considering this change. Tr. 60:6-19; Tr. 1260:5 – 1261:3; R-15.

Evidence was presented by the District, some of which was contested by Petitioner, itemizing factors Dr. Arnold took into consideration in considering a change of Student's educational location. Said factors were: 1) District's concern of Student's lack of progress; (2) an increase in Student's behaviors; 3) cost; 4) relationship between the District and ABC'nD; 5) other options available to Student once he turned school age; and 6) at some time, Student would need to transition from ABC'nD because although it was licensed up to age 12, it currently only offers programming to grade two, and it would be easier to transfer sooner than later.

For this decision, the Panel does not believe it is necessary to scrutinize the factors the District considered. The Panel does deem that said consideration was made in good faith, but notes that the factors of cost and adversarial relationship between the District and ABC'nD were not legitimate considerations if ABC'nD was the only school that could implement Student's IEP. What prompted the District to consider the change merges into the legitimacy of the decision itself.

14. Dr. Arnold contacted Rainbow in order to inquire about whether it could implement Student's IEP and was willing to accept Student. In order to make that determination, Rainbow requested Student's IEP and Evaluation Report and wanted to observe Student at ABC'nD. Dr. Arnold sent Rainbow a copy of Student's IEP and Evaluation Report and contacted ABC'nD to make arrangements for the observation. Tr 162:4-12; Tr. 162:22-23; Tr 158:22-25; Tr. 159:12, R-16

15. On July 16, 2010, Marilu Herrick[4] and Michon Lester[5] observed Student at ABC'nD. Tr. 435:13-21; Tr. 1118:20-24; R-16. While observing, Student had a

[4] Ms. Herrick is the Executive Director of Rainbow Center. Tr. 69:21-23; Tr. 154:23 – 155:2. Ms. Herrick is co-founder of Rainbow Center. Tr. 450:9-10, Tr. 451:1-18. She has a Bachelor of Science in Education in Speech Pathology and Audiology, a Master's Degree in Speech Pathology and Audiology, and she spent another year completing her clinical competence. She has certifications in learning disabilities, behavior disorders, emotionally disabled, and severely developmentally disabled. Tr. 448:22-25; Tr. 449:1-8. Prior to working at Rainbow Center, she worked in the State School for Severely Handicapped at Higginsville, and she worked in two different public school districts as a learning disabilities teacher and a speech therapist. She also worked in private practice where she worked with language and learning disabilities as well as reading disabilities, language, and a multitude of typical therapeutic interventions. Tr. 449:12-22; Tr. 154:23 – 155:2; Tr. 448:19 – 449:22; Tr. 450:8-10.

[5] Ms. Lester has been a special education teacher at Rainbow for over 11 years. Tr. 1097:12-17. Tr. 1098. She is a certified Gentle Teaching mentor. Tr. 1099:1-6. Tr. 1100-1105. Ms. Lester has been working with children with autism since 1999. Tr. 1115:19-22. She has worked with over 100 children with autism across the spectrum since

tantrum and exhibited significant behaviors. Tr. 1122:10-17. ABC'nD staff kept pushing Student back in his chair by his shoulders. Tr. 1122:24 – 1123:2. Rainbow has experienced similar behaviors from students at its center. Tr. 1344:11-13. Due to Student's behaviors, ABC'nD terminated the observation prior to its scheduled ending time and asked the representatives from Rainbow to leave. Tr. 1344:14-23. During the observation, Ms. Lester did not observe ABC'nD staff utilize any methodologies or strategies/interventions that Rainbow does not also utilize. Tr. 1120:7-14. Ms. Herrick did not see anything during her observation that caused her concern about whether Rainbow could implement Student's IEP. Tr. 1344:24-1345:10. Rainbow believed that Student would be able to fit into its program. R-16.

16. After observing Student at ABC'nD, and reviewing his IEP and Evaluation Report, Rainbow indicated that they could implement Student's IEP and would accept him as a student. From July 20, 2010 forward, Rainbow believed that it was ready for Student and was able to implement Student's IEP at whatever time the IEP team met and determined he would start attending. Tr. 170:13-22; Tr. 173:1-23; R-16.

17. Dr. Arnold continued attempting to contact Student's parent in order to discuss changing Student's location of services. Because Student's Parent was not responding to Dr. Arnold's messages, the District proceeded to notice up an IEP meeting in order to discuss a change in location of services to Rainbow. Dr. Arnold contacted ABC'nD in order to schedule the IEP meeting, and ABC'nD selected the date for the meeting. Tr. 1263:5-18; R-16, R-18.

18. Notice of the meeting was sent to Parent notifying her of the date, time and location of the meeting and that the purpose was to discuss location of services. Tr. 1067:7-10; R-19. After receiving her notice of the meeting, according to Dr.

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that time. Tr. 1115:233 – 1116:12. Ms. Lester is a special education teacher at Rainbow Center. Tr. 1097:12-15. She has a bachelor's degree in liberal studies from Central Missouri State University and certifications in special education, cross-categorical, and severe developmentally disabled. Tr. 1098:5-8, R-39. She has received training in Gentle Teaching and is a certified Gentle Teaching mentor. She has been through the TEACCH program and PECS training. She is the MAP-A trainer for Rainbow Center, has received blood-borne pathogens training, ABA training, discrete trial training, Hoyer lift training, Creating Rhythmic Connections for Learning training, first aid, CPR, abuse and neglect, HIPAA, and FERPA training, and attended a Building Skills for Autism Workshop. She is certified in Mandt, attended a seminar entitled "The Fine Art of Using Discrete Trial Training with Students with Autism," and has attended an Asperger's syndrome conference. Tr. 1098:16-21, Tr. 1099:1-16, Tr. 1100:20-22, Tr. 1101:12, Tr. 1102:3-25, Tr. 1103:1-25, Tr. 1104:1-4, R-39. Ms. Lester began working at Rainbow Center as a paraprofessional prior to her position as a special education teacher and also fulfills the role of case manager at Rainbow. Tr. 1105:11, Tr. 1105:22-25, Tr. 1106:1-13.

Arnold, Parent contacted her to discuss the potential change in location of services. After discussing the change with Dr. Arnold by telephone, a conversation that lasted about an hour, Parent indicated that she knew Student would have to transition at some point anyway, and it would be easier on him at a younger age. At the end of the conversation, Dr. Arnold believed that Parent was fine with the transition. Tr. 1263:21 – 1264:9.

19. On September 17, 2010, an IEP meeting was held at the District to discuss Student's location of services. Tr. 62:13-16. In attendance at that meeting were Parent, Dr. Arnold, Donna Thompson (District Autism Consultant), Melinda Ritchey (District process coordinator), Nancy Michaels (ABC'nD Director), Amy Cooksey (ABC'nD social worker), Amy Naylor (ABC'nD behavior specialist and Student's teacher), Marilu Herrick (Rainbow Director), and Michon Lester (Rainbow special education teacher). R-20. Tr. 1068:5-6. At the meeting, Parent was not in agreement with the change in location of services. Tr. 1264:13-16;

20. Dr. Arnold began the meeting with a discussion that the team wanted to consider whether or not Student's current location of services at ABC'nD was meeting his needs, or if the District needed to look at a change in location of services. Tr. 1069:22-1070:13; Tr. 1264:25-1265:15. During the meeting, Dr. Arnold raised her concern that Student had not been making appropriate progress at ABC'nD and that his behaviors were increasing. Tr. 62:17-22; Tr. 653:8-14. ABC'nD staff reported progress that Student had made at ABC'nD, which the District believed was inconsistent with the lack of progress that had been reported during Student's previous IEP meetings with the District. Tr. 1265:12-22. Parent expressed her concern that Student's behaviors continued to increase as they had over the last four (4) years. R-20. Both Parent and ABC'nD raised concerns about the lack of progress with respect to Student's challenging behaviors. Tr. 114:18 – 115:2; Tr. 1070:21-1071:10. At no time during the meeting did anyone identify a particular provision of Student's IEP that they believed Rainbow could not or would not implement. Tr. 1084: 7-11; Tr. 1271:18-23. However, Ms. Lester testified that ABC'nD representatives did express concern that Rainbow could implement the IEP although she could not recall any specific area other than a social worker and home support. Tr. 1128:21 – 1129:13. One concern ABC'nD had was about methodologies Rainbow used was based on the fact that Rainbow advertised that it was a center for communication disorders and does not advertise that it is a center for autism spectrum disorders. Tr. 529:21 – 530:2; Tr. 809:19 – 810:11. One methodology

discussed during the meeting was PECS. Tr. 636:3-14. Rainbow explained during the meeting that their staff had been trained in both TEACCH and PECS. Tr. 860:12-18. At the meeting, Amy Naylor[6] did not express the belief that Rainbow would not be an appropriate placement for Student although some of her concerns were raised at the meeting. Tr. 708:15- 709:21; Tr. 770:2-10. At the conclusion of the meeting, which was adversarial, (Tr. 118:3-19; Tr. 1182:12-17) Ms. Ritchey[7] had not heard any concerns that caused her to believe that Rainbow could not implement Student's IEP. Tr. 1085:11-16.

21. There were no changes made to Student's IEP during the September 17, 2010, meeting, and his placement remained as private separate school (day) facility. Tr. 1081:17-19. Dr. Arnold indicated to the team that the District was changing Student's location of services to Rainbow, and the team discussed what transition activities were needed in order to facilitate the change. Tr. 121:7-23. No one, at the September 17, 2010 meeting raised any concerns about whether the relocation of services constituted a change of placement. Tr. 1087:16-19. A transition plan was formulated and the initial date of attendance for Student at Rainbow would be October 4, 2010. Tr. 123:17-24. Upon leaving the meeting, it appears that all participants understood that Student would begin attending Rainbow on Monday, October 4, 2010. Tr. 1085:17-21. Tr. 1130:10-13; Tr. 1268:17 – 1269:6.

22. Because there were no changes made to Student's IEP during the September 17, 2010, meeting, the District did not issue a notice of action following the meeting. Tr. 63:12-23; Tr. 124:20-23. Dr. Arnold contacted DESE twice about whether a notice of action is required to be issued by the District with respect to a change in location of services. Tr. 125:1-9; Tr. 1269:7-20; Tr. 1270:1-6; Tr. 1270:13-22.

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[6] Ms. Naylor has a degree in elementary special education and is a board certified behavior analyst. Tr. 515:20-24.

[7] Melinda Ritchey is a special education process coordinator and educational diagnostician for the District. Tr. 1051:22-25. More pertinent to this case, she is the process coordinator for Student. Tr. 1052:9-14. Within the District, she is the special education process coordinator and educational diagnostician for Westview and Eklhorn Elementary Schools. Tr. 1051:23-25. She has a bachelor's degree in elementary and special education, a master's degree in education, and more than 45 additional hours in education beyond her master's degree. She has continuing education in-service trainings provided by the District every year and has been trained by Project ACCESS in all areas of autism, including teaching children with autism as well as evaluating children with autism. Tr. 1054:1-9. She is certified in elementary education and kindergarten through eighth grade and has special education certification in areas of emotional disturbance as well as mental retardation through ninth grade. Tr. 1055:23-25; Tr. 1056:1. She has been a process coordinator for the District for ten years. Prior to working as a process coordinator, she was a special education teacher in the District, teaching children who had mental retardation and autism. Throughout her tenure as a process coordinator, she has also fulfilled the educational diagnostician role. Tr. 1056:5-25; Tr. 1057:1.

Similar to moving students between rooms or buildings within the District, the District considered the change in location of services to be an administrative decision. Tr. 77:21 – 78:3. The District utilized the placement continuum adopted by DESE for school age children. Tr. 1088:21 – 1089:9. A student's IEP would need to change to the point that it results in movement up or down the placement continuum to be considered a change of placement. Tr. 1094:8 – 1095:20. Student's placement was private separate school (day) facility and did not change as a result of the September 17, 2010 IEP meeting. Tr. 1096:3-11; R-15; R-18.

23. On September 24, 2010, Dr. Arnold sent ABC'nD an email reminding them that Student's first day at Rainbow would be October 4, 2010, and asking them to keep her apprised of any transition activities. R-21.

24. As part of the transition plan for Student, his teacher at ABC'nD (Amy Naylor), his parent, and his sister, toured Rainbow on September 24, 2010. The purpose of this tour was to create a social story to facilitate transition of Student and was not to conduct a program evaluation of Rainbow. Nancy Michaels, the Owner/Director of ABC'nD, did not attend the tour. Tr. 830:5-8. During the tour, Rainbow indicated it would utilize the same schedule that Student had at ABC'nD in order to ease his transition. Tr. 636:15-23; Tr. 637:11-18. During a meeting at Rainbow immediately preceding the tour, Rainbow discussed their training in PECS. Tr. 646:6-10. Student appeared to have a good time when he was at Rainbow. He was involved in different activities, played with different sensory toys, walked through the facility on the tour, and did not appear to display any frustration or behaviors. Tr. 649:17-19; Tr. 969:10-19; Tr. 1140:3-7.

25. During the tour, Rainbow shared with Parent and Ms. Naylor the changes that were in progress to the room that would ultimately be Student's classroom at Rainbow. The changes were minor and included moving the bookcases and a white board table out of the room. Tr. 195:9-20. Parent would not sign Rainbow's form during the tour acknowledging that she had been provided an enrollment packet and that certain items had been discussed. Tr. 274:9 – 275:6; Tr. 968:11-16; Tr. 968:21-24.

26. As a result of the tour, Ms. Naylor developed concerns about "clutter" at Rainbow, including items on the walls that she believed would be distracting to Student, and whether there was sufficient delineation of spaces in what would be Student's classroom at Rainbow. Tr. 521:8 - 525:14. Ms. Naylor did not relay

any of these concerns to the District or to Rainbow. Tr. 633:2-6; Tr. 646:21-25; Tr. 1007:7-20; Tr. 1139:19 – 1140:2; Tr. 1273:23 – 1274:1. Ms. Naylor did express some concerns regarding Rainbow following her tour in the form of an internal ABC'nD document that was not provided to the District or Rainbow. Tr. 714:6-23. Based on pictures that she saw, Ms. Michael also had concerns about "clutter" at Rainbow that she believed would be distracting to Student, and areas that have multiuse rather than a single use. Tr. 775:20 – 776:14. No one from ABC'nD made any contact with the District after the September 17, 2010, IEP meeting regarding any concerns they had about Rainbow. Tr. 1397:9-12.

27. On Monday, September 27, 2010, Ms. Naylor completed the transition packet for Student, including a social story, a list of transition plan activities, preference list, and sensory processing strategies/activities for Student. R-24. She developed the transition packet based on her findings following the tour and included things that ABC'nD felt would be important information for Rainbow to have about Student. Tr. 857:23 – 858:6. She provided the transition information to her director, Ms. Michaels. On that same day, she prepared a memo regarding her tour of Rainbow, which she also provided to her director. Ms. Naylor did not include Student's data sheets in his transition packet. Tr. 634:8-15; Tr. 648:12-15; Tr. 650:8-15; Tr. 650:25 – 651:8; Tr. 1276:23 – 1277:11; R-48. Ms. Naylor did not indicate in her transition packet that she had any doubts or reservations about the transition to Rainbow. Tr. 704:25 – 705:4. Nor did she express in writing to anyone that she believed Rainbow could not implement Student's IEP. Tr. 707:19 – 710:9; Tr. 714:24 – 715:2.

28. ABC'nD was supposed to email the transition packet to Rainbow when it was completed. Rainbow called ABC'nD regarding Student's transition, but ABC'nD did not respond. Uncertain about whether they were going to receive anything for Student before his first day of attendance, Rainbow proceeded to make a PECS book for Student in the event ABC'nD did not send Student's with him before the first day of attendance. Tr. 164:20 – 165:14; Tr. 354:14-23.

29. On September 29, 2010, Dr. Arnold made the necessary transportation arrangements for Student to begin attending Rainbow on October 4, 2010. Tr. 1278:11-13; R-60. Dr. Arnold made arrangements for bus transportation to pick Student up on Monday morning, October 4, 2010, and take him to his first day of school at Rainbow. Tr. 1278:11-13.

30. On Thursday, September 30, 2010, Dr. Arnold sent an email to both ABC'nD and Rainbow informing them that she had made the necessary transportation arrangements for Student to begin Rainbow on Monday, October 4, 2010. R-22.

31. On Thursday, September 30, 2010, Parent filed this due process complaint challenging the change in location of services to Rainbow. R-64. The District was still under the impression that Student would begin attending Rainbow on Monday, October 4, because it did not receive any indication from Parent or ABC'nD that Student was not going to attend Rainbow on Monday. The District did not believe that stay put applied to a change in location of services. Tr. 1277:21 – 1278:10; Tr. 1366:14 – 1367:3. This assumption, while in general is correct, given Parent's Complaint that Rainbow could not implement the Student's IEP, was erroneous in the opinion of the Chairperson, as later ordered.

32. As of Thursday, September 30, 2010, it was still Ms. Michael's understanding that Student would be attending Rainbow beginning on October 4, 2010. Tr. 836:17-20; R-22.

33. On Friday, October 1, 2010, Apple Bus Company sent written notice to Parent in Student's backpack that Student would be picked up at 7:45 a.m. on Monday morning to go to Rainbow. R-23; R-60.

34. On the afternoon of Friday, October 1, 2010, ABC'nD sent an email to Dr. Arnold indicating their understanding that Student was starting school at Rainbow on Monday and forwarding Student's transition information for Rainbow. Included with this transition information was a new behavior intervention plan dated September 2, 2010, that the District had not previously received. Tr. 837:2-8; Tr. 1087:6-9; Tr. 1274:4-12; R-17; R-24. Prior to receiving the email from ABC'nD on October 1, 2010, the District was unaware that this new behavior plan existed. Tr. 1274:18 – 1275:3; Tr. 1275:18-22; Tr. 1376:15-20. The September 2, 2010, behavior plan contained only minor revisions from the previous behavior plan, which was dated October 26, 2009. Other records and information that ABC'nD had regarding Student, such as intervention strategies, general instructional sheets, structure of classroom, methods used with him, were not included as part of the transition information provided. Tr. 1396:10 – 1397:8; R-49. Receipt of the transition information caused the District to continue to believe that Student would be sent to Rainbow on Monday, October 4, 2010. Neither Parent nor ABC'nD informed the District to the contrary. Tr. 1366:14 – 1367:3.

35. On Monday morning, October 4, 2010, the bus arrived at Student's home, at which time Parent came out to the bus and informed the bus driver that Student would not be getting on the bus to go to Rainbow. The bus arrived again the next morning (Tuesday), at which time Parent again informed the bus driver that Student would not be getting on the bus to go to Rainbow. Tr. 1278:17-21; Tr. 1279:16-25; Tr. 1367:6-18.

36. On October 6, 2010, the Chairperson entered an Order requiring that Student's location of services be maintained at ABC'nD during the pendency of this due process proceeding. Immediately after receiving notice of this Panel's Order, Dr. Arnold reinstituted bus service for Student to ABC'nD, which resumed on the afternoon of October 7, 2010. Tr. 1280:7-22; Tr. 1369:4-8.

37. Student has continuously attended ABC'nD during the pendency of these proceedings. He had no break in service as the result of the filing of the due process complaint. The District has paid for all of ABC'nD's invoices for Student in full, including for October 4, 5, and 6, 2010. Tr. 1281:9-18; Tr. 1369:9-15; R-50.

38. On October 18, 2010, Parent submitted a request to the District to be reimbursed for her mileage expense in transporting Student to and from ABC'nD on October 4, October 5, October 6 and the morning of October 7, 2010, as well as for her mileage expense for her travel to and from Rainbow on September 24, 2010, for her tour of Rainbow. R-31. Her total mileage submitted was 510 miles, 448 of which were for travel to and from ABC'nD. Tr. 1369:21 – 1370:7.

39. The District reimbursed Parent for her mileage expense in the total amount of $204.00 based on the mileage rate of $.40 per mile set by the District which included transporting Student to and from ABC'nD after the filing of her due process complaint but before the stay put order was issued and bus transportation was reinstituted. Tr. 1281:19 – 1282:2; Tr. 1369:21 – 1370:7; Tr. 1372:11-15; R-51.

40. As a political subdivision, the Board of Education of the District annually adopts and publishes a mileage reimbursement rate. For the 2010-2011 school year, the District mileage reimbursement rate set by the Board of Education was $.40 per mile. This mileage reimbursement rate is used to reimburse all District mileage, including for staff and other parents and is reflected on the District's mileage reimbursement form. Tr. 1283:5-16; Tr. 1283:25 – 1284:6; Tr. 1369:21 –

1370:7; Tr. 1371:5-15; R-31. Parent's counsel paid several witnesses travel fees in the amount of 47.5 cents per mile, which is less than the IRS reimbursement rate of $.50 per mile. Tr. 222:15-18; Tr. 416:18-23.

41. Parent initially inquired about the mileage reimbursement rate on October 20, 2010, at which time Dr. Arnold explained what reimbursement rate had been set by the Board. R-31.

42. In October 2010, Dr. Arnold made arrangements for Parent to tour another private separate school (day) facility (PBM) to see if Parent was agreeable to a change in location of services to that facility. R-29. Parent would not respond to Dr. Arnold's messages and did not show up for the tour. Tr. 1372:20 – 1373:9; R-31.

Rainbow

43. Rainbow is an umbrella entity that encompasses Rainbow, which is the day school, and Rainbow Options, which is the adult day habilitation program. Rainbow is located at 900 NW Woods Chapel Road in Blue Springs, Missouri. Tr. 377:4-18; Tr. 455:13-18; Tr. 456:24 – 457:10; R-40.

44. Rainbow is an approved private agency by the Missouri Department of Elementary and Secondary Education and is approved to serve children ages 3 through 21 with the following disabilities: autism, young child with developmental delay (to age 5), emotional disturbance, multiple disabilities, intellectual disabilities, speech or language impairment and specific learning disabilities. Tr. 466:19 – 467:11; 467:17-20; Tr. 468:5-19; R-46. While Rainbow does take children with other disabilities, its focus is on autism. Tr. 1142:16-21.

45. Rainbow is a day school that offers an intensive, therapeutic intervention program to allow each child to develop to their fullest independent functioning potential. It serves students ages 3 to 21 and has been in business for 34 years. Rainbow currently contracts with 20 public school districts, including Excelsior Springs School District. Rainbow has been serving children with autism for many years. The District has sent students to Rainbow in the past and currently has students attending that center. R-53; Tr. 450:11-17; Tr. 452:7-10; R-40; R-44. With the increase in incidence rate of autism in the student population, Rainbow has taken measures over the years to better suit its programming for that particular population of students, including adding things like Project TEACCH,

discrete trial, visual schedules, work boxes, and Gentle Teaching to its programming and curriculum. Tr. 454:5-17; Tr. 504:12-19.

46. Rainbow has approximately 60 students, 40 of whom have autism. All students at Rainbow have IEPs, and a student's IEP is what determines the services they receive. Tr. 430:11-18; Tr. 470:5-10.

47. There are approximately 50 staff members at Rainbow. Tr. 1023:5-24. Although Rainbow advertises a minimum student-to-staff ratio of 3:1, the ratio is often much better. Staff who are counted in the student-to-staff ratio are teachers and paraprofessionals. Tr. 319:9-15; Tr. 470:12-20.

48. Rainbow does not accept all children for enrollment. It has a process it employs in order to determine whether it will accept a particular student. That process includes reviewing paperwork from the school district including service minutes required, conducting an observation of the child, seeking input from current providers, consulting with the Rainbow behavior support team, evaluating staffing needs and determining whether Rainbow believes it can make a difference for the child. Typically, the parent will come for a tour of the facility and obtain an enrollment packet. Tr. 504:23 – 507:11.

49. As of September 30, 2010, Rainbow began school activities with personal care and students arriving at 8:45 a.m. Personal care and transition activities begin again at 3:00 p.m., and students leave Rainbow at approximately 3:15 p.m. Rainbow advertises its regular school day as running from 9:00 a.m. until 3:00 p.m.; however, therapies may be scheduled before and after these times as has historically been the case for several years at Rainbow. Tr. 276:23 – 277:14; R-44. Although Rainbow offers respite care, Student would not be participating in respite care. Tr. 145:3-7; Tr. 145:12-16; Tr. 502:9-13; Tr. 502:19 – 503:9. Rainbow has multiple staff members who have provided either instruction or therapy services before or after the regular hours of instruction for multiple students. Jennifer Lay, a speech language pathologist at Rainbow, has specifically provided speech language therapy services on a regular basis outside the regular posted hours of Rainbow. Tr. 404:6-9; Tr. 404:24 – 405:3; Tr. 496:17 – 499:21; Tr. 500:18-25; Tr. 501:20-24; Tr. 1136:15 – 1137:12; Tr. 1360:23 – 1361:14.

50. The therapies provided by Rainbow include speech and language therapy, occupational therapy, physical therapy and behavior management. The program

at Rainbow includes ABA/discrete trial training, augmentative communication support, community access, functional life skills, Gentle Teaching, individualized academics, Orton Gillingham Multi-Sensory Program, Project TEACCH, social skills, sensory integration, and self regulation. Rainbow utilizes methodologies that are consistent with ABA. Rainbow has staff trained in each of these program components. Tr. 483:2-10; Tr. 488:15-17; Tr. 489:3-25; Tr. 490:7 – 491:6; R-40.

51. During the summer of 2010, Rainbow began converting a library/instructional area into an early elementary classroom (the classroom Student would attend) in anticipation of several new early elementary students who would begin attending Rainbow. Tr. 398:12-15; Tr. 402:20-403:2; Tr. 1132:18-1133:19. By utilizing one classroom space with multiple learning areas for this group of students, Rainbow could minimize transitions, which are often challenging for this younger student population. Tr. 236:5-11; Tr. 900:14-19; Tr. 1335:24 – 1336:24. The students still transition some, but the transitions are within the classroom to different areas delineated for different purposes. Tr. 387:25-388:17. This set up allows the younger students to learn how to independently move about within a class with multiple learning areas so that they can develop the skills to move into other areas out of the classroom. Tr. 901:16 – 902:11; Tr. 1336:11-24. Toward the beginning of the 2010-2011 school year, Rainbow made some minor changes to the early elementary classroom in order to further delineate the space for different activities. Tr. 339:7-10. Those changes included adding PECS icons to label the work areas, creating centers for different activities, adding more work boxes and concept folder games, moving some bookcases and a white board table, adding a SMART table and rearranging the classroom. Tr. 195:9-20; 196:14 – 197:1; 197:20 – 198:19; R-38. The early elementary classroom has two smaller rooms in the back of the room, one of which is for individual instruction (one-on-one discrete trial) and the other is for speech therapy. Tr. 200:4-21; Tr. 245:1-13. Prior to conversion of the library/instructional area, the early elementary students received their instruction in a different classroom. Tr. 403:13-16.

52. The early elementary classroom at Rainbow has a SMART table that is a computer table with a touch screen table top. The computer has different activity choices depending on the skill students are working on. It is an interactive technological tool that engages students in learning skills in a “hands on” manner. Tr. 906:8 – 907:18; R-43.

53. The early elementary classroom contains various centers that are delineated for different activities. The classroom also contains a variety of instructional activities and manipulatives, sensory items, work boxes, musical instruments, and books. R-42; R-43. Children eat lunch in their classrooms so that their teachers can work on manners, social skills, independent functioning, hand-eye coordination, and feeding skills. Tr. 205:21 – 206:5; Tr. 387:25 – 388:17.

54. Rainbow delineates space for different use through room/furniture arrangement and the use of labels and icons and other visual cues. R-42; R-43. The classroom has different centers, circle time, a table area, cozy corner for reading, and a gross motor area. Tr. 902:12 – 903:15; Tr. 905:3-14. Rainbow uses visual cues at the table in the early elementary classroom in order to let the children know that a different activity will take place there. Tr. 905:15 – 906:7.

55. Rainbow utilizes a behavior support team approach in programming for and addressing student behaviors. Tr. 1106:22 – 1107:23; Tr. 1108:4-18; Tr. 1109:3-14; Tr. 1109:15 – 1110:4. The team, which has many years of experience in behaviors, engages in the functional analysis of behaviors and development of behavior intervention plans. The team meets on a regular basis and conducts data based reviews of behaviors in order to come up with strategies to address them. The team consists of teachers, the executive director, the behavior support staff, and some paraprofessionals. Brad Byrd, Karen Brown and John Creason are members of the behavior support staff who help develop behavior plans and are available on a daily basis for behavior support. Tr. 272:2-15; Tr. 472:18 – 473:12. They have approximately 38 combined years of experience in working with behaviors. Tr. 1146:12 – 1147:9; Tr. 1148:11-20. Behavior data is collected on a daily basis, which is then used to develop, modify and track IEP goals and objectives. Tr. 1106:22 – 1107:23; Tr. 1108:4-18; Tr. 1109:3-14; Tr. 1109:15 – 1110:4.

56. Professional staff at Rainbow holds certifications in the areas of Severely Developmentally Delayed, Educable Mentally Handicapped, Behavior Disorder/Emotionally Disturbed, Learning Disability, Early Childhood Special Education, Elementary Education, Mental Retardation, and Multiple Categorical. Tr. 476:11 – 477:17; R-39; Tr. 477:23 – 478:3. Rainbow has an internal training program whereby it can provide staff training and in-servicing on-site. Tr. 479:23-25.

57. Rainbow has clinically certified speech language pathologists on staff. The speech language pathologist usually meets with a new student on their first day to set up services. Tr. 473:16 – 474:2; Tr. 474:21 – 475:2.

58. Rainbow contracts with Paul Chang and Associates for its occupational therapy services. Tr. 1302:13-14. It contracts for whatever number of minutes is needed to meet its students' IEP therapy minutes. Tr. 474:3-20. Paul Chang and Associates has been cooperative with Rainbow in getting services set up for new students during their first week. Tr. 475:3-12. Rainbow utilizes certified occupational therapy assistants ("COTA") in providing occupational therapy services to students. Tr. 1320:6-20; Tr. 1323:8-14; R-69. A COTA works under the direction of a registered occupational therapist ("OTR") and implements therapies, strategies and programming for students. Tr. 1304:14-22; Tr. 1305:21-24. Educational institutions, both public and private, utilize COTAs to provide occupational therapy services. Tr. 1305:7-10. The District utilizes COTAs because they are cost effective and because it has had good experience using them. Tr. 1387:15-23. A COTA is appropriately certificated to provide direct occupational therapy services to students if he/she has an associate's degree as well as licensure through the State of Missouri. Tr. 1305:15-18; Tr. 1387:24 – 1388:8. Paul Chang & Associates assigns OTRs to directly supervise its COTAs. Rainbow evaluates its contracted occupational therapy staff through use of an evaluation form and self evaluation. Tr. 1358:6-19.

59. A multitude of sensory therapy and sensory activities are included in the program at Rainbow. These may include lotion therapy, the use of lights, different textures and touch sensations, chewables, vestibular, movement, among other physical activities. Tr. 491:7 – 492:8.

60. Rainbow utilizes Gentle Teaching, which is a method or technique that focuses on helping a child feel safe and loved and developing a trusting relationship. Tr. 483:13 – 485:4; Tr. 881:2 – 883:10. Rainbow has its own mentors, which means it has staff who are trained to be trainers. Tr. 880:6-14; Tr. 1099:1-19; R-36.

61. Rainbow has attained three year accreditation from CARF International, which is the highest level of accreditation a center can receive. CARF stands for the Commission on Accreditation for Rehabilitation Facilities. As part of that accreditation process, CARF observes in the classrooms at Rainbow, interviews teachers and staff, and reviews records. Tr. 374:12-14; Tr. 375:3-15; Tr. 464:14 – 465:4; R-33.

62. In addition to daily communication to the parent about their child, Rainbow regularly communicates with parents about center activities and provides various types of programming and resources for parents. R-35. Rainbow regularly showcases student work and achievements. R-34.

63. As stated above, Rainbow utilizes PECS, which stands for Picture Exchange Communication System. Rainbow staff is trained in the utilization of PECS. Rainbow uses Boardmaker to create its PECS icons and utilizes the concept of "finished" in implementing PECS. Tr. 487:13-14; Tr. 487:21 – 488:6; R-42; R-43. PECS is an emerging intervention. Tr. 1172:18 – 1173:2.

64. Rainbow has a playground with numerous, colorful sets of equipment and play areas. R-43, pp 7 and 8.

65. Rainbow uses the concept of a work box system with students. Tr. 390:18-23; Tr. 751:17 – 752:21; Tr. 1121:17-19. Rainbow modifies how it uses work boxes with students based on the development level and skill set of each child. Rainbow uses visual schedules, picture icons, and the concept of 'finished" with its work box system. Tr. 751:17 – 752:21; Tr. 753:5 – 755:9; Tr. 756:8-25. Depending on a child's IEP, Rainbow may use work boxes to teach skills such as sorting, fine motor skills, patterning, color recognition, visual discrimination, and one-to-one correspondence. Work boxes are tied to IEP goals. Tr. 757:25 – 758:11; Tr. 974:17-19. Its staff has been trained to utilize work boxes with students. Rainbow has been trained and has experience in TEACCH. Stephanie Bolton has received training, supervision and oversight in utilization of TEACCH and has experience setting up work boxes and implementing them. Tr. 886:11-23.

66. The first day that a student spends at Rainbow, the staff spends a lot of time getting to know the student, building rapport and a relationship with them, and not necessarily taking a lot of data the first week. Tr. 758:12 – 759:8.

67. Rainbow services breakfast to students. TR. 732:22 – 733:4. Breakfast includes a wide variety of things like waffles, cereal, oatmeal, quiche, and fruit. Tr. 733:5-14.

68. Rainbow offers extended school year services as determined by each child's IEP. Tr. 925:13-19.

69. Applied Behavioral Analysis ("ABA") is a concept that espouses the notion that behavior is observable and measurable and that in order to determine what is going on with behavior, you have to do an analysis of why behavior is occurring and what may be reinforcing that behavior. It includes the notion that certain things can be done in order to increase the occurrence of a behavior or decrease the potential for a behavior to occur. ABA includes an ongoing assessment component and encompasses a number of different interventions and treatment approaches. Those approaches include discrete trial teaching, reinforcement and shaping, peer support and social stories. It is best practice to use a variety of interventions depending on the particular needs of a child. Tr. 1160:11 – 1162:14; Tr. 1163:11-18. Rainbow staff has been trained in ABA. As part of the training, Rainbow had a behavior support therapist present to help with ABA training, who has background and training in ABA and provided support for Rainbow staff. He provided some modeling and was available for mentoring and to provide feedback. Tr. 1014:1-18.

70. Over the last 13 years, the District has placed at least seven students at Rainbow ranging in age from five to 21. Five of those students have had autism and fell at the low end of the spectrum with cognitive delays. Tr. 42:21-24; Tr. 1225:15-20. The District currently has two students at Rainbow, excluding Student. Tr. 1226:8-18. The District students that have been served at Rainbow have made progress while at Rainbow, and two of them were able to transition back to the District. Tr. 1227:5-15. The District has had a positive administrative relationship with Rainbow. Tr. 1229:18-20.

Based on the above, the Panel believes, and so holds, that Rainbow can provide Student "specialized instruction in an environment designed especially for children with autism" – a requirement of Student's March 24, 2010 IEP. R-11, p. 19.

ABC'nD

71. ABC'nD is located at 3930 Washington Street in Kansas City, Missouri. Tr. 713:9-13. The center has been open for five years. Tr. 615:3-6. It serves students age birth to fourth grade. Tr. 615:17-22. Four students who are enrolled at ABC'nD are school age, the rest are pre-kindergarten. Tr. 616:4-9. Not all students at ABC'nD have had an autism diagnosis. Tr. 616:10-13. However, the only time Ms. Michael can recall that a student did not have a diagnosis in the autism

spectrum was a child too young to be diagnosed or was in the process of a diagnosis. And if the diagnosis was not one of autism, he/she would be dismissed. R-66; Tr. 8:95.

72. ABC'nD is an approved private agency by the Missouri Department of Elementary and Secondary Education and is approved to serve children ages 3 through 12 with the following disabilities: autism, young child with developmental delay, other health impairments, and speech or language impairment. Tr. 468:20 – 469:3; Tr. 794:16-19; R-46. Although it is licensed to age 12, ABC'nD has never actually had a student reach the age of 12. Tr. 794:4-11. Every student at ABC'nD has to transition to a new school at some point due to age limitations. Tr. 616:14-20. Most do so before the approved age limit. Tr. 616:21-24.

73. ABC'nD is a small center and its current location opened in approximately 2005. It has no playground. Tr. 5:1-23; 27:17-20; Tr. 631:6-8; Tr. 1120:21 – 1121:13; R-49. ABC'nD has about 18 to 20 students, five or six of which are contract placements from school districts. Tr. 790:22 – 791:6. Student is the only student the District has ever had placed there. Tr. 1224:20 – 1225:6.

74. ABC'nD is a facility designed especially for children with autism, providing therapies, intervention strategies, and methodologies designed specifically and exclusively for children with autism. P-9, p. 393. Included in such are TEACCH, ABA, Response therapy, social stories, activity based interventions, Aspergers interventions, sensory therapy, discrete trial teaching, reinforcement, and work boxes.

75. Ms. Michaels of ABC'nD is recognized as an expert in the area of autism. Tr. 792:23 – 793:3; Tr. 27:16-29:5; R-66: P-9, pp. 300-391, 392. She has developed over 100 IEPs for students and is involved on some level in the development of the IEPs for every student at ABC'nD. Tr. 801:9-15.

76. ABC'nD uses the same space and rooms for different purposes and delineates the area for that purpose by physically using different sections of the same room or by using cues to show it is a different activity. Tr. 630:20 – 631:5. ABC'nD separates student work areas by hanging material from the ceiling. Tr. 632:10-16. Tr. 551:14-25.

77. ABC'nD has rearranged the classrooms many times since it opened. It is not uncommon for an agency to rearrange its rooms. Tr. 702:2-11.

78. As stated above, Amy Naylor is Student's primary teacher at ABC'nD. Tr. 515:10-13; Tr. 675:24-25. Ms. Naylor served Student years before she obtained her Board Certified Behavior Analyst certification through online courses. Tr. 606:8-16. She obtained her BCBA on September 30, 2010, after both of Student's behavior plans had been written. Tr. 614:12-24. Ms. Naylor performed the functions of conducting functional behavioral assessments, data collection, and developing behavior plans all prior to becoming a BCBA. She specifically performed those functions for Student prior to becoming a BCBA. Tr. 607:13-22; Tr. 613:9-13. Student's behavior plan had not been revised by ABC'nD after Ms. Naylor obtained her BCBA certification. Tr. 614:25 – 615:2. Ms. Naylor had the same trainer for TEACCH as Rainbow staff. Tr. 607:23 – 608:1. Ms. Naylor relies on the speech therapist when she has questions about PECS and to set up work boxes on specific goals. Tr. 605:20 – 606:2.

79. Children in Student's class at ABC'nD range in age from five through 10. Tr. 625:2-4. There is a fourth grade student in Student's class at ABC'nD. Tr. 624:11-13. Student receives 45 minutes to one hour per day of one-on-one instruction at ABC'nD in addition to 30 minutes per week of speech or occupational therapy. Tr. 531:1-6.

80. ABC'nD has four pre-school peer models, all of whom are younger than school age. Some of the pre-school peer models are relatives of employees. Tr. 619:11 – 620:4.

81. ABC'nD also uses Boardmaker to print PECS icons. Tr. 618:22 – 619:10.

82. Ms. Naylor, consistent with Ms. Bolton, testified as follows: An educator is in a better position to know what methodologies, strategies and interventions are more effective with a student after getting to know him. Tr. 625:23 – 626:3. It takes time to get to know a new student. Tr. 626:22 – 627:3. If data indicates that methodologies, strategies and interventions are not effective with a particular student, then you change what you are doing. Tr. 628:23 – 629:2.

The Panel does not grade Rainbow and ABC'nD as it is not necessary to establish which school ranks higher on its delivery of services to autistic children. Comparisons throughout this decision are made because ABC'nD is a school that

has specialized instruction in an environment designed especially for children with autism and has implemented Student's IEPs for years. Therefore, to the extent Rainbow offers similar services, it, too, offers such specialization. Although personnel from each school criticized the other, with ABC'nD's criticisms being more intense, it is the Panel's belief that much of the "sabre rattling" was a product of the two schools attempting to establish superiority over the other. In reality, the programs, environments, dedicated staffs, methodologies, strategies, interventions, and activities of the two schools are overwhelmingly more similar than they differ.

Implementation of Student's IEP at Rainbow

83. Student's IEP contains a demographic section, a meeting participation page, a report of present level of academic achievement and functional performance, special considerations, 12 goals and objectives, progress reporting requirements, a services summary, transportation section, regular education participation section, placement considerations and decision, a list of accommodations and modifications, supports for school personnel, and a behavior plan. R-11; R-17.

84. Rainbow can fully implement the provisions of Student's current IEP and has implemented similar IEPs for other District students. Their overall educational program is similar to that offered by ABC'nD. Student's present level of academic achievement and functional performance is very similar to those of other District students who attend Rainbow. R-53.

85. Stephanie Bolton[8] will be Student's special education teacher implementing his IEP. Tr. 225:20-23; Tr. 1033:16-23. Upon initially reviewing Student's IEP, Ms.

[8] Ms. Bolton has been a special education teacher at Rainbow Center for three years. Tr. 886:6-8. She has worked with children with autism during that time. Tr. 896:22-25. She has received formal Pyramid Education Program PECS training at an off-site workshop and has trained other staff at Rainbow Center on the use of PECS. Tr. 225:24 – 226:1; Tr. 480:9-18; Tr. 481:2-5 Tr. 880:2-5. Ms. Bolton has a bachelor's degree from Graceland University in elementary education/early childhood education as well as training in special education. She has Missouri State teaching licenses in early childhood education, elementary education, and cross-categorical special education ranging from pre-kindergarten to twelfth grade, as well as endorsement in reading from the State of Iowa. Tr. 877:3-10, R-39. She took two Praxis exams required for state licensure to attain a Missouri state special education teacher's license. Tr. 877:21-25. She has received Mandt training, Gentle Teaching training, Pyramid education program PECS training, HIPAA and FERPA training, CPR training, Hoyer Lift training, Bloodborne Pathogens training, Standard First Aid training, MAP-A training, Creating Rhythmic Connections for Learning training, abuse and neglect training, and she attended a conference on autism and Asperger's syndrome. She has also received personal hands-on discrete trial training and assistance from staff members who are experienced in and have training in TEACCH. Tr. 878:4-25, Tr. 879:1-10, R-39. Prior to working at Rainbow, she was a preschool teacher and worked with early childhood children in a preschool setting for two through five-year-olds. Prior to working as a

Bolton had no doubt that Rainbow could immediately implement it. Tr. 919:3-12. After reviewing Student's entire IEP, Ms. Bolton did not see anything that Rainbow would not have been able to implement on October 4, 2010, if Student had attended beginning that day or any time after that. Tr. 965:1 – 966:6.

86. Student will be assigned to Ms. Bolton's early elementary classroom at Rainbow. Tr. 1335:8-23. There are currently five (5) students in Student's classroom along with a teacher and three paraprofessionals. The students in the class range in age from five to eight, and four of them are autistic. One is higher functioning but the other three are lower functioning. Tr. 887:20; Tr. 1019:8-18. Rebecca Hanes will be Student's paraprofessional, which would result in six (6) students, a teacher, and four paraprofessionals in the classroom. Rainbow will assign Student his own paraprofessional even though his IEP does not require it. Two speech pathologists, one occupational therapist and one physical therapist also provide services to the students in Ms. Boltons' class. Tr. 887:25 – 888:6. Ms. Bolton spends on average one hour per day individually with each student in her class. The individualized attention is flexible because student needs vary, but students receive one-on-one attention from paraprofessionals in the classroom when Ms. Bolton is not available. Every child receives at least 30 minutes of one-on-one time from Ms. Bolton per day to work on IEP goals and extensive one-on-one adult attention through the day. Tr. 227:23 – 228:16; Tr. 229:4-14; Tr. 230:10-122; Tr. 249:4-23; Tr. 311:7-9; Tr. 471:8-11; Tr. 471:8-22. Routine is key in her class because transitions are often an issue for the children in her class. Tr. 897:9-16; Tr. 899:8-13; Tr. 918:1-6.

87. Ms. Bolton arrives at Rainbow between 7:30 and 7:40 a.m. and usually leaves between 3:45 p.m. and 4:00 p.m. Tr. 735:12-18. She has students in her classroom until 3:10 or 3:15 p.m. Tr. 737:10-23. Instead of taking a 30 minute break for lunch every day, she takes two 15 minute breaks so that she can model for her students at lunch. Students eat lunch in the classroom. Tr. 745:6-14. Tr. 877-880. Tr. 885.

88. Ms. Bolton has experienced success in working with students on their behaviors at Rainbow. Tr. 923:1 – 924:5.

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preschool teacher, she worked at an inner city Kansas City School District at a charter school teaching first grade children. Tr. 885:14-21.

89. Ms. Bolton has to use different strategies from day to day depending on the child. Tr. 888:20-23. Ms. Bolton has a color coded folder system in place in her classroom with goals and data sheets in order to manage and oversee the paraprofessionals in her classroom to ensure they are properly implementing student IEPs. She meets with the paraprofessionals in the morning to review the plans for that day, and for some paraprofessionals develops a weekly schedule. She will work directly with them in order to model and oversee their work. Tr. 890:13-22; Tr. 891:4 – 12; Tr. 894:1-21.

90. Rebecca Hanes[9] will be Student's paraprofessional. Tr. 311:7-9; Tr. 1012.

Goals and Objectives.

91. The goals listed in Student's IEP are typical of the goals listed in IEPs of District students receiving services at Rainbow. Rainbow employs appropriately certificated staff to implement Student's goals. R-53.

92. Student has 12 goals listed in his IEP. R-11. Rainbow has experience in implementing the goals that are included in Student's IEP. Tr. 1327:13-21. Ms. Bolton is able to implement each of the instructional goals in Student's IEP. Tr. 926:8-12. Ms. Bolton described how she would implement Goal Numbers 1, 2, 3, 4, 5 and 8. Tr. 231:1-20; Tr. 926:13 – 927:15; Tr. 928:20 – 929:23; Tr. 930:23 – 931:20; Tr. 931:21 – 932:8; Tr. 932:15 – 933:12; Tr. 940:3 – 943:14; Tr. 945:17-19. Ms. Bolton has reviewed and determined that she is able to implement Goal Numbers 9 and 10 as well. Tr. 945:20 – 946:3. Ms. Bolton's goal implementation would include introducing various activities multiple times throughout the day so that Student has lots of opportunity to practice. She would also have different staff members work with him on certain goals so that he can generalize the skills. Tr. 231:21 – 232:8. Ms. Bolton also uses errorless teaching in her instruction on goals, which is a strategy under the ABA umbrella. Tr. 929:24 – 930:22.

93. Goal Numbers 5, 6, 7 and 12 are occupational therapy goals for Student. Tr. 932:15 – 934:13; Tr. 946:21 – 947:1. Goal Number 11 is a speech goal. Tr. 946:4-11.

[9] Ms. Hanes received a Bachelor of Science degree in Educational Studies and Special Education from Avila University. She completed training in Health Insurance Portability and Accountability Act (HIPPA), Family Education and Rights Privacy Act (FERPA), the Heartsaver CPR Program, Proper and Safe Use of the Hoyer Lift, Bloodborne Pathogens, First Aid Certification, and Abuse and Neglect through Rainbow Center. Additionally, she received an Advanced Student Certificate for training in the Mandt System. Rebecca is a certified Gentle Teacher and Division of Developmental Disabilities Medication Aide in the State of Missouri. R-39.

94. Rainbow keeps track of what level of prompting is necessary for a student on a particular goal so that it has a running idea of the student's level of independence on that goal. TR. 927:16 – 928:19. Student's IEP also specifically indicates what level of prompting is necessary with respect to individual objectives/benchmarks. R-11.

Progress Reporting Requirements.

95. Rainbow maintains individualized data for each student, including detailed progress data on goals, objectives and behavior. Tr. 492:13-15; Tr. 495:16-21. The raw data is often graphed out in order to analyze progress and trends. Tr. 496:6-8. Ms. Bolton maintains a data notebook on each student in her class. She records data at least three times a week on each goal. Tr. 908:8 909:12; R-45.

96. Rainbow maintains behavior data on a daily basis, and records that data on behavior charts individualized to each student. This data is utilized to keep track of progress on behavior goals and benchmarks. At the parents' option, the daily behavior data is sent home on the back side of the daily communication sheet. In Student's class, Ms. Bolton keeps track of behavior data for each child every hour. Tr. 493:12 – 494:7; Tr. 911:16 – 912; R-41.

Accommodations and Modifications.

97. Student's IEP contains a number of accommodations and modifications, all of which have been provided to students at Rainbow and many of which are already part of regular components of their education program. R-53. From a compliance perspective, the accommodations and modifications in an IEP should indicate the frequency of how often such accommodations and modifications should be implemented while allowing room for professional judgment on the part of the educator. For instance, frequency should be marked daily if the team firmly believes that an accommodation or modification will be used at some point in the day every day. Tr. 1383:22 – 1384:15.

    a. Individual picture with words schedule: Each of the students in Ms. Bolton's class have an individual picture with words schedule. Student's visual schedule was supposed to be sent with him from ABC'nD. If it was not, Rainbow would use icons to set up his schedule throughout the day

as well as his schedule that goes home. Tr. 951:8 – 952:8. In addition, Ms. Bolton uses a large visual schedule with icons in her class on a daily basis. Tr. 983:13-25; R-42; R-43. Rainbow will use the concept of "first…then…" with Student. It would also utilize a visual schedule and picture icons to help him know what to expect next and when he is finished with an activity. Tr. 727:6 – 729:3.

b. Discrete trial: Discrete trial is a method of errorless teaching that is intended to shape and develop learning skills by allowing the child to be successful with small portions of task analysis. Ms. Bolton would use discrete trial with Student and may model implementation of it so that Ms. Hanes can utilize discrete trial with Student as well. Tr. 313:21 – 315:3. Rainbow was observed appropriately utilizing discrete trial with its students as early as five years ago. Tr. 1185:12-19. Ms. Bolton has a solid understanding of discrete trial and utilizes it in her instruction. She is quickly able to provide a detailed example of how she uses it, including the incorporation of errorless teaching. Ms. Bolton would use discrete trial in conjunction with Student's work boxes. Tr. 952:12 – 954:4; Tr. 974:8-12. Rainbow had work boxes set up to utilize with Student when he was scheduled to start attending Rainbow on October 4, 2010. Tr. 255:19-24; Tr. 757:1-6.

c. PECS: Ms. Bolton would utilize PECS with Student in her classroom. Tr. 954:5-11.

i. Stephanie Bolton has received PECS training and is able to describe, in detail, how she would utilize PECS with Student given that he is at Level 4. Ms. Bolton would use Student's PECS book for communication purposes so that Student could communicate his wants and needs. Specifically, she would work with Student to use the Velcro sentence strip on the front of his PECS book, to place the "I want" icon on it, and, using attributes, to use additional icons to communicate. He would then hand the sentence strip to his communication partner, who would give him the item he is requesting. Ms. Bolton is able to describe the use of pointing, modeling, pausing, and shaping away in implementing PECS. She demonstrated an understanding of the prompts and procedures that are utilized on Level 4 of PECS. Tr. 718:8-15; Tr.

23 – 722:19; Tr. 762:2-11; Tr. 940:3 – 943:14. Ms. Bolton also demonstrated an understanding of other PECS levels. Tr. 723:21 – 724:22. Ms. Bolton initially organizes a new PECS book with the icons in alphabetical order until the student makes the book "theirs" by putting the icons in the order he or she wants for ease of communication. Tr. 729:4 – 730:18. Ms. Bolton incorporates the concepts of "first then" and "finished" into her utilization of PECS. Tr. 943:15 – 945:10.

ii. By agreement, ABC'nD was to send Student's PECS book, backpack containing reinforcers and visual supports, and daily picture with word schedule with him to Rainbow. Tr. 644:14-24. It also contained things that Student used for calming such as lotion and books. Tr. 645:4-16; R-24. In order to be prepared and to ensure that Student had a PECS book the first day that he came, Rainbow made him a PECS book when it first learned Student may be coming to Rainbow. The PECS book was completed before October 4, 2010. Tr. 245:24 – 246:20; Tr. 935:5-11; Tr. 1116:19 – 1117:2. Student's visual schedule is located in his PECS book and would have come with him to Rainbow from ABC'nD. Tr. 647:1-11. It would have been more ideal for Student to have the actual PECS book he had been using for some time. Tr. 935:18 – 936:7. If Student had to use the new PECS book created by Rainbow, Ms. Bolton would allow him to customize his own book and put the icons in the order and location he wants so that he can be in control of his own communication. Tr. 936:21 – 938:16.

d. Social stories: Ms. Bolton uses social stories on an as needed basis because they are typically used to introduce a new activity or situation. She understands social stories and was quickly able to explain what they are by way of example. Tr. 954:13 – 955:10.

e. Reinforcement system: Rainbow uses reinforcers with its students, and sometimes uses a token system whereby a student gets a reinforcer after completing a certain number of tasks or something the teacher is asking the student to do. The circumstances when a child gets a reinforcer varies from child to child depending on their individual needs. Rainbow

would utilize a reinforcement system for Student. Tr. 955:19 – 956:14. Rainbow utilizes reinforcers in its instruction and goal implementation. Tr. 940:3 – 943:11.

f. Peer models:

i. Student would participate in community integration activities at Rainbow and, through those activities, would have exposure to and interaction with typical peers. Those activities would include things like going to the library, swimming, horseback riding, and going to the gym. Tr. 1347:23 – 1348:7. Rainbow pays for any costs associated with student participation in community integration activities. Tr. 286:18-22; 288:16-20; Tr. 291:20 – 292:2; Tr. 292:13-18. In addition, students at Rainbow have contact with typically developing peers before and after school when some of the children of staff members spend time at Rainbow. Rainbow has three children in second, third and fifth grade who serve as typical peer models. Student would have peer models through these two means at Rainbow. Tr. 956:20 – 957:18; Tr. 1138:3-18.

ii. Student has an emotional relationship with some adults, but he does not have an emotional relationship with other children that are in his program. Tr. 866:12-15. During her limited observation of Student, Donna Thompson noted that Student did not engage with peers and did not notice a peer model sitting directly across from him. Tr. 1178:9-14; R-10. During an IEP meeting for Student pertaining to his current IEP, ABC'nD indicated that peer models needed to be removed from Student's IEP because they do not have school age peer models. Tr. 1397:13-19.

g. Visual supports: Rainbow utilizes visual supports for students throughout the environment so that children will know what different areas are used for. For example, Ms. Bolton's classroom includes a visual support for the bathroom in which students take a small Velcro icon off of the large visual support and take it to the matching large visual support in the bathroom. The bathroom itself contains a visual support for hand washing. These same visual supports would be used with Student. Tr.

957:19 – 958:8; Tr. 981:14 – 982:14; Tr. 982:23 – 983:3; Tr. 988:22 – 989:12; Tr. 989:22 – 990:6; R-42; R-43. By way of further example, Rainbow utilizes visual supports throughout the center by posting labels and icons and using PECS books with several children. TR. 373:17-21; R-42; R-43; Tr. 487:13-14. Student's classroom at Rainbow uses a variety of visual supports and a daily visual schedule. R-42; R-43.

h. Sensory processing activities: Rainbow integrates various sensory activities in throughout the school day. Rainbow has multiple areas with sensory equipment and activities, including an occupational therapy classroom, large sensory area, activity room and playground. Some of the sensory activities include ball pit, bean table, rebounder, sensory swings, squeeze machine, sensory lights, and sounds. Tr. 958:9 – 959:10; Tr. 992:22 – 993:1. Rainbow has a sensory area that contains a ball pit, trampoline, tactile table, swings, squeeze machine, and rooms with mats. R-42; R-43. There are various sensory stations located throughout the center that include items such as weighted blankets and vests. R-42; R-43. Rainbow also has an occupational therapy room that contains various types of lights and other equipment. There is a large activity room available for students that contains equipment such as swings, therapy balls, cardiovascular equipment, trampoline, and weighted items. R-42; R-43.

i. Supports for seating: Rainbow would assign Student his own paraprofessional to be in close proximity at all times to implement supports for seating. Specifically, she would ensure that he is sitting and working and is in an area where he is safe. Tr. 959:11-23.

j. Structured environment: Ms. Bolton's classroom routine is consistent. She ensures that her students know what is coming next, and they consistently know what is expected of them. The learning areas in her classroom are delineated for a particular use. Tr. 959:24 – 960:11; R-42; R-43.

k. Daily progress note: Rainbow utilizes a written, daily schedule every day for each student, which is used as the basis for daily communication with the parents. In Student's class, Ms. Bolton sends a daily communication sheet home to parents that informs them about the daily progress of

their child. Tr. 960:25 – 961:10; Tr. 1003:12-17. She uses a daily communication sheet that is set up with icons delineated for each time period set up throughout the day. She uses icons that match the icons used with students so that parents and their children can communicate about their child's day. Tr. 247:1-5; Tr. 492:10-12; Tr. 492:16-19; Tr. 493:12 – 494:7; Tr. 909:17 – 911:15; Tr. 979:9-18; R-42; R-43. Prior to October 4, 2010, Rainbow had created a daily schedule for Student to send home to Parent to communicate about his day. Tr. 247:6-16.

l. Assistance with home toilet training: Ms. Bolton would work on toilet training with Student throughout his school day. Tr. 961:11-20.

Supports for School Personnel.

98. Under Supports for School Personnel, Student's IEP includes training for autism spectrum disorder. Rainbow has an internal training program that includes ongoing training for staff with respect to autism and student with autism. Tr. 963:13-17.

99. Under Supports for School Personnel, Student's IEP includes autism consultant services. R-11. Ms. Thompson works with students placed by the district in private agencies. She is the in-district autism consultant who would be responsible for any autism consultant services required by Student's IEP. Tr. 1186:5-10. She has worked with at least one other Excelsior Springs student who is currently placed at Rainbow (Tr. 1160:3-7), and is available for consultation any time. Tr. 1203:7-11. Ms. Bolton has worked with Excelsior Springs with respect to other children from the district placed at Rainbow. Her experience with Excelsior Springs is the District has been helpful and provided assistance when requested. They made transition of another student with autism to Rainbow easy. Tr. 1037:2-19; Tr. 1038:12-18. Donna Thompson is available to provide autism consulting services to Rainbow if necessary. Tr. 81:8-10.

100. Student's IEP requires autism consultant services at a frequency of "other," which means there would be personnel available to provide support to teachers in addressing issues involved in supporting children with autism as needed. Tr. 91:22 – 92:4. It could include such services as providing examples of the best way to decrease challenging behaviors, to increase the ability to learn, the approaches and methodologies that have proven to be successful with children

with autism. Such services are initiated at the request of the agency. Tr. 92:5-17. Private agencies typically do not request the assistance of the District's autism consultant because they have their own in-house expertise in that area. Tr. 110:25 – 111:12; Tr. 1387:2-11.

Behavior Plan.

101. Behavior intervention plan: Student has a behavior plan that was developed by ABC'nD. R-17. There are not a lot of differences between the October 2009 and the September 2010 behavior plans for Student. Rainbow would have been able to implement either of those behavior plans before October 4, 2010, as well as at the time of the hearing. Tr. 961:21 – 963:6; Tr. 1114:9 – 1115:2; Tr. 1140:12-23. Rainbow behavior plans are ordinarily a little more in depth than Student's existing behavior plan and include functional behavior analysis. Tr. 1115:3-18. There is nothing in Student's behavior plan that addresses any behavior issues or concerns that Rainbow had not dealt with before. Tr. 1327:8-12.

102. Ms. Naylor testified that it would not be a problem if somebody was to implement Student's October 2009 behavior plan instead of his September 2010 behavior plan. Tr. 577:19-24. Either of them could be used initially. Tr. 578:4-5. The behavior plan was revised in September 2010 because ABC'nD began using Student's PECS book and making that available for him to select a calming activity. Tr. 579:21-25. Utilization of his PECS book was the only big difference between the two plans. Tr. 612:2-11.

Regular Education Participation.

103. Student will be educated with nondisabled children at Rainbow to the same extent as ABC'nD and will have the same and in some instances better opportunities to participate in nonacademic and extracurricular activities. R-53. As stated above, Rainbow has a community access program whereby students go into the community for activities like swimming, library, skating and others where they interact with typically developing peers. Tr. 147:22 – 148:5. Participation in such activities does not affect whether Rainbow can implement Student's IEP because students work on IEP goals and skills while participating in such activities. Tr. 149:18-22; Tr. 150:16-25.

Services Summary.

104. Student IEPs determine the service minutes they receive, and if Student's IEP requires minutes beyond the length of the normal school day, those minutes will be provided to him at Rainbow. As of September 30, 2010, Rainbow had already made arrangements for Student's therapies to begin at 8:30 a.m. Tr. 404:6-9; Tr. 404:24 – 405:3; Tr. 496:17 – 499:21; Tr. 500:18-25; Tr. 501:20-24; Tr. 1136:15 – 1137:12; Tr. 1360:23 – 1361:14. The District has had other students whose IEP minutes go beyond the length of the regular school day. The District contracts for the additional minutes required by the IEP. For Student, the District was going to schedule transportation so that Student would arrive at Rainbow at 8:30 a.m. and leave Rainbow at 3:30 p.m. in order to extend his day to provide for the minutes in his IEP. Tr. 1388:20 – 1389:16. By October 4, 2010, Rainbow had already made arrangements with one of its speech language pathologists to provide therapy minutes to Student outside the regular posted hours of the center. Tr. 405:12-18.

105. Rainbow adheres to the State of Missouri certification requirements that apply to staff in public schools and requires the same certifications of its staff. Tr. 1351:1-9; Tr. 1351:20-23. For Student's IEP, the State of Missouri requires a special education teacher with appropriate certifications, a licensed and certificated speech/language pathologist, and a registered occupational therapist or COTA to provide the services required by Student's IEP. Tr. 1379:8-20; Tr. 1388:12-16. Rainbow has appropriate certificated staff to implement Student's IEP. Tr. 1379:21-25. Since at least summer of 2010, Rainbow had an appropriately certificated teacher, contracts with an appropriately licensed COTA and OTR, and has appropriately licensed and certificated speech/language pathologists to implement the various services required by Student's IEP. Tr. 1325:25 – 1326:17. The behavior team that would work with Student at Rainbow has the appropriate credentials, training and qualifications to implement Student's IEP and behavior plan. Tr. 1326:18 – 1327:1.

106. Jennifer Lay[10] would be the speech language pathologist providing services to Student. Tr. 79:22-25; Tr. 80:1-4.

[10] Ms. Lay received a Master of Arts degree in Speech-Language Pathology from The University of Kansas. She completed training in Health Insurance Portability and Accountability Act (HIPPA), Family Education and Rights

107. Erin Scheerer[11] would be implementing the occupational therapy services required by Student's IEP under the direction of a registered occupational therapist.

108. Trina Rice[12] is the registered occupational therapist who supervises Erin Scheerer. Tr. 302:21-24. Ms. Rice comes to Rainbow and would provide services to Student. Tr. 303:17-22. She is the OTR who is assigned to the caseload at Rainbow and supervises and oversees the services provided by Ms. Scheerer as well as other COTAs. Tr. 1305:25 – 1306:8; Tr. 1307:23 – 1308:1.

109. Student's case manager would be Michon Lester at Rainbow. Tr. 1105:22 – 1106:1.

110. Student is receiving 150 minutes of speech therapy services per week. Rainbow employs certificated staff to provide Student's speech therapy services. The services Student is required to receive under his IEP are similar to the services other District students receive through Rainbow. R-53. The services are similar with respect to goals and objectives, PECS, the semantic skills, as well as number of minutes. Tr. 43:19 – 44:10. Rainbow has experienced therapists who have provided speech language services to students with similar goals and objections. Tr. 33118 – 332:12. Rainbow's staff had the capacity to provide the speech

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Privacy Act (FERPA), and Abuse and Neglect through Rainbow Center. Jennifer is a certified member of The American Speech-Language-Hearing Association, and a Speech Language Pathologist licensed in the State of Missouri. R-39.

[11] Ms. Scheerer is a contracted employee through Paul Chang and Associates. Tr. 301:23 – 302:20; Tr. 302: 21-24; Tr. 1303:4-23. Ms. Scheerer is a COTA, which is a certified occupational therapy assistant. She has her Missouri occupational therapy assistant license, her national board certification in occupational therapy to be a COTA and has an associate's degree. Tr. 1304:9-13; Tr. 13135-7; Tr. 1314:15; Tr. 1320:6-20; Tr. 1323:8-14; R-69. Ms. Scheerer received an Associate of Applied Science degree from Sanford-Brown College in Occupational Therapy. R-39; R-69.

[12] Ms. Rice has a Missouri occupational therapist license and a bachelor's degree in occupational therapy. Tr. 1315:1-12; Tr. 1319:6-17; R-69. Ms. Rice has provided direct occupational therapy services to students at Rainbow Center and previously held the position Ms. Scheerer now holds. Tr. 1306:14-22. Ms. Rice is available to Ms. Scheerer to support her, answer questions and provide clarification with respect to services she is providing. Tr. 1307:2-7. Ms. Rice actually logs her supervisory hours, and Rainbow Center gets billed for their hours on their invoice from Paul Chang & Associates. Tr. 1308:6-15. Marilu Herrick has observed both Ms. Rice and Ms. Scheerer providing occupational therapy services and believes they both do an excellent job in implementing occupational therapy services. Tr. 1309:15 – 1310:1; Tr. 1312:25 – 1313:4. Tr. 474:3-9; Tr. 475:3-12; Tr. 1302:13-18; Tr. 1358:6-19. Ms. Rice received a Bachelor of Science degree in Occupational Therapy from The University of Kansas. She is a licensed Occupational Therapist under the Division of Professional Registration in the State of Missouri. R-69.

language services required by the Student's IEP before October 4, 2010. The speech language pathologist usually meets with a new student on their first day to set up services. Tr. 473:16 – 474:2; Tr. 474:21 – 475:2.

111. Student is receiving 90 minutes of occupational therapy services per week. Rainbow employs appropriate certificated staff to provide Student's occupational therapy services. The services Student is required to receive in this area under his IEP are similar to the services other District students receive through Rainbow. R-53

112. Student would receive individual speech and occupational therapy at Rainbow to meet the therapy minutes required by his IEP, not group therapy. He would have opportunities throughout his day to incorporate what he learns in individual therapy into group activities. Tr. 200:22-24; Tr. 201:3-8; TR. 329:19 – 330:7.

113. As of summer 2010 and thereafter, Rainbow was and is able to provide the special education services minutes listed in Student's IEP, and Stephanie Bolton is qualified to be the person to implement and coordinate those services. Tr. 948:9-1; Tr. 1328:6-9; Tr. 1329:18 – 1330:7. In scheduling therapy minutes for a new student, typically the therapists will see the student during the first week to begin implementing goals and objectives in that service area. Tr. 1329:5-11. On Student's first day, Ms. Scheerer and/or Trina would have met Student and set up the minutes required by his IEP for occupational therapy services. TR. 305:9-13.

Extended School Year Services.

114. Rainbow offers ESY services and can implement the ESY provisions of Student's IEP. R-53. The determination about whether a student is entitled to extended school year services (ESY) is made on an annual basis based on documented regression. The team identifies goals and objectives that need to be addressed during ESY in order for the child to maintain skills, not progress, in those areas. A child's ESY minutes may vary from year to year. As of the time of the hearing, the IEP team had not yet made an ESY determination for Student. The District would contract to provide whatever number of ESY minutes the IEP team determines are necessary for Student. Tr. 1392:21 – 1393:24.

115. Methodologies are typically not listed in a child's IEP. Tr. 1385:23 – 1386:8. If an IEP team determines that a child requires a particular methodology in order to receive FAPE, that methodology would be reflected on the accommodations/modifications page of the child's IEP. Tr. 1386:9-14. The same would be true if it is determined that the child requires the use of ABA in order to receive FAPE. Tr. 1386:15-19. Student's IEP does not require ABA services. At no time did ABC'nD indicate to the District or IEP team that they believe Student required ABA services. ABC'nD drafted Student's IEP and did not write ABA into his IEP. Tr. 1386:20 – 1387:1.

General

116. Student's March 24, 2010, IEP is not impermissively vague because it can be interpreted and implemented in different ways by different people. Tr. 39:13-18. There was no evidence submitted suggesting such, and Ms. Michael aptly testified that it was her professional obligation to raise an issue with the IEP team if she believed a student's IEP was inappropriate. Tr. 825:15- 826:14. There is often more than one private agency that is able to implement a child's IEP. Tr. 114:6-13.

117. Although the services of a social worker is not required by Student's IEP, the District talked to Parent during the September 17, 2010, IEP meeting about contacting the District if she needed assistance from a social worker. Tr. 82:13 – 22.

118. There was some discussion during the Parent tour on September 24, 2010, about whether Student had a physical exam and a TB test. The issues were addressed. Tr. 1134:6 – 1136:2. Parent takes Student to KU Medical for regular checks for his medication. Tr. 866:23-25. Since Student goes to the doctor frequently, getting the physical paperwork would not pose a challenge. Rainbow allows students to enroll and begin attending until they are able to schedule an appointment to get their physical or TB tine test. Rainbow nurses are able to give the TB tine test and had such nurses on staff in September and October of 2010. Rainbow would have allowed Student to start attending on October 4, 2010, without a physical. Student's physical or TB test status would not have prevented him from starting school at Rainbow on October 4, 2010. Tr. 1338:4 – 1340:3; Tr. 1394:8-20. Rainbow requires a physical and TB skin test for students prior to starting in the program; however, those requirements are flexible. Tr.

279:25 – 280:7; Tr. 280:24 – 281:11. Rainbow is proactive in helping parents obtain immunization records and a physical. Tr. 282:12-21.

119. Although a free or reduced lunch is not required by Student's IEP, the District has arranged for Student to have a free lunch at Rainbow, which will bill the District for the cost. Rainbow provides free lunch for other students who qualify. Tr. 82:23 – 83:19; Tr. 125:24 – 126:6; Tr. 126:15-20.

120. Ms. Bolton expected Student to begin attending Rainbow on October 4, 2010, and was prepared for him to arrive on that day. In preparing for him to come, she made sure she was familiar with his IEP, met with his paraprofessional, created a schedule for him, and arranged for breakfast and lunch. Once a student starts, she ordinarily has the speech pathologist and occupational therapist come in during the first few days to get to the know the student and set up a therapy schedule. Tr. 975:12 – 976:23. Michon Lester also engaged in preparations for Student's attendance on October 4, 2010. Tr. 11322-17.

121. Ms. Lester testified that she had discussed with Amy Naylor during Ms. Naylor's tour of Rainbow that Ms. Naylor was going to email certain information to Ms. Lester to assist with Student's transition, such as a list of foods Student liked, and a copy of his schedule at ABC'nD. Apparently, some of this information was not provided. Tr. 1117:3 – 118:16. Rainbow was going to replicate Student's schedule at ABC'nD in order to facilitate a smooth transition for Student. Tr. 643:10 – 644:7. Receiving the complete transition packet and information from ABC'nD was not necessary in order for Rainbow to be able to implement Student's IEP on October 4, 2010. TR. 355:18 – 356:5.

122. The District had worked closely with Rainbow in making preparations for Student to begin attending Rainbow on October 4, 2010, and was confident Rainbow was prepared for him to start on that date. Tr. 1395:6-13.

Educational Records

123. The District did not receive copies of records subpoenaed from ABC'nD by its counsel. Tr. 1249:20 – 1250:3.

124. The District has maintained all of Student's records that it received from ABCn'D in the Student's education files in the District. Those records were included in any records reviews conducted by Parent. Tr. 1248:4-18.

125. The issue of providing records was the subject of motions and pre-hearing Orders. No motion was pending before the Chairperson at the time the hearing commenced asserting that educational records were not provided and no proof, or offer thereof was presented as to any prejudicial effect upon Petitioner because records were not provided.

III. CONCLUSIONS OF LAW - DECISION

A. General

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

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

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

4. The purpose of IDEA and its regulations is: (1) "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living"; (2) "to ensure that the rights of

children with disabilities and their parents are protected"; and, (3) "to assess and ensure the effectiveness of efforts to educate children with disabilities." 34 C.F.R. § 300.1.

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

6. The IDEA does not require that a school district "either maximize a student's potential or provide the best possible education at public expense." *Rowley, supra.,* 102 S.Ct. 3034, 3049; *Fort Zumwalt Sch. Dist. v. Clynes, supra.* 119 F.3d 607, 612; and *A. W. v. Northwest R-1 Sch. Dist.,* 813 F.2d 158, 163-164 (8th Cir. 1987). Likewise, the IDEA does not require a school district to provide a program that will, "achieve outstanding results", *E.S. v. Independent Sch. Dist. No. 196,* 135 F.3d 566, 569 (8th Cir. 1998); that is "absolutely [the] best", *Tucker v. Calloway Co. Bd. of Educ.,* 136 F.3d 495, 505 (6th Cir. 1998); that will provide "superior results," *Fort Zumwalt Sch. Dist. v. Clynes, supra.* 119 F.3d 607, 613; or, that will provide the placement the parents prefer. *Blackmon v. Sch. Dist. of Springfield, R-12,* 198 F. 3d 648, (8th Cir. 1999); *E.S., supra.* 135 F.3d 566, 569. "[T]he law of [the Eighth] Circuit is clear. A school district meets the statutory obligation to provide a free appropriate public education by providing educational benefit. The statute does not require the school district to provide the best possible education." *Carl D. v. Special Sch. Dist. of St. Louis Co.*, 21 F. Supp. 2d 1042, 1047 (E.D. Mo. 1998). The IDEA

is satisfied when the educational agency provides individualized education and services sufficient to provide the disabled child with "*some educational benefit*." *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (emphasis added)).

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

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

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

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

Rowley, supra, 458 U.S. at 206-07.

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

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

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

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

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

Rowley, *supra,* 458 U.S. 176, 203-4 (1982).

11. While the law cited above regarding substantive compliance speaks from a look-back perspective in ascertaining whether a district has met the requirements, in this case, the Panel must decide whether Rainbow can meet the requirements.

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

13. 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 Petitioner loses at the conclusion of the case if the evidence on both side 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).

B. Findings-Conclusion

1. Procedural Compliance

Issue Number 1.

Was the proposed transfer process of Student from ABC'nD to Rainbow in violation of Petitioner's procedural rights under the IDEA and, if so, whether this constituted a denial of FAPE.

Two specific issues raised by Petitioner at hearing pertinent under this issue are: (1) whether or not an IEP meeting was required and if so whether it was properly noticed and held; and (2) if a notice of action was needed following the meeting. The Panel finds that Student did not suffer a denial of FAPE from any procedural issue.

a. IEP Meeting and Notice

The threshold question is whether District's decision to move Student from ABC'nD to Rainbow was a change in placement mandating IDEA's meeting and notice requirements[13]. The parents of a child with a disability must be afforded an opportunity to participate in meetings

[13] Petitioner argues that the District failed to comply with several requirements of the IDEA regarding placement which read: Placements. In determining the educational placement of a child with a disability . . . each public agency must ensure that (a) The placement decision – (1) is made by a group of persons knowledgeable about the child, the meaning of the evaluation data, and the placement operations; and (2) is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118; (b) The child's placement – (1) is determined at least annually; (2) is based on the child's IEP; and (3) is as close as possible to the child's home; (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled; (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 CFR 300.116. See 20 U.S.C. 1412(a)(5). Private school placements by public agencies. (a) Developing IEPs. (1) Before a public agency places a child with a disability in, or refers a child to, a private school or facility, the agency must initiate and conduct a meeting to develop an IEP for the child in accordance with §§ 300.320 and 300.324. (2) The agency must ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the agency must use other methods to ensure participation by the private school or facility, including individual or conference telephone calls. 34 CFR 300.325. *See* 20 U.S.C. 1412(a)(10)(B). However, if the transfer decision was not a placement decision, the aforesaid requirements are not mandated.

with respect to the identification, evaluation, educational placement of the child, and the provision of FAPE to the child. 34 C.F.R. § 300.501(b)(1). School districts are required to provide notice to ensure parents of children with disabilities have the opportunity to participate in meetings for any of these purposes. 34 C.F.R. § 300.501(b)(2). The notice of meeting must indicate the purpose, time and location of the meeting and who will be in attendance. 34 C.F.R. § 300.322(b)(1). The notice must also inform the parents of the provisions in 34 C.F.R. § 300.321 (a)(6) and (c) regarding the participation of other individuals on the IEP team who have knowledge or special expertise about the child and 34 CFR § 300.321(f) regarding the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP team meeting for a child previously served under Part C of the Act.

Petitioner alleges the decision to move Student from ABC'nD to Rainbow was a change in Student's placement requiring an IEP meeting and the appropriate notice. The District argues that this was a change in location of services and not a change of placement. "[N]ot every change to a student's IEP constitutes a change in educational placement." *Stancourt v.Worthington City Sch. Dist.*, 2008 WL 4151623 (Ohio App. 10 Dist.); *see also Cavanagh v. Grasmick,* 75 F.Supp.2d 446, 466 (D. Md. 1999). "[A]n educational placement, for the purposes of the [IDEA], is not changed unless a fundamental change in, or elimination of, a basic element of the educational program has occurred." *Cavanagh*, 75 F.Supp.2d at 467 (*citing Sherri A.D. v. Kirby*, 975 F.2d 193, 206 (5th Cir. 1992)). *See also Hale v. Poplar Bluff R-I Sch. Dist.*, 280 F.3d 831, 834 (8th Cir. 2003); *AW by Wilson v. Fairfax County Sch. Bd.*, 372 F.3d 674, 682 (4th Cir. 2004)(holding that educational placement refers to the environment in which educational

services are provided rather than the location to which the student is assigned); *Concerned Parents & Citizens for Continuing Educ. at Malcolm X v. New York City Bd. of Educ.,* 629 F.2d 751 (2d Cir. 1980)(holding that the transfer of students from one school to another school with a comparable educational program did not amount to a change in placement).

To be considered a change in educational placement, the proposed change must "substantially or materially alter the child's educational program." *Letter to Fisher*, 21 IDELR 992, 993-95 (OSEP 1994). If there are two or more appropriate locations at which a child's IEP may be implemented, the assignment of a particular location may be an administrative determination, provided that the determination is consistent with the placement team's decision. *White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 382 (5th Cir. 2003) (*citing Letter from Office of Special Education Programs to Paul Veazey* (26 Nov. 2001)). Whether a change in location substantially or materially alters a student's special education program and thereby constitutes a change in placement is determined on a case-by-case basis after considering the following factors:

1. Whether the educational program set out in the child's IEP has been revised;
2. Whether the child will be educated with nondisabled children to the same extent;
3. Whether the child will have the same opportunities to participate in nonacademic and extracurricular services; and
4. Whether the new placement option is the same option on the continuum of alternative placements.

Letter to Fisher, 21 IDELR 992 (OSEP 1994)*; see also Cavanagh*, 75 F.Supp.2d at 468. After considering these factors, the Panel finds that the change in location of the provision of

Student's services from ABC'nD to Rainbow does not amount to a change in placement creating the need for an IEP meeting.

First, Student's IEP was not changed as his placement remained as private separate school (day) facility. During the September 17, 2010 meeting, neither Petitioner nor ABC'nD identified a single provision in Student's IEP that needed to be changed. Dr. Arnold indicated to the team that the District was changing Student's location of services to Rainbow, and the team discussed what transition activities were needed in order to facilitate the change. The team established a transition plan and established the initial date of attendance for Student at Rainbow would be October 4, 2010. Of paramount importance, there were to be no changes to the program or services provided Student through his IEP.

Second, Rainbow has an integration program in place in which Student would have the opportunity to participate. The program provides for varying levels of community integration in "real life" practical settings that allow for peer modeling opportunities. Student may participate in activities such as swimming, going to the library, horseback riding and going to the gym. Rainbow pays for any costs associated with student participation in community integration activities. In addition, students at Rainbow have contact with typically-developing peers before and after school when children of staff members spend time at Rainbow. There are three children in second, third and fifth grade who serve as typical peer models. Student would have opportunities to interact with peer models at Rainbow. In a comparison with ABC'nD, Rainbow provides at least equal, if not greater, interaction with peer models.

Finally, Rainbow and ABC'nD are both private separate school (day) facilities, so there is no change on the continuum of alternative placements. Each school district is required to make

available a continuum of alternative placements to meet the needs of children ages five (5) to twenty-one (21) with disabilities for special education and related services. *Missouri State Plan, Reg. IV, p. 52*. The placement continuum shall include: (1) Inside the regular class 80 percent or more of the day; (2) Inside the regular class no more than 79 percent of the day and no less than 40 percent of the day; (3) Inside the regular class less than 40 percent of the day; (4) Public Separate (Day) Facility; (5) Private Separate (Day) Facility; (6) Public Residential Facility; (7) Private Residential Facility; and (8) Homebound/Hospital. *Missouri State Plan, Regulation IV, p. 56.* There was no movement on the continuum of alternative placements due to the change in location.

The Panel further finds that a change from ABC'nD to Rainbow would not substantially and materially alter Student's educational program. Since the purpose of the September 17, 2010 meeting held by the District was to discuss the change of Student's location of services and did not relate to Student's identification, evaluation, educational placement, or the provision of FAPE to Student, the District was not required to conduct an IEP meeting. If the educational program is the same or comparable and consistent with the IEP team's placement decision, then the District's decision to move Student to another private center is akin to the District deciding to move Student from one classroom to another or from one District program to another. Such a change in location of services does not necessarily implicate IDEA and is permissible in both the public and private setting.

However, even assuming the District was required to hold an IEP meeting, it complied with the procedural requirements of IDEA. During the summer of 2010, the District made numerous attempts to contact Student's mother in order to discuss changing the Student's

location of services from ABC'nD to Rainbow. Student's mother did not respond to any of the District's attempts to reach her. Due to the District's failed attempts to reach Parent, the District issued the notice of meeting for September 17, 2010. The notice of meeting indicated the date, time and location of the meeting, the purpose of the meeting, and the invited participants to the meeting. Both ABC'nD and Rainbow were invited to the meeting and attended. The District ensured that the required members of the IEP team were present as well. Parent attended and was provided with the opportunity to participate. Petitioner had notice of the September 17, 2010 meeting to discuss Student's transfer and was present at the meeting. *See Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 421, 427 (8th Cir. 2010)(technical violation regarding requirement to schedule a meeting did not affect IEP or otherwise deprive student of FAPE where parent attended meeting).

Because an IEP meeting was not required, the District did not violate Petitioner's procedural rights. However, this Panel holds that even if a meeting was required, the District held one which met the procedural requirements of IDEA.

b. Notice of Action

Petitioner also alleges that the District violated her procedural rights by failing to issue a notice of action regarding the change in Student's location of services. A school district must provide parents with prior written notice whenever it proposes or refuses "to initiate or change the identification, evaluation or educational placement of the child or the provision of FAPE to the child." 34 C.F.R. § 300.503(a); *Missouri State Plan for Special Education*, Regulation V, p. 60.

The Panel has already determined that the change of Student's location of services from ABC'nD to Rainbow does not constitute a change of placement. Because the purpose of the

September 17, 2010 meeting held by the District was to discuss the change of Student's location of services and did not relate to Student's identification, evaluation, educational placement, or the provision of FAPE to Student, the District was not required to conduct an IEP meeting or issue a Notice of Action.

However, even if a notice of action was required, the Panel finds that the failure to issue a Notice of Action did not impede Student's right to a FAPE. Petitioner participated in the transition meeting and was given the opportunity to participate in the decision-making process, and Student was not denied educational benefit. *See Max M. v. Illinois State Bd. of Educ.*, 629 F.Supp. 1504, 1518 (N.D.Ill. 1986)(School district's violation of student's procedural rights due to failure to provide written notice not a denial of FAPE where parent was involved in developing student's educational program). Moreover, the purpose of a Notice of Action is to afford the parent the opportunity to challenge the IEP team's action regarding identification, evaluation, educational placement or the provision of FAPE. Petitioner did just that through this due process complaint which was filed 13 days after the September 17, 2010 meeting and, as such, cannot now claim her opportunity to challenge was impeded by not receiving a Notice of Action. In addition, the District's response to Petitioner's due process complaint contained the required components of a Notice of Action, curing any possible procedural defect.

Additionally, even assuming, *arguendo*, a Notice of Action was required and/or an IEP meeting was required and the procedural requirements regarding IEP's were not followed, the procedural inadequacies did not 1) impede Student's right to FAPE; or 2) significantly impede Parent's opportunity to participate in the decision-making process regarding the provisions of FAPE; or 3) cause a deprivation of educational benefits. The Panel can only find a denial of a

free appropriate public education if one of these elements exists, and the Panel finds that none did. 20 U.S.C. §1415(f)(3)(E)(ii)(2005); see *Independent Sch. Dist. No. 283 v. S.D. by J.D., id.* Parent was not prejudiced and has not provided any evidence thereof resulting in a denial of FAPE. Parent filed the present due process complaint, and Student continued receiving services at ABC'nD. Student was not denied FAPE as a result of any alleged procedural violations by the District.

c. Whether the District provided Petitioner with an opportunity to review Student's education records as required by the IDEA.

Although not specifically identified as an issue at the outset of the hearing, Petitioner has asserted that the District did not provide her with a complete set of Student's education records as she had requested. Tr. 1071: 11-25; 1248:19 – 1249:3. Specifically, Petitioner argues that the records Respondent received from ABC'nD pursuant to subpoena as part of this litigation were Student's education records and should have been provided to Petitioner. The Panel finds that such records were not Student's education records as defined by federal law. However, even assuming *arguendo* they were, Petitioner was afforded the opportunity to review the records.

IDEA does not contain its own definition of education records but incorporates the FERPA definition. 34 C.F.R. § 300.611(b). The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g ("FERPA") defines education records as ". . .those records, files, documents, and other materials which: (1) contain information directly related to a student; and (2) are maintained by an educational agency or institution or by a party acting for the agency or institution." 20 U.S.C. §1232g(a)(4). Petitioner is entitled to "inspect and review" any records directly relating to Student and maintained by the District or by a party acting for

the District. 20 U.S.C. §1232g(a)(1). While the subpoenaed records were directly related to Student, they were not maintained by the District or a party acting for the District. "The phrase 'acting for' connotes agents of the school, such as teachers, administrators, and other school employees." *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 433, 122 S.Ct. 934, 151 L.Ed.2d 896 (2002). The District did not maintain the subpoenaed records from ABC'nD, nor did any agents of the District as defined by the Supreme Court. Tr. 1249:20 – 1250:3. The District's counsel obtained the disputed records through subpoena. However, counsel does not "act for" the District for purposes of maintaining education records under FERPA. To decide to the contrary would mean that there could be no work product in records subpoenaed by counsel for purposes of litigation. Counsel's action of subpoenaing records for litigation is not "acting for" the District for purposes of FERPA.

Also, it appears that Petitioner had access to ABC'nD's records as counsel for Petitioner was physically, at least on one occasion, present at ABC'nD to take pictures, but indicated she could not take pictures of 700-800 documents. Tr. 1254:12-20.

2. Substantive Compliance

<u>Issue Number 2.</u>

Whether Rainbow can appropriately implement Student's IEP of March 24, 2010.

As stated above, Student's placement on the continuum of alternative placements is private separate school (day) facility. Effective October 4, 2010, the location at which Student's March 24, 2010, IEP would be implemented was to be moved from ABC'nD to Rainbow. Petitioner alleges that Rainbow cannot appropriately implement Student's March 24, 2010, IEP. Petitioner has the burden to prove that Rainbow cannot implement the IEP. The issue is not

whether Rainbow compares more favorably than ABC'nD – only whether Rainbow can implement the IEP and provide FAPE. *See Ft. Zumwalt Sch. Dist. v. Clynes, supra.,* 119 F.3d 607, 612-13 (school district not required to provide best possible education, only to provide special services so that students benefit from their education).

A school district must implement a student's IEP with all required components. 20 U.S.C.A. § 1414(d)(2)(A); 34 C.F.R. § 300.323(c). To prepare specifically for Student, prior to the September 17, 2010 meeting, representatives from Rainbow observed Student at ABC'nD to ensure that his IEP could be implemented at Rainbow. Following its visit to ABC'nD, Rainbow confirmed that it could implement Student's IEP.

Rainbow is nationally accredited and utilizes the following strategies and methodologies, among others, with its students: PECS, TEACCH, Orton-Gillingham, Gentle Teaching, Applied Behavior Analysis/Discrete Trial, social stories, sensory integration and self regulation. Rainbow staff has received training in each of these.

For the reasons stated above in this decision, including those extensively set forth in paragraphs 43-70 and 83 – 115 of the Background Facts, the Panel finds that Rainbow can fully implement Student's IEP.

Issue Number 3.

Whether Rainbow was able to appropriately implement Student's IEP of March 24, 2010, on September 30, 2010.

A corollary issue is that even if Rainbow can now appropriately implement Student's March 24, 2010 IEP, could Rainbow appropriately implement Student's IEP on September 30, 2010, the date Petitioner filed her due process complaint? Whether the relevant date is September 10, 2010 or October 4, 2010, which was the date on which Student was to begin

attending Rainbow, the result is the same. Petitioner and Student toured Rainbow with Ms. Amy Naylor, Student's lead teacher at ABC'nD, on September 24, 2010. The building tour lasted 30-40 minutes and was limited to Student's assigned classroom, a work room, a therapy room, a reading room and an open sensory area. At the time of the tour, Student's assigned room was in the process of being converted to an early elementary room for students of the same age and developmental level. Students assigned to that room would have centers, art and lunch in the same room in order to minimize their transitions.

Petitioner argued that Rainbow was not prepared to implement Student's IEP because of some concern over whether Student had a physical exam and a TB test. However, the issues were addressed and taken care of, and nothing about the requirement for a physical or TB test would have prevented Student from attending Rainbow. Parent takes Student to KU Medical for regular checks for his medication. Since Student goes to the doctor frequently, getting the physical paperwork would not pose a challenge. Rainbow allows students to enroll and begin attending until they are able to schedule an appointment to get their physical or TB tine test. Rainbow nurses are able to give the TB tine test and had such nurses on staff in September and October of 2010. Rainbow would have allowed Student to start attending on October 4, 2010, without a physical.

For the reasons stated above in this decision, including paragraphs 43-70 and 83-115 of the Background Facts, the Panel finds that Rainbow was prepared before September 30, 2010 to implement Student's IEP. Student was scheduled to transfer to Rainbow on October 4, 2010, and the Panel finds that Rainbow was ready for Student and able to implement his IEP at that time.

Issue Number 4.

Whether the March 24, 2010, IEP was not reasonably calculated to provide Student FAPE because it is so vague it could be properly implemented at either Rainbow or at ABC'nD.

The sole basis for Petitioner's denial of FAPE regarding this claim is that the IEP could be implemented at more than one facility. Petitioner alleges that if Student's IEP can be implemented at Rainbow and ABC'nD, then Student's IEP must be impermissibly vague. There is no basis in the law to support such a claim. In fact, a properly drafted IEP can be implemented by a different school or facility unfamiliar with the IEP or the student.[14] The IDEA and Missouri State Plan for Special Education ("State Plan") both require that a student's IEP include:

1. a statement of the child's present levels of academic achievement and functional performance;
2. a statement of measurable annual goals, including academic and functional goals;
3. a description of how the student's progress towards meeting the annual goals will be measured and when periodic reports on the student's progress towards meeting those goals will be provided;
4. a statement of the special education and related services and supplementary aids and services to be provided to the student and a statement of the program modifications or supports that will be provided;
5. a statement of the child's participation in physical education;
6. an explanation of the extent to which the child will not participate with nondisabled children in the regular class and in the activities described in the student's IEP;
7. a statement of any individual appropriate accommodations that are necessary to measure the student's academic achievement on State and district-wide assessments;

[14] Amy Naylor testified that it is common that more than one agency or more than one school may be able to implement a particular child's IEP. Both she and Nancy Michaels believe that there are other private agencies in the Kansas City area that can implement Student's IEP.

8. the projected date for the beginning of the services and modifications described in paragraph four, and the anticipated frequency, location, and duration of those services and modifications;
9. a listing of the individuals who attended the IEP meeting and their role;
10. a statement indicating the child's eligibility or ineligibility for extended school year services; and
11. a statement of the placement considerations and decision.

Missouri State Plan for Special Education, Regulation IV, Pages 43-44; 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320. Petitioner has the burden of proof on this issue and does not allege that any particular required element of Student's IEP is missing or deficient and does not identify a single component of the IEP that is vague. This Panel finds that Student's IEP includes all of the elements required by the IDEA. Student's IEP and behavior plan are designed to provide him with an educational benefit. Neither ABC'nD nor Petitioner raised any concerns regarding Student's IEP at the March 24, 2010 IEP meeting and Student's IEP was being implemented without incident at ABC'nD beginning August 18, 2010. Amy Naylor did not personally participate in drafting Student's IEP but had no difficulty later interpreting and implementing his IEP. Services and staff constitute the necessary linchpin in appropriately implementing an IEP – not a particular location.

Rainbow staff reviewed Student's IEP in detail and affirmed they could implement it properly. Rainbow has reviewed and implemented many IEPs drafted in a similar manner to Student's IEP and noted no vague provisions that it is incapable of interpreting. The District drafts its own IEPs in a manner similar to Student's IEP. The District suggests revisions to student IEPs that it believes to be vague, but did not suggest any revisions following development of Student's March 24, 2010 IEP. Likewise, if Ms. Michael had concerns with the appropriateness of Student's IEP, she would raise those concerns in his IEP meeting, which she

attended on March 24, 2010. Ms. Michael does not recall raising any such concerns for Student. This Panel holds that Student's March 24, 2010, IEP includes all of the elements required by the IDEA, is not vague, and was reasonably calculated to provide Student a FAPE.

Issue Number 5.

Whether Rainbow provides Student with the least restrictive environment ("LRE") in comparison to ABC'nD.

There is a "strong congressional preference" under the IDEA for educating students in the least restrictive environment ("LRE"). *Rowley*, 458 U.S. at 202; *Carl D. v. Special Sch. Dist. of St. Louis Co.*, 21 F.Supp.2d 1042, 1058 (E.D. Mo. 1998). The IDEA regulations embody the LRE concept:

> Each public agency shall 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 non-disabled; and
>
> (2) Special classes, separate schooling or other removal of children with disabilities from the general educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. § 300.114(a). Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 C.F.R. § 300.115. The continuum includes instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. *Missouri State Plan*, Regulation IV – FAPE/IEP/LRE, p. 52; 34 C.F.R. § 300.115. The concept of LRE addresses the continuum of placements required by the IDEA. Based on the continuum model, the concept of LRE addresses the placement that a child is provided and not the

particular services that may be provided to further support the child's unique needs. *Poway Unified Sch. Dist.*, 37 IDELR 174 (SEA CA 2002); *Board of Educ. of the City Sch. Dist. of the City of Rochester*, 26 IDELR 823 (SEA NY 1997).

Both Rainbow and ABC'nD are private separate school (day) facilities and as such are the same placement on the continuum of alternative placements. Petitioner agreed with Student's placement on the continuum of alternative placements as set forth in the March 24, 2010 IEP. Petitioner has the burden of proof on this issue, but offered no evidence at hearing to support her contention that Rainbow is a more restrictive placement than ABC'nD. To the extent Petitioner claims ABC'nD provides more exposure to nondisabled peer models, the Panel has already found that Rainbow will provide at least equal, if not greater, exposure and interaction with nondisabled peer models than ABC'nD. In addition, Ms. Michaels testified that peer models are no longer beneficial to Student. The Panel holds that Rainbow is no more restrictive than ABC'nD and as such is the LRE.

Issue Number 6.

Whether Respondent violated Student's rights under the IDEA by failing to make payments to Parent for transportation or direct payments to ABC'nD.

Petitioner alleges that the District failed to satisfactorily compensate her for her transportation of Student to and from ABC'nD during the period following Petitioner's September 30, 2010 request for a due process hearing and prior to the Hearing Chair's October 6, 2010 Stay Put Order. The District reimbursed Petitioner for her mileage at the District's mileage reimbursement rate of 40 cents per mile. In addition to reimbursing Petitioner for transporting Student to and from ABC'nD, the District reimbursed Petitioner for mileage resulting from her transportation to and from Rainbow for a tour of Rainbow on September 24,

2010, which it was not obligated to do. Petitioner insists that the District's reimbursement of 40 cents per mile is insufficient and that Petitioner should have been reimbursed at the IRS rate of 50 cents per mile.

Special education and related services, including transportation, must be provided to all eligible students with disabilities at no cost to their parents. 34 C.F.R. § 300.34. A parent who transports a child to and from school would therefore be entitled to reimbursement if transportation is a related service for that student. Although a parent may be entitled to reimbursement for transportation to and from school, the IDEA does not provide any directives regarding parental reimbursement and there is no authority that provides that a school district must reimburse a parent for mileage at the IRS's mileage reimbursement rate as requested herein by Petitioner. Political entities are not obligated to adopt the IRS's mileage reimbursement rate. *See 1 C.S.R. § 10-11.030 State of Missouri Vehicular Travel Regulations* ("The allowance or reimbursement shall be computed at a rate not to exceed the Internal Revenue Service (IRS) standard mileage rate less three cents per mile.") Petitioner's counsel acknowledged during the hearing that mileage reimbursement may vary depending on the political entity. Tr. 1425:9-1432:16. She stated that she paid witness fees at the rate of 47.5 cents per mile, which is below the IRS rate demanded from the District.

Courts and state educational agencies considering the issue of reimbursing parents for costs of transportation have found that reimbursement rates should be related to the market value of the actual services provided. *See Chester Co. Mental Health/Mental Retardation Agency*, 7 ECLPR 92 (SEA PA 2009) (parent not entitled to stipend for lost work time in addition to reimbursement for mileage); *see also Zak L. by Tracy L. v. Cambridge Sch. Comm.*, 44

F.Supp.2d 395 (D.Mass. 1999). Other state educational agencies considering reimbursement for transportation have ordered that parents be reimbursed at the entity's standard rate for mileage reimbursement. *Desert Sands Unified Sch. Dist*., 36 IDELR 89 (SEA CA 2001); *Chester Co. Mental Health/Mental Retardation Agency*, 7 ECLPR 92 (SEA PA 2009).

Of note, the District was under no obligation to reimburse Petitioner for her travel to and from Rainbow for the September 24, 2010 tour. Assuming, *arguendo*, that the District was required to reimburse Petitioner at the IRS's mileage reimbursement rate, the District's additional payments to Petitioner for transportation to and from Rainbow offset any loss due to the difference between the District's standard mileage reimbursement rate and the IRS's mileage reimbursement rate. The Panel holds that Petitioner was appropriately compensated for her transportation costs.

The Panel further holds that the District fully paid ABC'nD for services rendered to Student.

Conclusion

For the reasons stated above, the Panel concludes that Rainbow is able to appropriately implement Student's IEP of March 24, 2010 and was able to do so at all pertinent times; that Student's IEP was reasonably calculated to provide Student a free appropriate public education ("FAPE") and was not impermissively vague; that the proposed transfer process of Student from ABC'nD to Rainbow was not in violation of Petitioner's procedural rights under the IDEA; that, in comparison to ABC'nD, Rainbow provides Student with an equal, if not less of a restrictive environment; and that the District has appropriately compensated Petitioner for all transportation costs.

Appeal Procedure

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

So ordered by the three member panel empowered pursuant to Section 162.961 Revised Statues of Missouri.

Concur	Dissent
_____	_____
Richard H. Ulrich, Hearing Chair	
_____	_____
Ralph Caraffa, Hearing Panel Member	
_____	_____
Debrah Stenner, Hearing Panel Member	

Dated:_____

CERTIFICATE OF SERVICE

I do hereby certify a copy of the foregoing was placed in the U.S. Mail, postage prepaid by certified mail, return receipt requested this 20th day of July, 2011, addressed to:

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