

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

_____)	
Parent, _____,)	
Petitioner,)	
)	
v.)	Complaint filed April 8, 2010
)	
KANSAS CITY, MISSOURI 33 SCHOOL)	
DISTRICT,)	
)	
Respondent.)	

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND DECISION**

PROCEDURAL HISTORY AND STATEMENT OF ISSUES

A. Procedural History.

This matter comes before the three-member Due Process Hearing Panel convened by the Missouri Department of Elementary and Secondary Education (“MDESE”) pursuant to Section 162.961 R.S.Mo., on the request for due process filed by Petitioner KR (hereinafter “Parent” or “Petitioner” or “Student’s Mother”) on behalf of her son _____ (hereinafter “Student”), a student who resides in the Kansas City, Missouri 33 School District (hereinafter “School District” or “District” or “Respondent”). The request for due process (“Complaint”) was received by MDESE on April 8, 2010 and was dated April 7, 2010. Petitioner’s exhibit 34¹ (hereinafter P for Petitioner or R for Respondent, or HP for Hearing Panel, followed by a dash and then exhibit number and then at page number if applicable).

The request for due process was precipitated by a Notice of Action issued by the School District dated April 1, 2010 (admitted as P-33; also R-563) in which the School District stated its intent to change the location of services provided to Student from Milestones Academy, a private institution operated by Partners in Behavioral Milestones (“PBM”), a private company, to Sherwood Center, another private institution.

The Hearing Panel convened by MDESE consists of Panel members Dr. Patty Smith and Ms. Marilyn McClure and Chairperson Janet Davis Baker. The Student and Student’s Mother are

¹ The Chairperson does not find the Parent’s initial complaint to MDESE to be in the admitted exhibits. Counsel for Respondent indicated he would not stipulate to its admission (Tr. 6:1050); however it is the complaint accepted by MDESE which started the due process procedure and further is found in the Respondent’s exhibit book at R-565. The Chairperson admits this exhibit as part of the record in this case.

represented by Stephen Walker, Esq. The Respondent School District is represented by W. Joseph Hatley and Lawrence Altman.

The Student's Mother filed the initial complaint pro se. After Mr. Walker's entry of appearance, Petitioner filed an amended complaint on October 13, 2010, titled "Petitioners' Clarification of Issues or, Alternatively, Amendment or Supplement of Due Process Complaint." HP-1. The School District moved to strike the amended complaint and the Chairperson entered an Order dated November 2, 2010, finding that one of the issues raised in the amended complaint was immaterial, that one raised an issue of law, and allowing the remainder of the amended complaint to stand. HP-2. After the development of a subsequent new individualized education program ("IEP") for Student on November 30, 2010 (sometimes referred to also as the December 2010 IEP), the parties had agreed that Petitioner could file an amended complaint based on that IEP, if she so chose. The second amended complaint, titled "Petitioners' Second Amendment or Supplement of Due Process Complaint" was filed on December 27, 2010. HP-3. The School District filed a Notice of Deficient Second Amended Complaint on January 3, 2011 and the Chairperson issued an Order on January 31, 2010 finding the complaint sufficient and stating the issues to be addressed at the hearing. HP-4. The complaints and amendments will be referred to as the "complaint" unless the context requires otherwise.

The parties waived the resolution session and a mediation session was unsuccessful. The hearing was conducted at the offices of the School District on February 22 through 24, 2011, February 28 through March 1, 2011 and then because of inclement weather causing the Hearing Panel's inability to convene as scheduled in February, on May 11 through 13, 2011. The hearing was closed at Parents' request. Transcript of Due Process Hearing at page 6 (hereinafter "Tr." followed by volume number, colon, and page number(s)).

The following exhibits, some of which are duplicates, were admitted as part of the record of the hearing:

Petitioner's exhibits:

1, 2, 3, 4, 5, 6, 10, 13, 14, 17, 19, 20 (pp. 171-98), 21, 22, 23, 24, 26, 28, 30, 31, 32, 33, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59, 60, 62, 63, 64, 65, 66, 71, 72.

Respondent's exhibits:

525, 529, 530, 534, 548, 558, 561, 562, 563, 568, 573, 574, 545, 577 (p. 611), 578, 580 (p. 625), 581, 582, 585, 586, 587, 588 (pp. 663, 671, 681), 591, 596, 597, 599, 600, 602, 605, 607, 612, 613, 616, 618, 619, 620, 624, 633, 635, 636 (pp. 756-769), 683, 684, 690, 691, 693, 694, 695.

Student's Mother called the following witnesses to testify: Student's Mother; JR; RH; CD; LM; and Dr. KD. The School District called JC and Dr. CH.

B. Time-Line Information.

The Petitioner requested an extension of time for the Hearing Panel's decision through October 1, 2010 and then January 1, 2011, which the Chairperson granted. As a result of the District's requirement to complete a new IEP for Student on or before December 1, 2010, and because the hearing was scheduled to begin on November 8, 2011, the parties agreed to a continuance of the hearing and the parties jointly requested an extension of time for the Hearing Panel's decision through April 30, 2011, which the Chairperson granted in an Order of November 9, 2010. HP-5. Due to the inability of the parties to conclude the hearing as scheduled because of inclement weather causing the need to schedule additional hearing days, at the conclusion of the first set of scheduled hearing days the Petitioner requested an extension of time for the Hearing Panel's decision through July 1, 2011, which was granted by the Chairperson. Tr. 5:1039-40. At the conclusion of the May hearing dates, the Petitioner requested an extension of time for the Hearing Panel's decision through September 15, 2011 which the Chairperson granted. Tr. 8:1555-56. A subsequent request was made by the School District to extend the Hearing Panel's decision through September 23, 2011, which the Chairperson granted.

C. Statement of Issues.

The issues before the Hearing Panel upon which evidence was presented during the hearing arise out of the compliance of the School District with the requirements of the Individuals with Disabilities Education Act ("IDEA") as implemented in the State of Missouri, regarding the School District's provision of a free appropriate public education ("FAPE") to Student through an individualized education program ("IEP") developed by the School District for Student. The issues are more specifically identified by the Chairperson in the Order of January 31, 2011 (HP-4) as follows:

1. Do the IEPs proposed by the School District to be implemented at Sherwood Center provide FAPE to Student?
2. Did the School District in the IEP process consider input from persons knowledgeable about Student and his disabilities and provide the required opportunities for Student's Mother to participate in the IEP development process?
3. Are related services such as counseling or home-based supervised programs required by IDEA and if so, necessary to provide Student with FAPE?
4. Is a transition plan and/or behavior intervention plan necessary for Student to receive FAPE, and if developed, were they adequate to provide FAPE?

While Petitioner's first and second amended complaints, or supplementations, stated that Petitioner did not intend to withdraw issues that may have been raised in the preceding complaints and reference was made to a previous IEP, in fact there is only one IEP that is of issue, and that is the one developed by the School District dated November 30, 2010. There were no IEPs developed from the date of the precipitating Notice of Action, April 1, 2010, until the IEP dated November 30, 2010, found at R-694. Mother's initial complaint states that the

move to a new location “requires a new IEP at a new location.” P-34 at 267. The IEP in existence at the time of the April 3, 2010 Notice of Action was not the subject of a due process complaint, rather the Mother complained of the change in location and stated that a new IEP would have to be developed. Despite the Chairperson’s reference to “IEPs” in the above Statement of Issues, there is only one IEP complained of – the one of November 30, 2010, which was the subject of the second amended complaint. The IEP in existence at the time of the April 1, 2010 notice of action was the IEP of December 1, 2009 (P-26; R-551), about which Mother had no complaint and under which services were being provided at Milestones, Mother’s preferred location for the provision of services to Student. The parties’ counsel subsequently agreed that the December 1, 2009 IEP was the last agreed upon IEP for Student. See further discussion *infra*.

In addition to the above issues regarding FAPE, the issue of “stay put” has been involved in this due process proceeding. The Student’s Mother’s initial complaint requested that Student remain at his location of Milestones Academy pending resolution of the due process complaint. Student’s Mother’s complaint contended that the change of location proposed for Student would not provide FAPE and that it was not just a change in location but a change of “everything” in Student’s program. P-34 at 267.

As referenced in the Chairperson’s Pre-Hearing Order on Stay Put, dated February 8, 2011 (HP-6) the stay put placement of the child was first discussed on June 2, 2010, during a conference call between Stephen Walker, on behalf of the Student and Parent, and MacKenzie Wagler, then attorney for School District. At the time, the Student had been placed by the School District in Milestones Academy (“Milestones”), the private school offered through Partners in Behavior Milestones (PBM). The School District had proposed to implement the IEP for Student (the IEP of December 1, 2009) in a different private school, Sherwood Center (“Sherwood”). The School District contended that the Student’s IEP could be implemented at Sherwood Center and this would just be a change in location for IEP service delivery while the Parent contended that it would be a change in special education placement. Parent’s initial complaint had contended that a change in location would affect student to teacher ratios. During the initial conference call, the Chairperson was advised that Sherwood Center is a cross-categorical school with a higher student to teacher ratio than Milestones (often referred to synonymously by the name of the school’s owner, PBM), which had a ratio of 1:1, one teacher for one student. Because of the possibility that there were some substantive differences in the program that would be provided to Student at Sherwood Center, the Chairperson stated that the stay put placement at that time would be considered to be PBM but that the parties could further brief the issue and provide additional factual support for their positions. As a result of the limited facts available to the Chairperson from the Parent’s initial complaint and what was provided during the conference call, the Chairperson did enter an Order on August 27, 2010 (HP-7), referring to PBM as the stay put placement.

After August 27, 2010, the parties subsequently briefed the issue leading to the Chairperson’s Order of February 8, 2011. The Chairperson again determined that she did not have before her sufficient facts to make a determination but expected that she would at the conclusion of the scheduled hearing. Moreover, the Chairperson noted that the crux of the Parent’s complaint to be raised before the Hearing Panel was the appropriateness of the School District’s IEPs, which

called for service delivery at Sherwood Center and not PBM/Milestones Academy. Consequently, the Chairperson ordered that the stay put placement remain at PBM through the dates scheduled for hearing, taking the issue under advisement. The stay put issue is determined in this decision as well as the substantive issues stated above.

There is a two year statute of limitations under the IDEA for due process complaints which runs from the time the parent or public agency (the School District), “knew or should have known about the alleged action that forms the basis of the due process complaint.” 34 C.F.R. § 300.511(e). This deadline has exceptions, however, if the parent was prevented from filing a complaint because the public agency made specific misrepresentations that it had resolved the problem forming the basis of the complaint or that the public agency withheld information from the parent that was required to be provided to the parent. 34 C.F.R. § 300.511(f). There are no allegations by Parents of any exceptions to the two year statute and no dispute regarding the timeframe for the relevant evidence concerning the issues before the Hearing Panel. While an analysis of IDEA violations may only go back two years, testimony and evidence relating to the Student prior to that time provides the Hearing Panel with relevant background and context.

FINDINGS OF FACT

A. Student Background and History.

1. Student’s date of birth is August 4, 1998 and at the time of the hearing he was 12 years old. Tr. 1:63; R-694. Student lives with his Mother within the boundaries of the Respondent School District. R-694. Student has a diagnosis of autism. Tr. 1:63. At the time of the hearing Student was 6 feet tall and weighed 265 pounds. Student’s Mother characterized him as “big” and “aggressive.” Tr. 2:168. According to Student’s Mother, speech and language and behavior are challenges for Student. Tr. 1:64-5.

2. Student’s Mother has a bachelor’s degree in journalism but no degree in education and is not a certified teacher. Tr. 1:113-15.

3. The Student is presently attending Milestones Academy (“Milestones”). Tr. 1:63. He has attended Milestones for seven years, and during that time, has never received academic instruction in anything other than a one-on-one (“1:1”) setting and has never been educated in a classroom setting with other students. Tr. 1:125. Student receives his instruction 1:1 in a cubicle, which is screened on three sides from visual distractions, with all of the work environment and reinforcement system in close proximity to him. Tr. 2:242, 353, 405. According to Student’s Mother, Student has made great progress there. Tr. 1:65.

4. Student’s Mother refused consent for the Student to be re-evaluated in 2006 for reasons she did not recall (Tr. 1:116-17) and then in 2008, refused consent for the Student to receive the following tests as a part of his re-evaluation: VMI Developmental Test of Visual Motor Integration; Universal Nonverbal Intelligence Test; and the Leiter Nonverbal Intelligence Test. R-525. Student’s Mother refused consent for those tests based on the advice of an advocate, RH, and because she did not believe they would indicate the Student’s true ability. Tr.

1:124. However, Student's Mother at the time of the hearing could not state what the tests were intended to measure. Tr. 1:120-24.

5. On July 31, 2009, an IEP meeting was held at which School District personnel advised Mother of the District's desire to transition the Student from Milestones to either Rainbow or Sherwood, both private schools. Tr. 2:173-174. According to Dr. CH, the District's Director of Exceptional Education, that decision was based on concerns that the Student was not making progress toward independence at Milestones, and despite having been at Milestones for several years, continued to be taught exclusively on a 1:1 basis, preventing his generalization of skills. Tr. 7:1122-1124. The School District believed this was of increasing significance as the Student got older, because according to Dr. CH, it can be very difficult for a student who is taught exclusively on a 1:1 basis, in a small, isolated space, to show independence, which is needed to enable the Student to transition into adulthood. Tr. 7:1127.

6. On December 1, 2009, during an IEP meeting, there was further discussion of transitioning the Student to another school. An IEP was developed during the December 1, 2009 meeting (P-26; R-551) and counsel for the parties agreed that this IEP was the IEP under which services were being provided to Student at the time of the initial due process complaint.² Tr. 6:1090-97. The specific placement of this IEP was "private separate school (day) facility." R-551 at 414.³ The IEP indicated that there would be no regular education participation. R-551 at 413. There was no reference in this IEP to 1:1 instruction or Applied Behavioral Analysis as a method of instruction of the goals and objectives of the IEP. The IEP's Alternate Form F which indicates recommendations and modifications to be used in general and special education does not indicate the use of Applied Behavioral Analysis or 1:1 instruction. R-551 at 418-19. The IEP provided for extended school year services. R-551 at 415. The Student remained at Milestones under this IEP.

7. A meeting was scheduled for December 14, 2009 for Milestones Academy to present its suggestions relating to Student's transition. R-534; Tr. 2:153-154. Milestones prepared a "Transition Considerations" document dated December 11, 2009, that was presented during the December 14, 2009 meeting. R-616.

8. Dr. CH testified that the District refused to adopt the Milestones transition plan as written (R-616), because its implementation would result in "dragging the transition out too long", and because it provided that Milestones personnel would have to train Sherwood personnel, who, Dr. CH testified were "highly educated, highly trained and highly experienced." Tr. 7:1131-1132.

² While the parties identified this IEP as the last agreed-upon IEP which has consequences for stay put analysis, there are references elsewhere during the hearing to the November 30, 2010 IEP as the one currently in effect. Tr. 5:899, referring to R-694. Also, JR testified that she believed that at least one of the November 30, 2010 IEP goals was being implemented at Milestones at the time of her testimony in February 2011. Tr. 2:363 (regarding Goal 10 of the IEP at R-694). The testimony during the hearing concerned the ability of Sherwood personnel to implement the November 30, 2010 IEP, not the December 1, 2009 IEP. See, e.g., Tr. 5:888-890, 7:1159-61.

³ The December 1, 2009 IEP is Exhibit P-26 and R-551 and was admitted as P-26; however because of the difficulty making out the specific page numbers within Petitioner's exhibit, further reference will be made to the document as it appears in Respondent's exhibits.

9. In response, the District developed its own transition document, dated March 29, 2010 (R-561), with assistance from SS, a Project ACCESS consultant with expertise in serving students with autism. Tr. 7:1132-1134. Project ACCESS is a MDESE-funded program which provides consultants to assist public school districts in Missouri. Tr. 7:1133.

10. An IEP meeting was held on March 29, 2010 during which the IEP team⁴ decided that the Student would transition to Sherwood. R-534. The District issued a Notice of Action advising of the change in location dated April 1, 2010. P-33; R-563.

B. Facts Relevant to Development of December 2010 IEP.

11. Before Student's Mother's initial complaint could be heard, it was time for the development of a new IEP. That IEP was developed during a series of meetings in November, 2010 with the last one on November 30, 2010 (hence, the reference to this IEP as either the November 30, 2010 IEP or in some places the December 2010 IEP), and was sent to Student's Mother on December 17, 2010. R-694 at 998. The specific placement of this IEP was "private separate school (day) facility." R-694 at 1023. The IEP indicated that there would be no regular education participation. R-694 at 1022.

12. On December 3, 2010, the District issued a Notice of Action advising that under the new IEP, it was still planning to change the location of services to Sherwood, based upon the District's belief that at Sherwood, the Student would have greater opportunities for the generalization of skills. Further, the District expressed concerns in that Notice of Action that Milestones had been implementing goals that were not a part of the Student's IEP, without convening an IEP meeting to address the revision of his IEP. R-693.

13. When the Student's IEP was being reviewed in November, 2010, leading to the IEP at issue in this hearing, District personnel expressed their intention to use the March 29, 2010 transition plan for the proposed move to Sherwood Center. The Student's Mother understood that the District intended to use R-561 as the transition plan for the move contemplated by the Student's current IEP. Tr. 2:154-156.

14. The Student's Mother stated during her testimony that if the Student accomplished the goals in the December, 2010 IEP, this would represent meaningful progress for him. Tr. 1:79, 2:167-168.

15. Student's Mother's believes that the Student can only be educated in a 1:1 setting. Tr. 1:69-70.

⁴ The term "IEP Team" is a term of art under the IDEA and is "interdisciplinary" and includes the student's parent(s), at least one of the student's regular and special education teachers, a representative of the district ("local education agency" or "LEA"), an interpreter of evaluation results, and such other individuals who have knowledge or special expertise, at the invitation of the parents or district. 34 C.F.R. § 300.321.

16. Student's Mother testified that some of her concerns over Sherwood arose because of two visits she made to the school, the first of which lasted approximately 40-45 minutes, and the second of which lasted approximately 30 minutes. Tr. 1:132. On her first visit, she saw a student lying on his stomach, fidgeting and appearing to be doing nothing. Tr. 1:72. She did not see any evidence of 1:1 instruction. Tr. 1:74. On her second visit, she saw a student sitting in or covered in vomit. Tr. 1:74, 76. Mother acknowledged that the Student himself has breaks built into his programming at Milestones, where to an observer it may appear that he is doing nothing (Tr. 1:133) and that the Student has urinated on the floor at Milestones. Tr. 1:135-138.

17. Student's Mother's also testified that she did not see "ABA" (Applied Behavior Analysis). Tr. 1:74, 133. Student's Mother understands ABA to require solely 1:1 instruction of repetitive tasks, using a discrete trial methodology. Tr. 1:133-134. JR, owner of PBM and Milestones Academy, testified that ABA "absolutely" includes more than discrete trial teaching. Tr. 2:272. In the seven years the Student has been at Milestones, he has been instructed on a 1:1 basis, with an assigned staff person for the task at hand. Tr. 2:227, 229-30.

18. Student's Mother testified that the students she observed at Sherwood appeared to be lower functioning than Student (Tr. 1:76-7) and that Sherwood had told Mother that the goal for students there was to be trained for employment in sheltered workshops. Tr. 1:74.

19. Student's Mother's testified that Student loved the outdoors and animals and she was "looking at a different plan for [Student], something that would nurture that and where he could learn and live and be as independent as possible." Tr. 1:75.

20. Student's Mother's advocate RH acknowledged that if the Student had been making progress at Milestones, he would have expected the number of 1:1 hours to decrease, because the ultimate goal for a student in a 1:1 setting is to transition the Student into a classroom setting as early as possible, and because a 1:1 setting is not appropriate for a child to have functionality later in life. Tr. 3:533-534.

21. RH is an advocate for Student's Mother who has attended IEP meetings relating to Student for several years. He described his role as one of helping Mother navigate the IEP process. Tr. 3:438-39. RH does not have a college degree and is not a certified teacher. Tr. 3:529-30. RH has never been inside Sherwood. Tr. 3:529-530. During the year prior to his testimony at the hearing, RH had spent no more than 25 or 30 minutes around Student. Tr. 3:538.

22. Milestones' ultimate goal, according to co-founder JR, "is to level out behavior and reintegrate students back into their least restrictive environment." Tr. 2:210. JR has a bachelor's degree and master's degree in applied behavior analysis and is a Board Certified Behavior Analyst ("BCBA"). Tr. 2:197, 200. She is not a certified teacher. Tr. 2:268.

23. According to JR, at PBM and Milestones, "we work with people with disabilities and behavioral challenges using the science of applied behavior analysis." Tr. 2:201. JR described Milestones as "a school for students with severe behavioral challenges." Tr. 2:200.

24. According to JR, the Student's behaviors of aggression and property destruction have largely stabilized at Milestones.⁵ Tr. 2:289, 295-96.

25. Student's Mother testified that Student needed a "zero distraction" environment in order to learn and that this was a difference between Sherwood and PBM. Tr. 1:70, 96. At Milestones, there are approximately 50 students in a large office space, separated only by cubicle walls that do not extend to the ceiling. Tr. 1:128-129; 7:1125-1126. It is Mother's understanding that virtually every student at Milestones has a significant behavioral problem. Tr. 1:128-129. On her visits there, Dr. CH observed students who were screaming. Tr. 7:1126. JR characterized the setting at Milestones as "noisy." Tr. 2:243. Milestones has not attempted to educate the Student in a setting with visual distractions, or at least has not taken any data on whether he would continue making progress even if visual distractions were introduced. Tr. 2:279-280.

26. JC is a special education teacher at Sherwood Center. JC has a bachelor's degree in psychology and a master's degree in special education, and is certified to teach special education by the State of Missouri. JC began working at Sherwood before she graduated from college, and then taught there full-time between 1979 and 1985 or 1986. For some time afterward, she split time between managing a pizza shop and continuing to assist with students at Sherwood. She spent three years as a teacher in the Raymore-Peculiar School District, and then returned to Sherwood on a full-time basis in 2005, where she has remained since. (5:863-866.)

27. JC testified that Sherwood uses 1:1 discrete trial teaching with students, but not exclusively. Tr. 5:871-872. The method that Sherwood uses with a student depends upon the individual student's needs, and determining what does and doesn't work with that student. Tr. 5:882. It can be called an "eclectic" approach, of "bringing different methods together." Tr. 5:933-34. JR confirmed that during the November, 2010 IEP meetings, Sherwood discussed its planned use of ABA strategies for teaching academic skills to Student. Tr. 2:261-262. Further, JC denied that most instruction at Sherwood is done in a group setting. Tr. 5:927.

28. JC testified that Student would initially be educated in a 1:1 setting similar to what he is accustomed to at Milestones, but that he would be gradually introduced to being educated alongside other students, in a classroom-type environment. If Sherwood finds that the Student simply cannot tolerate group instruction, then he would be educated solely in a 1:1 setting. Tr. 5:892-894. This determination would be based on data collected regarding his behavior and academic progress. *Id.* RH also did not recall anyone from Sherwood stating that the Student would not receive 1:1 services during his attendance at Student's IEP meetings. Tr. 3:555-556.

⁵ The graphs attached to R-690 reflect the number of times the Student engaged in behaviors targeted for management in his BIP over a year period prior to the development of his November 30, 2010 IEP. Over that period, he engaged in only four acts of aggression (Tr. 2:298; R-690 at 965) and 27 acts of property destruction. R-690 at 964. However, "property destruction" includes actions that do not actually result in any harm to property; according to JR, hitting a table falls within the BIP's definition of "property destruction," with the Student's implementer or teacher making a judgment call over what constitutes property destruction including whether the hitting is a "bang" constituting property destruction or a "tap" which is not. Tr. 2:289-291; 4:689-90.

29. LM has a bachelor's degree in communication disorders and a master's degree in special education with an emphasis on autism. LM became a Board Certified Behavior Analyst in 2009. She is not a licensed teacher. Tr. 4:755. LM worked at Sherwood for about a year and testified that she was very familiar with Sherwood. Tr. 4:793, 796. She testified that at the time she was there, the population at Sherwood was considered low functioning autistic students and that most of the students did not have significant behavior problems. Tr. 4:796-97. Her comparison of the Student as "higher than low" functioning (Tr. 4:805) was driven by perceived differences in behaviors and IQ. Tr. 4:805-807. LM did not know Student's IQ. Tr. 4:807. Student's Mother's refused to consent to certain intelligence testing of Student. Tr. 1:124; R-525.

30. LM provided a report of her recommendations to Mother on what an appropriate education for Student would include which contained information from her observations at Sherwood. P-28. She reported that she observed students at Sherwood receiving 1:1 instruction (P-28 at 251) although this was not her testimony during the hearing. Tr. 4:770-71. She had not reviewed any information regarding Student, including any IEP, before the observation. Tr. 4:778-79. In her report, LM reported that some of the students she observed at Sherwood did not appear to be engaged productively; however, she had not reviewed any of the IEPs of those students, and thus did not know if breaks may be part of positive reinforcements provided for within those students' IEPs. Tr. 4:787-788. She acknowledged that the frequency with which a particular student requires reinforcement depends on the individual needs of the child. Tr. 4:788-790.

31. JC testified that in addition to learning from 1:1 instruction, students can learn from their peers and the instruction provided to those peers. Tr. 5:871-873. According to JC, teaching students in a small group setting teaches them to "attend", and pay attention to what other students are doing, including picking up more advanced skills being learned by other students in the group, thus reducing the time it takes the less-advanced student to learn that skill later. Tr. 5:873-879. This type of learning is known as "incidental learning." Tr. 5:931. This helps students to develop social interactions with their peers so that they can learn not just from a teacher, but from those peers. Tr. 5:873-875.

32. JC believes the Student can learn this way, based on her observations that the Student seems bright, and has a foundation of skills that would enable him to learn and make meaningful progress in a group. Tr. 5:889-890. Receiving instruction in a group would eventually teach him to tolerate others, to stay on task while around others, and ultimately promote his independence. Tr. 5:894. In JC's opinion, all students learn incidentally. Tr. 5:1019. In JC's years at Sherwood, she is not aware of any student who has not been able to make a successful transition to Sherwood, whether they are coming from a home setting, a public school or another private school. Tr. 5:906. When asked whether Student would make meaningful progress on the November 30, 2010 IEP at Sherwood, JC testified that she was "99.9 percent sure that he would make progress." Tr. 5:890. She believed that Student would make progress in a group setting as well since he already had the foundations to learn in a group. *Id.*

33. JR testified that in her opinion Student was not ready to be instructed in a classroom based on Student's data, her observation of him and visiting with his team. Tr. 2:375-376. Student has never been taught in a classroom setting. Tr. 1:125, 4:685. In the year before her testimony, JR spent between 2-5 hours with Student. Tr. 2:271.

34. CD is the program director of Milestones, a job she has held since 2005. She began working at Milestones in its accounting department in 2001, and became a field consultant about a year later, helping families to set up ABA programs in their homes, setting up teaching programs and procedures, and training tutors and families on how to teach children with disabilities. Tr. 4:611-619. CD has a bachelor's degree but does not have a degree in education, does not have a teaching certificate, and took no special education classes while in college. Tr. 4:683.

35. CD testified that she did not know how the Student would do in a classroom setting if teaching methods were changed, because she does not have a "crystal ball." Tr. 4:633-634. CD said that she couldn't say whether or not Student would make progress at Sherwood but in her opinion he would not make progress at the level he is progressing at PBM if current learning methods were not maintained. Tr. 4:710-11. According to CD, Student is not an incidental learner, and thus he doesn't automatically pick up skills from others or watch them to pick up skills. Tr. 4:622-24.

36. Milestones has never taken data on any efforts to educate the Student in anything other than a strict 1:1 setting in a cubicle. Tr. 4:686-87. CD does not do any direct instruction with Student but supervises his lunch period. Tr. 6:688. She has never been to Sherwood. Tr. 6:689.

37. CD testified that Student has been taught exclusively for his time at Milestones through a prompting strategy known as errorless instruction where a student is not allowed to make an error before a response to an instruction. Tr. 6:694-95. CD acknowledged that teachers who have experience with students like the Student may find that a different methodology than that used by Milestones may also work with him. Tr. 4:695. LM also testified that teachers of students with autism have successfully used other methodologies. Tr. 4:779-81.

38. Dr. CH testified that the District places about 20 students with autism at Sherwood each year, and that the District has been "very pleased" and "very satisfied" with the progress those students have made at Sherwood, both from a behavioral and an academic standpoint. Tr. 7:1166-1167.

39. Dr. CH, the District's Director of Exceptional Education, has a bachelor's degree in elementary education, with certifications to teach the learning disabled and the mentally handicapped. She has a master's degree in administration, and a doctorate degree. She is also certified as a school administrator, as a superintendent, and in special education administration. Tr. 7:1114-1116.

40. At the IEP meetings in November, 2010, Sherwood personnel were specifically asked if Sherwood could implement the IEP, and except for the use of a PBM-style "safe room",

included in the behavior plan which was included in the November 30, 2010 IEP, they stated that Sherwood could implement the IEP. Tr. 7:1159-1161.

41. The Student's IEP provides that he will receive speech and occupational therapy. R-694 at 1021. Sherwood contracts with an agency to provide those services to its students, so the Student would receive those services at Sherwood. Tr. 5:882.

42. One of the accommodations or modifications listed on the Student's IEP is that he would be provided a study carrel for independent work. R-694 at 1027. Sherwood will provide a cubicle since he is used to the cubicle environment. Tr. 5:892. His academic instruction when he arrives will be provided 1:1. Tr. 5:892-93.

43. The District sent the Parent a Notice of Action on December 17, 2010 advising that, with the change in location to Sherwood, the minutes of special instruction would be reduced from 338 minutes per day per the IEP of December 1, 2009, to 1,620 minutes per week. R-695. The difference in time over a course of a week in the regular school year would be one hour and 10 minutes, or 14 minutes a day.

44. JR testified at the hearing that the Milestones' program is a full calendar year program with "mini breaks" during the school year and her understanding is that Sherwood takes part of the summer off. Tr. 2:263. According to JC, Sherwood follows a traditional school year, and then usually takes a two-week break in June and a two-week break in August. Tr. 5:884. During the summer months work on the students' IEP goals and objectives continues. Tr. 5:884.

45. Mother also testified at the hearing that Sherwood does not take students on community outings as frequently as Milestones, with Milestones having outings three times a week and Sherwood having outings only twice a month, and that Student needed repetition for skill acquisition. Tr. 1:77-78. She testified that some of the Student's IEP goals were to be implemented during community outings and that the skills in Goals 1, 5, 6, 7 and 10 would not be acquired on the Sherwood outing schedule. Tr. 1:85-86.

46. When Student goes on the outings, he generally goes alone, with only his implementer; JR did not know the specifics of the interactions Student experienced on those outings. Tr. 2:407-408. JR testified that certain of the IEP goals would "eventually" be taken out into the community. Tr. 2:250-52.

47. According to JC, students the Student's age at Sherwood go on community outings once per week, with other students, with activities designed to work on each student's individual goals. Tr. 5:901-904.

48. JR testified that the November 30, 2010 IEP could be implemented at Milestones. Tr. 2:265. She testified that Sherwood could not implement the November 30, 2010 IEP regarding use of a safe room and always using 1:1 instruction; she was assuming that the IEP set 1:1 instruction out as a requirement. Tr. 2:151-52.

49. At Milestones, when Student engages in aggressive behavior or property destruction as defined by his behavior support plan (R-691 at 978), JR testified that he is “removed from the general classroom setting to a safe area and then transitioned back. So the two components, the safe room area and the fellows to help move to the safe room area, it’s my understanding that Milestones Academy is unique having those -- having those two components.” Tr. 2:230-31. Further, JR testified that she “got the feeling from the -- from the ladies from Sherwood Center that they did not have those components at Sherwood Center. I believe one of them actually said we can’t implement this behavior plan as it is written.” Tr. 2:231.

50. The definition of property destruction in the behavior plan written by Milestones (R-691 at 978) was acknowledged by JR as being exactly the same as the one in the November 30, 2010 IEP (R-694 at 1032). Tr. 2:290-91.

51. Milestones uses “behavior support people” characterized as “big guys” (Tr. 2:227) to implement the transitions and execute the Student’s behavior plan. The Milestones’ “safe room” is 6 feet wide by 10 feet long, and locks from the outside so that the Student cannot get out. Tr. 2:286, 4:703. When he goes into the safe room, the Student is generally in it by himself. Tr. 2:285-286.

52. CD testified that if Student “exhibits behavior in the targeted behavior plan” the safe room is the intervention for the behavior. Such behaviors constituting property destruction would include hitting a table hard enough to constitute a bang of the table in the judgment of the person who observes it. Tr. 4:702-03.

53. Sherwood does not have a Milestones-style “safe room”⁶ but does have a safe area to which students may be escorted which according to JC may be a part of a room or hallway. Tr. 5:900. JC testified that Sherwood doesn’t believe in a safe room and neither does she, primarily because of safety considerations, as the child could harm him or herself in it. Tr. 5:898-99. JC testified that other than the safe room, Milestones could implement all parts of Student’s behavior plan. Tr. 5:901.

54. JR had no knowledge of any plans to change Milestones’ safe room pursuant to any change in law (Tr. 2:287) and CD, PBM’s program director, likewise knew nothing about the change in Missouri law. Tr.4:701. She did testify that Milestones was in the process of “fading” the use of the safe room for the Student, but only because he was showing that it was not needed to the extent it had been used in the past. Tr. 4:701.

55. JC other objection to a safe room was from a behavioral standpoint, as a student who wants to escape a task can act out and go to the safe room to “chill.” Tr. 5:899.

⁶ As of July 1, 2011, the School District contends that Milestones’ safe room is illegal under Missouri law (at least with respect to students like the Student who are placed at Milestones by public school districts). See further discussion *infra*.

56. In the event of behavioral problems by the Student, Sherwood will follow Student's behavior plan in the November 30, 2010 IEP with the exception of the safe room, substituting instead a safe area. Tr. 5:899-901. Sherwood's staff is trained in Mandt, a "crisis intervention" technique (Tr. 5:882-83) where physical restraint is a last resort and used when there is danger of the Student harming someone else or themselves. Tr. 5:912. JC testified that she thought this technique was used at PBM based upon references that this had been used in the November 30, 2010 IEP. Tr. 5:987-88; R-694 at 1034. Sherwood has had other students enrolled who were as large as Student and who exhibited violent behavior; JC personally assisted in addressing violent behaviors exhibited by students who were of Student's size. Tr. 5:896-897.

57. JR testified that the Student would not be able to make progress at Sherwood without the implementation of Milestones' behavior plan. Tr. 2:232. She knows nothing about the qualifications of Sherwood staff to deal with problem behaviors. Tr. 2:354. The transition plan proposed by Milestones (R-616) for Student's transition to Sherwood recognized that once the Student moved to a different school, he may need a new Functional Behavior Assessment and changes to Student's behavior plan because of the possibility that a new environment may lead to behavioral changes. Tr. 2:420-422.

58. Prior to the development of the November 30, 2010 IEP, Milestones personnel provided a draft of the Present Level of Academic Achievement and Functional Performance (also known as "present levels" or "PLAAFP") section of the IEP, the goals and objectives section, and a Positive Behavioral Support Plan. R-691.

59. The final IEP largely adopted Milestones' draft content regarding goals and objectives, R-691, and according to Student's Mother, there was a lot of discussion at the meetings over what the goals and present levels would look like. Tr. 2:180, 252.

60. There were three separate meetings devoted to the development of the IEP, held on November 16, November 29 and November 30, 2010. Tr. 2:169; Ex. 694 at 1001.

61. During the IEP meetings themselves, Student's Mother acknowledged that she spoke little, allowing RH to speak for her. Representatives from Milestones were in attendance. Nobody from the District told Student's Mother, RH or Milestones representatives to stop talking. Tr. 2:168-169. Student's Mother testified that she did speak up and voiced her concerns that Student "was big, that he was aggressive, that he had just been hospitalized and almost removed from my home, and that my fear is that moving him to a new school at this time when he's not ready would do more harm than good and it could lead to him ultimately being so aggressive that he would be removed from my home." *Id.* Mother stated that at the time of the hearing, his behaviors in the home were better. Tr. 2:169.

62. With respect to the Behavior Intervention Plan ("BIP") (also referred to as a "behavior plan") the School District largely incorporated the targeted behaviors and interventions of the Milestones plan, R-691 at 978, into the November 30, 2010 IEP, R-694 at 1032. Tr. 1:137, 2:291, 8:1551.

63. Student's Mother testified that her request that Student remain at Milestones was discussed in the November 2010 IEP meetings. According to Student's Mother, Dr. CH "acknowledged that [Student] had made great progress at PBM but they thought he could benefit from a classroom setting, and therefore, they thought moving him at [sic] Sherwood would make a difference." Tr. 2:188. Student's Mother acknowledged that the School District did explain its reasoning at the IEP meetings and that she understood it. Tr. 2:188-89.

64. The Mother presented evidence that the School District made changes to the draft IEP document prepared by Milestones (R-691), specifically changing some verbs from the present or future tense to the past tense in both the present levels section and the behavior intervention plan. These changes were discussed during the IEP meetings. Tr. 2:373; 3:491; 7:1164. The parties disputed about whether there was agreement to these changes with Dr. CH believing there was agreement (Tr. 7:1195-1197) and RH and Mother believing that there was no agreement. Tr. 3:491, 596; Tr. 8:1539.

65. According to Dr. CH, the District's rationale for changing the verb tenses was that as drafted originally by Milestones, the language in present levels and the behavior plan could be construed to dictate instructional methodology.⁷ Tr. 7:1147-48, 1154-56. Dr. CH testified that if specifics were warranted that they could be put on Form F of the IEP, listing accommodations and modifications to the IEP. Tr. 7:1148. This is the location to indicate "visual cues, prompts and aids, consistent staff present during introduction of new skills, that that was a modification and an accommodation. So we agreed to move things to the appropriate place." *Id.*

66. Form F located at R-694 at 1027-28, sets forth accommodations and modifications for the student to be used in special and regular education. It includes, among other things, a study carrel for independent work and consistent staff present during the introduction of new skills.⁸

67. Dr. CH testified that although the District had decided in March or April of 2010 to transition the Student to Sherwood, the November, 2010 IEP meetings involved a new IEP, so when those meetings began, no decision had been made as to where the services would be provided. Tr. 7:1161. Dr. CH stated she was attempting to determine if there was anything "significantly different" that would cause her to believe the move should not occur. *Id.* She testified that what she heard at the meetings reinforced the decision to transfer the Student to Sherwood, because Milestones' instruction was not promoting the generalization of skills into

⁷ As an example of the changes, under the first bullet of the Milestones' draft of the PLAAFP, it states: "[Student] requires direct instruction and extensive repetition in a highly structured environment with low visual and auditory stimuli to acquire new skills." R-691 at 969. The School District's PLAAFP states: "Partners in Behavioral Milestones currently provides direct instruction and extensive repetition in a highly structured environment with low visual and auditory stimulus." R-694 at 1001. As an example in the behavior plan, the section labeled "Positive Behavioral Teaching Strategies" in the Milestones proposed Positive Behavioral Support Plan states what Student continues to need as strategies. R-691 at 977. This section was not deleted from the final BIP altogether, but the verb tense for the section was changed to reflect that the strategies in this section had been used in the past. R. 694 at 1031.

⁸ The consistent staff requirement was not included as an element on the Alternate Form F for the December 1, 2009 IEP. R-551 at 419.

different environments, and she was concerned over Milestones' unilateral creation of IEP goals without an IEP meeting. Tr. 7:1161-62.

68. JC did testify that she had been told prior to her observation of Student at Milestones, which were before the November, 2010 IEP meetings, that Student might be coming to Sherwood. Tr. 5:991-994. This was the reason for her observation. Tr. 5:992.

69. The Hearing Panel finds that there is no dispute about whether the goals and objectives of the November 30, 2010 IEP would provide the Student with meaningful educational benefit in light of the testimony of the witnesses. In fact, there was no testimony at the hearing about the adequacy of the individual goals and objectives – rather the testimony involved the methodology that should be employed to achieve them and the location for same.

C. Home Counseling Services.

70. Student's Mother testified that after her move to a new home in November, 2009, the Student began to show behavioral problems in the home, so Student's Mother engaged Dr. KD to work "on transitioning into the new house" (Tr. 1:104-105); however the first visit with Dr. KD did not occur until nearly a year after the move occurred. Tr. 4:816.

71. Dr. KD has a bachelor's degree in psychology, a master's degree in the foundations of clinical psychology, and a doctorate in behavioral science. Dr. KD is a Board Certified Behavioral Analyst. Tr. 4:810-814. Dr. KD first met Student toward the end of November, 2010 when she provided a consultation for behavioral services within Student's home environment (Tr. 4:816), and between then and when she testified on February 28, 2011, had provided 3-5 hours per month of services within the home to decrease problem behaviors in that environment. Tr. 4:816.

72. Dr. KD recommended that furniture be rearranged and that a sensory bin be placed by the computer to reduce the likelihood that the Student would damage furniture when acting out videos he saw on the computer. Tr. 1:102-107. At an IEP meeting in December, 2009, one month after moving to her new home, Student's Mother reported that the move was going well. Tr. 2:157. The Student's behaviors in his home environment were better, as of the hearing. Tr. 2:169.

73. Student's Mother also testified that the Student had made meaningful progress at Milestones, during the same time she has been receiving services by Dr. KD, and that he would continue making progress at Milestones. Tr. 1:65; 1:79.

74. Student's Mother testified that a request was made at the November, 2010 IEP meetings for assistance from the District in paying for a home behavior program. Tr. 2:156. Dr. CH does not recall such a request from Mother or anyone on Mother's behalf. Tr. 7:1163. There was no testimony from any other witness on Mother's behalf who was at the IEP meetings to corroborate that a request was made.

75. Student's Mother testified that Student's most recent IEP would result in meaningful progress if implemented at Milestones. Tr. 1:79. That IEP did not include a provision for services such as those provided by Ms. Dancho.

76. The behaviors that were of concern to Student's Mother in the home were not being replicated in the school environment. The Milestones progress report as of November 4, 2010 (R-690) included graphs depicting the frequency of aggression and property destruction. Those graphs do not reflect any significant increases in those behaviors in the school environment during the time immediately after Student's Mother's move to a new home or any time after the move.

77. Dr. KD's services were to assist Mother to generalize the treatments at Milestones Academy to her home. Tr. 4:822. Mother testified that Dr. KD assisted in Student-proofing her home by rearranging furniture and installing a sensory bin to prevent defacing of property. Tr. 1:106-07.

78. Dr. KD testified that her services were funded by the Missouri Department of Mental Health. Tr. 4:825-826

79. Sherwood contracts with the Department of Mental Health to provide in-home services for parents who need them. Tr. 5:908.

D. Transition Plan.

80. According to JR, a transition plan is necessary for students who leave Milestones in order to prevent inappropriate behaviors from occurring in the new environment. Tr. 2:212-13. The Student would "fall apart" without an appropriate transition plan. Tr. 2:236-37. PBM moved from one building to another in approximately March, 2009 (R- 587), but the Student's behavior graphs (R-690) do not reflect any appreciable spikes in targeted behaviors at that time. JR testified that the building move was difficult for Student. Tr. 2:236.

81. JR also testified that moving from one implementer (Milestones' reference for instructor) to another was a problem for Student and this would take four weeks to accomplish. Tr. 2:234. The situation would be more difficult if Student's entire setting was changed. Tr. 2:236.

82. CD testified that the Student "not only needs one person to teach him but when that person is not consistent and there's a change of that person, skill acquisition is lower." Tr. 4:634.

83. The School District's exhibits, at R-568, 573, 574, 575, 577 (p. 611), 578, 580 (p. 625), 581, 582, 585, 586, 588 (pp. 663, 671, 681), 591, 596, 599, 600, 602, 605, 607, 612, 613, 618, 619, 620, 624, 633, 635 and 636 reflect that over a period of just over three years prior to development of the December 2010 IEP, the Student was provided services by at least 17 different implementers or substitutes at Milestones (I1, I2, an unknown implementer who initialed R-574, I3, I4, I5, I6, I7, an unknown implementer who initialed R-602, I8, I9, I10, I11,

I12, I13, I14, and I15). Tr. 2:308-350. The implementers are the individuals who worked with Student on the IEP goals. Tr. 4:735.

84. The School District's exhibit at R-624 reflects that when an implementer at Milestones was working with the Student for the "first time," that the Student scored 100% on all of his programs that day, and exhibited no behaviors that would have led to a trip to the safe room.

85. The District's transition plan (R-561) incorporates many features of Milestones' proposed plan, R-616. It includes provisions for coordination between Milestones and Sherwood staff, observations by Sherwood's teacher of the Student while receiving services at Milestones, training of Sherwood's staff, ongoing support, and visits by the Student to Sherwood before starting instruction there. It provides for the Student initially to attend each school for a half day for the first 12 school days, except for those days each week when his Sherwood class is on community outings, when the Student will attend Milestones the entire day.

86. Dr. CH attested to the District's readiness to implement the transition plan when the transition commences (Tr. 7:1137-1142), including the ability to hire any staff required with 30 days' notice. Tr. 7:1142. Dr. CH testified that the District has recently hired several additional personnel to augment its internal expertise for students with autism. Tr. 7:1142-1146.

DISCUSSION AND DECISION RATIONALE

A. Burden of Proof.

The burden of proof in a due process hearing is on the party initiating the challenge to the IEP to prove a denial of FAPE. *Schaffer v. Weast*, 456 U.S. 49, 126 S.Ct. 528, 537 (2005). Accordingly, the burden of proof in this case is on the Petitioners to establish that the IEP at issue did not provide FAPE to Student. Petitioners must sustain their burden of proof by a preponderance of the evidence, the standard appropriate to most civil proceedings and the standard utilized by reviewing courts of hearing panel decisions. *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 654 (8th Cir.1999); 20 U.S.C. § 1415(i)(2)(B); *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990) (finding Student has the burden of proving by a preponderance of the evidence that the IEP was inadequate; citing *Tatro v. State of Texas*, 703 F.2d 823, 830 (5th Cir.), *aff'd in part and rev'd in part sub nom.*, *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984)).

B. General Legal Principals of Free Appropriate Public Education and Least Restrictive Enviroment.

Under the IDEA, all children with disabilities as defined by the statute are entitled to a free appropriate public education ("FAPE") in the least restrictive environment ("LRE") appropriate to allow that child to receive educational benefit. 20 U.S.C. §§ 1412(a)(1)(5), 1401(8). In addition to the federal statute and its implementing regulations at 34 CFR Part 300, Missouri has adopted the Missouri State Plan for Special Education – Regulations Implementing Part B of the Individuals with Disabilities Education Act ("State Plan") setting forth requirements imposed upon school districts for the provision of FAPE.

Under the Supreme Court test established by *Board of Education v. Rowley*, 458 U.S. 176, 203, (1982), FAPE consists of educational instruction specifically designed to meet the unique needs of the handicapped child, and related services as are necessary to permit the child to benefit from the instruction. FAPE is not required to maximize the potential of each child; however, it must be sufficient to confer educational benefit. *Id.* at 200. The *Rowley* standard is satisfied by providing meaningful access to educational opportunities for the disabled child. *Id.* at 192; *see also Lathrop R-II School District v. Gray*, 611 F.3d 419, 427 (8th Cir. 2010). The *Rowley* court determined that the IDEA requires school districts to provide a “basic floor of opportunity” consisting of “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Rowley*, 458 U.S. at 201. The Supreme Court found Congress’ intent in passing the IDEA was “more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.” *Id.* at 192.

A student is substantively provided 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. *Id.* at 203-04.

The extent of educational benefit to be provided to the handicapped child is not defined by *Rowley*; the Supreme Court required an analysis of the unique needs of the handicapped child to carry out the congressional purpose of access to a free appropriate public education. *Id.* at 188. However the Supreme Court found implicit in this purpose, the “requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child.” *Id.* at 200; *T.F. v. Special School District*, 449 F.3d 816, 820 (8th Cir.2006); *see also Gill v. Columbia 93 School District*, 217 F.3d 1027, 1035 (8th Cir. 2000). When later quoting from *Gill*, the Eighth Circuit supplied additional emphasis and stated: “The standard to judge whether an IEP is appropriate under IDEA is whether it offers instruction and supportive services reasonably calculated to provide *some* educational benefit to the student for whom it is designed.” (emphasis by Court). *Bradley v. Arkansas Department of Education*, 443 F.3d 965, 974 (8th Cir. 2006).

Federal courts interpreting *Rowley* have held that *Rowley* does not require a school district “to either maximize a student’s potential or provide the best possible education at public expense.” *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998). A school district is not required to provide a program that will “achieve outstanding results” (*E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998)) or one that is “absolutely best” (*Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6th Cir. 1998)) or one that will provide “superior results” (*Ft. Zumwalt*, 119 F.3d at 613); *see also Blackmon*, 198 F.3d at 658. However, the *Rowley* requirement of consideration of

the unique needs of the handicapped child does require consideration of the child's capacity to learn. *Nein v. Greater Clark County School Corp.*, 95 F.Supp.2d 961, 973 (S.D. Ind.2000). The requirement of "some educational benefit" requires more than a "trivial" benefit but not a maximization of the potential of a handicapped child. *N.J. v. Northwest R-1 School District*, 2005 U.S. Dist. LEXIS 24673, 22 (E.D. Mo. 2005).

To achieve its goals, the IDEA "establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree." *Honig v. Doe*, 484 U.S. 305, 308 (1988). The primary vehicle for carrying out the IDEA's goals in the provision of FAPE is the Individualized Education Program ("IEP"). 20 U.S.C. §§ 1414(d), 1401(8). An IEP must be in effect for each child with a disability who has been deemed eligible for services no later than the child's third birth date. 34 C.F.R. § 300.323; State Plan, Regulation IV at pages 41. An IEP is a written document containing, among other things:

1. A statement of the child's present level of academic and functional performance;
2. A statement of measurable annual goals for the child;
3. A description of how the child's progress toward achieving will be measured and when progress reports will be provided;
4. A statement of the special education and related services, and supplementary aids and services, that will be provided to the child, and any program modifications or supports for school personnel that will be provided;
5. An explanation of the extent, if any, to which the student will not participate with non-disabled children in the regular education classroom and other activities;
6. A statement of any accommodations necessary to measure the student's performance on state and district-wide tests, or a description of and explanation for alternative assessments that the student will take;
7. The projected start date for the services and modifications to be given the child, along with the anticipated frequency, location and duration of those services; and
8. For students age 16 and older, postsecondary goals for the student and a statement of the transition services necessary to assist the student in meeting those postsecondary goals.

20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320; State Plan, Regulation IV at pages 43-44. For children who are deaf or hard of hearing, the statute and regulations and State Plan require the consideration of the communication needs of the child, including the child's language and communication mode, "including opportunities for direct instruction in the child's language and

communication mode.” 20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.324(a)(2)(iv). A school district is not required to put more into an IEP than is required by law. *Lathrop*, 611 F.3d at 425.

Under *Rowley*, there are two components to the FAPE analysis, one procedural and the other substantive. An educational program can be set aside for failure to provide FAPE on procedural grounds under three circumstances: (1) where the procedural inadequacies have “compromised the pupil’s right to an appropriate education”; (2) when the district’s conduct has “seriously hampered the parents’ opportunity to participate in the formulation process”; or (3) when the procedural failure has resulted in “a deprivation of educational benefits.” *Independent School District No. 283 v. S.D.*, 88 F.3d at 556; *Lathrop R-II School District v. Gray*, 611 F.3d 419, 424 (8th Cir. 2010). Where this type of harm is found, the substantive question of whether the IEP provided FAPE is not addressed by the hearing panel. *W.B. v. Target Range School District*, 960 F.2d 1479, 1485 (9th Cir. 1991). Assuming no denial of FAPE on procedural grounds, the analysis turns to the substance of whether the IEP provides FAPE as defined by the *Rowley* standard.

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

It is also well settled that the determination of whether an IEP is appropriate and reasonably calculated to confer an educational benefit must be measured from the time it was offered to the student. *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1035 (3d Cir. 1993). As noted by the *Fuhrmann* court, “[n]either the statute nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement.” *Id.* at 1040. Therefore, in determining whether a particular IEP was reasonably calculated to confer educational benefit, the actions of the IEP team should not be judged in hindsight. *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990). “An IEP is a snapshot, not a retrospective . . . [i]n striving for ‘appropriateness,’ an IEP must take into account what was and was not objectively reasonable when the snapshot was taken, that is at the time the IEP was promulgated.” *Id.*

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

Each public agency 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 CFR § 300.114.

The *Rowley* court acknowledged that regular classroom environments are not suitable for the education of many handicapped children. “Mainstreaming” in the regular classroom environment is required “to the greatest extent appropriate,” considering the needs of the child. *Beth B. v. Van Clay*, 282 F.3d 493, 498 (7th Cir.), *cert. denied*, 537 U.S. 948 (2002) (quoting 20 U.S.C. § 1412(5)). The statutory language reflecting a mainstreaming preference has also been determined to reflect a “presumption in favor of the [student’s] placement in the public schools. *Blackmon*, 198 F.3d at 661; *Independent School District No. 283 v. S.D.*, 88 F.3d 556, 561 (8th Cir. 1996); *Mark A. v. Grant Wood Area Education Agency*, 795 F.2d 52, 54 (8th Cir. 1986), *cert. denied*, 480 U.S. 936 (1987). This “strong Congressional preference” for educating students in the least restrictive environment, *Carl D. v. Special School District of St. Louis County, Mo.*, 21 F.Supp.2d 1042, 1058 (E.D. Mo. 1998), is shown in the statutory language.

In Missouri, the preference for least restrictive environment has been expressed by legislation as follows:

To the maximum extent appropriate, disabled and severely disabled children shall be educated along with children who do not have disabilities and shall attend regular classes, except that in the case of a disability resulting in violent behavior which causes a substantial likelihood of injury to the student or others, the school district shall initiate procedures consistent with state and federal law to remove the child to a more appropriate placement. Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment shall occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Section 162.680.2 R.S.Mo.

Each school district must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. In Missouri for children of ages kindergarten through grade 12, the placement continuum includes: (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. State Plan, Regulation IV at p. 56.

The least restrictive environment should always be considered in determining whether a parentally preferred placement is appropriate. *Independent School District No. 83 v. S.D.*, 88 F.3d at 556, 561 (8th Cir. 1996); *see also Reese v. Board of Education*, 225 F.Supp.2d 1149, 1159 (E.D. Mo. 2002) (holding that although parents seeking an alternative placement for their child may not be subject to the same mainstreaming requirements as a school board, “the ‘IDEA’s requirement that an appropriate education be in the mainstream to the extent possible remains a consideration that bears upon a parent’s choice of an alternative placement and may be considered by the hearing officer in determining whether the placement was appropriate.”) (quoting *M.S. v. Board of Education*, 231 F.3d 96, 105 (2nd Cir. 2000)).

C. Procedural Issues.

As case law has established that in the event of substantial procedural harm that the substantive question of whether the IEP provided FAPE is not addressed by the Hearing Panel, the Panel first turns to the Parents’ procedural arguments.

Did the School District in the IEP process consider input from persons knowledgeable about Student and his disabilities and provide the required opportunities for Student’s Mother to participate in the IEP development process?

1. Parental Input.

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

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

The IDEA’s encouragement of consensus in the development of the IEP does not mean that a school district must accede to parental demands. As the Eighth Circuit stated in *Blackmon*, “[a] school district’s obligation under the IDEA to permit parental participation in the development of

a child's educational plan should not be trivialized. . . . Nevertheless, the IDEA does not require school districts simply to accede to parents' demands without considering any suitable alternatives." 198 F.3d at 657. Thus, where a district considers, but rejects a parental request, "[t]he School District's adherence to this decision does not constitute a procedural violation of the IDEA simply because it did not grant [the] parents' request." *Id.* at 657.

While consensus on all elements of the IEP is indeed the most desirable result, the desire to obtain consensus should not result in a school district abandoning its professional judgment in order to give in to parental demands. *Blackmon*, 198 F.3d at 657. A school district's consideration and ultimate rejection of a parental request does not constitute a procedural violation of the IDEA. *Id.* at 657-58. Although a student's placement is ideally to be achieved by consensus among the IEP team members, sometimes agreement is not possible. If consensus is not achieved, the school district has the duty to formulate the plan to the best of its ability in accordance with information developed at meetings; the parents' remedy is due process. The parents do not have the right to "veto" the IEP. *Ms. S. v. Vashon Island School District*, 337 F.3d 1115, 1131-1132 (9th Cir. 2003), *cert. denied*, 544 U.S. 928 (2005).

The Mother's feeling that the School District never seriously considered her input does not equate to a procedural violation. The School District considered information from Milestones and Sherwood. Again, merely not acceding to parental demands is not a denial of FAPE. *Blackmon*, 198 F.3d at 657. In fact, a comparison of the goals and objectives from the December 1, 2009 IEP (R-551) and November 30, 2010 IEP (R-694) shows that they are almost identical. Mother testified that Milestones' goals and objectives were incorporated into the November 30, 2010 IEP. Tr. 2:233. Similarly, the targeted behaviors and interventions in the BIP were virtually identical in the School District's and Milestones' versions. Tr. 7:1151; Tr. 8:1556; R-694 at 1032; R-691 at 978. The differences between the present levels and the BIP were due primarily to verb tense changes, which in the opinion of the professional educators within the School District was necessary to remove methodology from the IEP. Tr. 7:1147-48, 1154-56. This was done, according to Mother, after "plenty of debate" which is why the meetings for the November 2010 IEP were "three days long." Tr. 2:179.

There is no evidence that Mother or her advocate when in attendance or Milestones' representatives were precluded from providing their input or opinions about the IEP components. There was no evidence that the District failed to answer any questions of Mother; rather, the District's answers may not have been the ones she wanted to hear.

The majority of the Panel finds no violation of the IDEA in the area of parental participation. The Parent was notified of all IEP meetings, received notice of her due process rights (R-552), and actively participated in all IEP meetings herself or through her advocate. In fact, Parent can be characterized as being allowed to play an "aggressively participative role" in the IEP development process. *Independent School District No. 283 v. S.D.*, 88 F.3d 556, 562 (8th Cir. 1996).

2. Input of Experts or Knowledgeable Key Individuals.

Parents do not specifically argue in their Brief why they believe that the School District did not fairly consider the recommendations of outside experts or those persons knowledgeable about the child. The Panel assumes that Parents are referring to consideration of the comments of Milestones' personnel or Dr. KD.

With respect to the consideration of other expert opinions and recommendations, as discussed under parental participation above, there is no evidence that the School District failed to consider any expert opinions in the IEP process, including that of Milestones' representatives. The fact that those recommendations may not have been adopted wholesale does not mean they were not fairly considered. In fact, Milestones' proposed goals and objectives were almost word-for-word incorporated into the November 30, 2010 IEP as well as the recommendations on targeted behaviors and responses in the School District's behavior plan.

3. Predetermination.

While not discussed in Petitioner's Brief, there was testimony at the hearing about whether the decision to have Sherwood Center as the location for Student's services was predetermined, which would preclude consideration of parental input.

The Supreme Court in *Schaeffer v. Weast*, 546 U.S. 49 at 53, has acknowledged the significant role played by parents and guardians in the IEP process and "a school district cannot refuse to consider their concerns or evidence when drafting an IEP." *Fort Osage R-1 School District v. Sims*, 641 F.3d 996, 1005 (8th Cir. 2011). The parents in *Sims*, represented by Mr. Walker, argued that the school district had predetermined the educational program of the student, including placement, without adequate consideration of the student's needs or the parents' concerns. Citing *Lathrop* at 611 F.3d at 424, the Court stated that:

[W]hen a school district predetermines the educational program to be provided to a disabled student, prior to meeting with the parents and closes its mind to the concerns or evidence of the parents, the IEP is procedurally flawed and must be set aside because the parents were deprived of any meaningful "opportunity to participate in the formulation process.

641 F.3d at 1005. The *Sims* court found that the district court had made "an express finding that the School District was willing to listen to the Sims' evidence and concerns and work with them when drafting all of [the student's] IEPs, including the [specific IEP]." The court further found that all "material information" was provided to the parents, that the parents' outside medical evidence was considered, further testing had been ordered, and drafted to IEPs to "reflect and at least partially incorporate the evidence and the Sims' concerns." *Id.*

In a district court case in the district of New Jersey, the Court stated that the school district in question's failure to incorporate any suggestions of the parents or discuss with the parents the prospective placement and failure to listen to the concern of the parents showed an impermissible predetermination. *D.B. v. Gloucester Township School District*, 751 F.Supp.2d 764, 772 (D.N.J. 2010).

The majority of the Panel finds no predetermination within the meaning of *Sims*. Preparation is different from predetermination. There is no question that the School District thought that Student would be better served at Sherwood and that was the impetus for the Notice of Action that began this due process proceeding. However there was never any question about Student's **placement** in a private separate day school. That was stated in the November 30, 2010 IEP and the December 1, 2009 IEP and in no doubt was in IEPs developed prior to that. There were repeated meetings with Mother and the IEP team beginning shortly after the December 1, 2009 IEP meeting. Mother was allowed to voice her concerns about the location for the services and the transition plan proposed by the School District in all meetings and she confirmed that there were discussions regarding the Sherwood placement. Dr. CH testified that she was open to hearing information in the November 2010 IEP meetings that would cause her to question her belief that Sherwood was the more appropriate location. Tr. 7:1161. Again, just because the School District did not change its opinion does not mean that it refused to listen to Mother, her advocate or remain open to the possibility of the Student remaining at Milestones.

4. Notices of Action.

There was no complaint regarding Notices of Action in the first or second amendments or the Parent's original Complaint. However the Petitioner's Post-Hearing Brief states that the Notices of Action generated were "vague, sparse forms with virtually no detailed description explaining the action" and that there was no Notice of Action generated for "eliminating key components of the behavior plan and IEP" and "for refusing [Mother's] request for related or supplemental services in the home."

Pursuant to the IDEA regulations at 34 C.F.R. Section 300.503, a Notice of Action is required when, among other things, there is a change in placement or the services provided. There was no change in placement or level of services with respect to the behavior plan or IEP. The issue was the change in service location. The tense changes in the BIP previously discussed did not affect how the School District proposed to address Student's behaviors relative to how Milestones was addressing the Student's behaviors (other than the safe room, discussed *infra*) and the level of services did not change. Further, there was no evidence other than Mother's uncorroborated testimony on the request for the counseling. If she made a request in writing, it was not provided to the Panel.

Further, the majority of the Panel believes the notices of action that were sent were sufficient to comply with the requirements of 34 C.F.R. § 300.504(a) in that they included an explanation of the procedural safeguards available to the parents, a description of the action proposed or refused, an explanation of why the action was proposed or refused, a description of any options the school considered and why those options were rejected, a description of the evaluation procedures used to form the basis of the proposal or the refusal, and a description of other relevant factors. 34 C.F.R. § 300.505(a). The panel notes that if the Student's Mother believed at that time that there were other requests she made relative to services that were ignored by the IEP Team, and for which she did not receive a subsequent Notice of Action, that she could have requested that the IEP team reconvene to address these services.

During all times relevant to this proceeding, the majority of the Panel finds that the actions of the District with respect to the Student and his Parents have met the procedural requirements of the IDEA and State Plan. The Panel majority finds no procedural violations on the part of the District.

D. Substantive Issues.

Do the IEPs proposed by the School District to be implemented at Sherwood Center provide FAPE to Student?

Petitioner explains in the Post-Hearing Brief the basis for the contention that the School District's November 30, 2010 IEP does not provide FAPE as follows:

When a School fails to develop a program that is "reasonably calculated," fails to identify how it will address stereotypical behaviors that impede the student's learning and fails to afford the Student an opportunity to make meaningful educational benefit, the School has denied that Student a Free Appropriate Public Education.

Within this argument, the Petitioner claims that the IEP is "intentionally vague" and that the School District changed the IEP in certain critical concepts and criteria by virtue of not writing the IEP "in terms of its future application." Petitioner argues that the change is not one only of location, but by "eliminating the prospective application of many of its components, failed to *identify "the special education and other services necessary to help the student achieve those goals."* (emphasis in original). Petitioner contends that the final IEP "neither identified how progress would be fostered nor how the impeding behaviors would continue to be redressed", that there has "been no showing that Sherwood represents "*the educational method most suitable to the child's needs*", that the School District "unilaterally chose a methodology without acquiring any data or input that it was *most suited* to this particular child's educational needs" and that the IEP was not "reasonably calculated because the School District removed the IEP's prospective application concerning both implementation of the goals and objectives and the behavior intervention plan." (emphasis in original).

The second amendment attacks the IEP for failing to include the hallmarks of ABA: 1:1 instruction, errorless teaching, a low sensory environment and positive reinforcement. Further, Sherwood is attacked for having an "eclectic" program that is not researched based.

The Panel notes that there were *no* objections raised at the hearing either to the goals and objectives of the November 30, 2011 IEP or how progress would be measured and the language for the goals and objectives is *virtually identical* to the language suggested by Milestones. Student's Mother testified that accomplishment of these goals and objectives would constitute meaningful progress. The Panel concurs and finds that the School District's goals and objectives comply with the requirements of the IDEA and State Plan. The Panel assumes that Petitioner's argument is that the present levels section in the IEP and behavior plan were changed by the School District from the wording in the Milestones' versions.

1. Present Levels.

According to the Missouri State Plan, an IEP must include “a statement of the child’s present levels of academic achievement and functional performance, including how the child’s disability affects the child’s involvement and progress in the general education curriculum.” State Plan, Regulation IV at page 43.

According to the Eighth Circuit in *Lathrop*, 611 F.3d at 425, another case in which attorney Walker was involved, “even the entire absence of present level of performance does not deny a student of FAPE if the parties involved knew the information through other means.” *Id.*, citing *Doe v. Defendant I*, 898 F.2d 1186, 1189-91 (6th Cir. 1990).

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

The majority of the Panel finds that the present levels (on the IEP form titled “Present Levels of Academic Achievement and Functional Performance” or “PLAAFP”) in the November 30, 2010 IEP met the requirements of the IDEA and State Plan as well as the *Lathrop* holding. The Milestones’ input was reflected in the present levels regarding how Student was currently functioning and the mode of service delivery at Milestones (e.g., 1:1 instruction), and Mother’s concerns were noted. Changing the tense and wording to indicate what Milestones had done in the past versus what was being required in the future, was out of concern that the IEP would otherwise contain methodology and limit staff to that methodology. There was no change in tense of the goals and objectives in the IEP and Milestones’ versions were adopted almost verbatim. The PLAAFP is not where goals and objectives or how the School District will implement those goals and objectives is stated. The majority of the Hearing Panel finds no IDEA violation with respect to the PLAAFP as present in the November 30, 2010 IEP.

2. Failure to Identify the Special Education and Related Services in the IEP.

Petitioner’s own witness, JR, testified that the November 30, 2010 IEP could be implemented at Milestones, which suggests that she was able to identify the special education and related services required by the IEP. Similarly, the Sherwood representative JC testified that the November 30, 2010 IEP could be implemented at Sherwood, except with the situation regarding the “safe room”, discussed further *infra*. The removal of the prospective application of the

present levels and behavior plan did not affect what the witnesses understood was to be implemented. Further, the targeted behaviors and interventions of both the Milestones' and School District's IEP remain the same; the changes in the School District's version indicated what Milestones had used in the past without suggesting that this approach was the only approach that could be used going forward to deal with Student's behaviors.

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

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

Id. at *11.

While there is no further detail provided within the IDEA or state or federal regulations regarding the definition of a measurable goal, the law is well-established that the IEP goals and objectives are not expected to be as detailed as a teacher's lesson plans. *See, e.g., Nack v. Orange City School District*, 454 F.3d 604 (6th Cir. 2006) (rejecting attorney Walker's argument regarding measurable goals and holding that student's IEPs fully complied with all IDEA procedural requirements and the goals and objectives were capable of measurement); *Kuszewski v. Chippewa Valley School District*, 56 Fed.Appx. 655, 659 (6th Cir. 2003) (rejecting parents' argument that IEP lacked measurable goals and objectives where IEP contained such objectives as that "Brian will recall four story events in sequence after a reading" and noting that such objectives "are concrete examples of the measurable objectives Brian's parents claim the IEP lacks"); *O'Dell*, 503 F.Supp.2d at 1216 (rejecting parent contention that the IEP goals needed to be stated with specificity and finding that where the student's areas of developmental delay were identified, the IEP present level and goals provided "sufficient information" by which to assess the student's disability and the "efficacy of the IEPs"); *O'Toole*, 963 F.Supp. at 1000 (rejecting parent argument that annual goals were too general in nature and noting that parent failed to cite to any legal authority requiring district to establish more specific annual goals); *Logue v. Shawnee Mission USD No. 512*, 959 F.Supp. 1338 (D. Kan. 1997), *aff'd*, 153 F.3d 727 (10th Cir. 1998) (rejecting parent argument that stated goals were too general in nature and stating that parents failed to cite any legal authority to support their position).

Both the Mother and the School District testified as to the progress Student could be expected to make under the November 30, 2010 IEP. The IEP incorporated all of the goals and objectives suggested by Milestones, Mother's preferred service provider. The majority of the Panel can only conclude that the IEP was "reasonably calculated to provide *some* educational benefit to the student for whom it is designed." (emphasis by Court). *Bradley*, 443 F.3d at 974. The fact that the witnesses testified that Student did progress at Milestones under the School District's December 1, 2009 IEP also leads the majority of the Hearing Panel to conclude that the successive IEP was at least designed to provide like measurable progress.

3. Methodology in the IEP.

From the testimony at the hearing and the content of the original complaint and the amendments, Mother is contending Sherwood will be an inappropriate location for the provision of services under the November 30, 2010 IEP because Sherwood does not exclusively follow the applied behavior analysis ("ABA") approach advanced by JR and used at Milestones. According to her testimony and the testimony of LM, this method is the only research based strategy proven effective for the education of autistic children. Tr. 2:208, 4:768. Sherwood uses a variety of strategies for teaching autistic children, including some ABA methodology according to the testimony of JC. JC and LM characterized this as an "eclectic" approach. Tr. 4:799-800, 5:933-34. JR and LM contended that there is no research supporting the value of such an eclectic approach. Tr. 2:222-23, 4:801.⁹ LM and the Milestones' representatives along with Mother, testified that a 1:1 ratio of staff to Student is necessary for Student to learn skills. This is a hallmark of the Milestones program, along with errorless teaching, a discrete trial format and high levels of reinforcement and presumably this is encompassed in the ABA strategy.

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

Federal courts must defer to the judgment of education experts who craft and review a child's IEP so long as the child receives some educational benefit and is educated alongside his non-disabled classmates to the maximum extent possible. Here, Matthew's program was modified in response to the Gills' requests to

⁹ They were unable to identify any research that would have debunked this eclectic approach either. The criticism, not briefed, that there is no academic peer-reviewed research to support the use of multiple methodologies for an individual student, is not of consequence to the Panel's decision. The IDEA statute at 20 U.S.C. § 1414(d)(1)(A)(i)(IV) requires only that an IEP include "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research *to the extent practicable*, to be provided to the child...." (emphasis added). Thus, there is no absolute requirement of "peer-reviewed" research. While IDEA has been amended several times since *Rowley* was decided, methodology has never been mandated as a component of IEPs. To quote the finding of the Hearing Panel for the *Park Hill* due process proceeding, "[i]t would run completely counter to the purpose of IDEA for a school district to withhold the use of an accepted methodology that it believes would work for a student, simply because the use of that methodology in conjunction with the use of other accepted methodologies lacked specific research support." Decision of August 7, 2007, p. 47, n.13.

provide more one-on-one therapy, but the District believed that the proposed private program would deprive him of social interaction necessary for his intellectual development. Parents who believe that their child would benefit from a particular type of therapy are entitled to present their views at meetings of their child's IEP team, to bring along experts in support, and to seek administrative review. The statute set up this interactive process for the child's benefit, but it does not empower parents to make unilateral decisions about programs the public funds. Since Matthew received a free appropriate public education, the Gills have not made out a claim against the District or the Department.

Id. at 1038. *See also E.S. v. Independent School District No. 196*, 135 F.3d 566 (8th Cir. 1998) (FAPE not denied because the school district refused to mandate only the use of a certain methodology in the IEP for a dyslexic child); *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 614 (8th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998) (“As long as a student is benefiting from his education, it is up to the educators to determine the appropriate educational methodology”, citing *Rowley*, 458 U.S. at 208). Further, the Comments to the IDEA Regulations, *Federal Register*, Vol. 71, No. 156, p. 46665 (2006) confirm that the IDEA does not require that an IEP contain a description of “specific instructional methodologies” for its goals and objectives. The comment follows:

Comment: A few commenters recommended that the regulations clarify that the reference to “peer-reviewed research” does not require an IEP to include instructional methodologies. However, a few commenters recommended that the regulations require all elements of a program provided to a child, including program methodology, to be specified in the child’s IEP.

Discussion: ***There is nothing in the Act that requires an IEP to include specific instructional methodologies. Therefore, consistent with section 614(d)(3)(A)(ii)(1) of the Act, we cannot interpret section 614 of the Act to require that all elements of a program provided to a child be included in an IEP.*** [emphasis added]. The Department’s longstanding position on including instructional methodologies in a child’s IEP is that it is an IEP Team’s decision. Therefore, if an IEP Team determines that specific instructional methods are necessary for the child to receive FAPE, the instructional methods may be addressed in the IEP.

This general rule has been applied regularly in cases involving students with autism. In fact, “the clear weight of case law authority in autism methodology cases favors the District.” *Wissahickon School District*, 41 IDELR 22, *3 (Pa. SEA, March 24, 2004), citing *Adam J. v. Keller Independent School District*, 328 F.3d 804 (5th Cir. 2003); *Burilovich v. Board of Education*, 208 F.3d 560 (6th Cir. 2000); *Blackmon v. Springfield R-XII School District*, 198 F.3d 648 (8th Cir. 1999); *Dong v. Board of Education*, 197 F.3d 793 (6th Cir. 1999); *Adams v. State*, 195 F.3d 1141 (9th Cir. 1999); *Renner v. Board of Education*, 185 F.3d 635 (6th Cir. 1999); *J.P. v. West Clark Community Schools*, 230 F.Supp.2d 910 (S.D. Ind. 2002); *L.B. v. Nebo Sch. Dist.*, 214 F.Supp.2d 214 (D. Utah 2002); *Tyler v. Northwest Independent School District*, 202 F.Supp.2d 557 (N.D. Tex. 2002); *J.B. v. Horry Co. Board of Education*, 36 IDELR 65

(D.S.C. 2001); *C.M. v. Board of Public Education*, 184 F.Supp.2d 866 (W.D.N.C. 2002); *Pitchford v. Salem-Keizer School District No. 24J*, 155 F.Supp.2d 1213 (D. Or. 2001); and *Wagner v. Short*, 63 F.Supp.2d 672 (D. Md. 1999); see also *Gill v. Columbia 93 Sch. Dist.*, 1999 WL 33486649 (W.D. Mo. 1999) (concluding that parents did not have a right to compel a school district to provide a Lovaas-style one-on-one program for their autistic child).

As one federal court has noted, “it is not enough for [the parents] to invoke the word ‘eclectic,’ as if that were synonymous with ‘unsound.’ They still have to show that the particular approach used with [the student] was not reasonably calculated to provide him with meaningful educational benefits.” *West Clark*, 230 F.Supp.2d at 935. In *West Clark*, the parents contended that the ABA program is “so far superior to other programs that it should be recognized by the Court as the only reasonable way to teach autistic children.” 230 F.Supp.2d at 916. The court declined to find so. Neither does the fact that alternative methodologies may not be “peer-reviewed” result in a finding that the methodology is unsound. *Joshua A. v. Rocklin Unified School District*, 2008 WL 906243 at *3 (E.D. Cal. 2008) (“It does not appear that congress intended that the service with the greatest body of research be used in order to provide FAPE.”), *aff’d*, 2009 WL 725157 (9th Cir. 2009). See also *Board of Education v. J.A.*, 2011 WL 1231317 (N.D. W.Va. 2011).

Analogous to the current situation, the district court in *J.A.* stated in response to the concerns associated with transition that even if the student experienced negative effects from changing methodologies from ABA to some other method, “this does not mean that the IEP fails to provide a satisfactory education to J.A.” 2010 WL 1231317 at *9. The district court declined to “supplant the role of the IEP and find that only one methodology is appropriate for student simply because it has worked in the past, *especially when the alternative methodology has yet to be tried.*” (emphasis added). *Id.* at *9. Further, the quality of education at the preferred location is irrelevant and has no bearing on whether the IEP “passes muster under the IDEA.” *Id.*

The United States District Court for the Eastern District of Tennessee provided an extensive analysis of the relative merits of ABA and an “eclectic” approach, in *Deal v. Hamilton Co. Dept. of Education*, 46 IDELR 45 (E.D. Tenn., Apr. 3, 2006). In that case, the district court had reversed an ALJ’s finding that the school district’s “eclectic” program failed to meet the *Rowley* standard for a child with autism, and also reversed the ALJ’s conclusion that the school district had committed actionable procedural violations of IDEA.

On appeal, the Sixth Circuit reversed the district court’s judgment with respect to a couple of the alleged procedural violations, and further remanded the case for reconsideration of whether the school district’s program was substantively appropriate. *Deal v. Hamilton Co. Dept. of Education*, 392 F.3d 840 (6th Cir. 2004). The Sixth Circuit asked the district court to reconsider the case while applying a standard under which educational benefit was to be “gauged in relation to a child’s potential.” *Id.* at 864, quoting *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 185 (3d Cir. 1988).¹⁰

¹⁰ The Eighth Circuit has never adopted this heightened standard in any of its IDEA opinions.

On remand, the district court concluded that the school district's "eclectic" approach met even the heightened standard imposed by the Sixth Circuit. *Deal*, 46 IDELR 45. In the process, the district court first debunked the notion conveyed by many that the Lovaas study proves conclusively that ABA/DTT (discrete trial teaching) is the most, if not only, effective way to educate children with autism.

The district court in *Deal* relied in large part on *Pitchford v. Salem-Keizer School District No. 24J*, 155 F.Supp.2d 1213 (D. Ore. 2001). In that case, the court noted that Dr. Lovaas' study involved high functioning children with autism, which skewed the results of his study in favor of the methods used in the study. *Id.* at 1230-31. The *Pitchford* court therefore found that the general applicability of Lovaas' methods "to the broad range of autistic children is not clear." *Id.* at 1230-31.

The *Deal* court also relied on *Z.F. v. South Harrison Community Schools Corp.*, 2005 WL 2373729 (S.D. Ind. 2005). In that case, the parents of an autistic student entering kindergarten insisted that the school district continue implementing the ABA/DTT methods that had been used with the child in a home program for the past three years. The parents criticized the school district's program as "impermissibly eclectic." 2005 WL 2373729 at *12. School district personnel testified that they would use a variety of methods, including TEACCH and some ABA techniques. They further testified that the specific program for the student would depend upon what the district personnel perceived would benefit him once he began attending the school. *Id.*

The court in *Z.F.*, 2005 WL 2373729 at *12, endorsed the school district's approach:

This kind of flexible and varied approach is consistent with the IDEA's requirement that educational approaches be tailored to a child's individual needs. The IDEA does not specify any particular methodology and does not prohibit the use of multiple methods. The plaintiffs and their advisors clearly believe that an ABA-based program would be of greater benefit to Z.F., but again, that is not the question here. The question is whether the IHO and BSEA erred in finding the program proposed by the school to be in compliance with the IDEA. The district's proposed varied and flexible approach to Z.F.'s education does not, without more, meet the plaintiffs' burden on this question.

After discussing in considerable detail *West Clark*, the *Deal* court analyzed the evidence before it, and concluded that the school district's "eclectic" approach was appropriate, even under the heightened standard imposed by the Sixth Circuit. *Deal*, 46 IDELR 45. The school district identified several accepted methodologies it used in its programs for autistic children, including ABA/DTT, the Picture Exchange Communication System, structured teaching and incidental teaching. It presented evidence of positive outcomes achieved by autistic students who had been educated under those programs, including some who have been able to function in classrooms with non-disabled children. It also demonstrated that it had qualified personnel with expertise in educating children with autism. Based upon this evidence, in conjunction with flaws identified in the continued use of ABA/DTT, the *Deal* court concluded that the school district's "eclectic" approach satisfied the requirements of IDEA. The district court's decision in *Deal* was later

affirmed by the Sixth Circuit. *Deal v. Hamilton Co. Dept. of Ed.*, 258 Fed.Appx. 863 (6th Cir. 2008).

This discussion makes clear that the label applied to the type of programming to be provided a child is immaterial. If the District can show that the programming it will provide in whatever location meets the *Rowley* standard, then the District has complied with IDEA regardless of whether the ABA method is subjectively “better” or of more “quality.” The concerns about Student’s alleged difficulties with transitions alone, cannot drive the choice of methodology, especially where the proposed methodology has never been tried.

Despite the Petitioner’s contention regarding Sherwood not using ABA techniques, Sherwood and the School District have both committed to 1:1 instruction and other ABA methodologies as long as Student needs and benefits from it. Sherwood and the School District are willing to add personnel to implement the 1:1 instruction. There is nothing to allow the panel to conclude that Sherwood staff would not be qualified to implement Student’s IEP. While not briefed, another subject of hearing testimony was low-sensory environment. The evidence did not show that Milestones was in fact the perfect low-sensory environment, as its co-founder referred to the environment there as “noisy.” Tr. 2:243. Student was able to tolerate the noise and make progress at Milestones.

While the Panel unanimously finds that the goals and objectives of the November 30, 2010 complied with the IDEA, the majority of the Panel finds that the November 30, 2010 IEP developed by the School District may be implemented at Sherwood in compliance with the IDEA.

4. Are related services such as counseling or home-based supervised programs required by IDEA and if so, necessary to provide Student with FAPE?

Counseling services may be a related service under an IEP, if required to assist a child to benefit from special education. 34 C.F.R. § 300.34(a). While there was testimony from Mother that the counseling was of assistance to Mother in handling Student’s behaviors at home, there was no testimony that the counseling was assisting Student in receiving special education services and no testimony from the Milestones’ representatives that this has been necessary for Student to advance in his educational program there. The November 30, 2010 IEP, the implementation of which would allow Student to make meaningful educational progress according to Mother, did not contain any counseling requirement.

Other than there being insufficient evidence of a connection between the counseling services and educational needs, there is insufficient evidence that Mother made a request for this from the School District. Other than Mother’s testimony, there is no corroboration from any other person, including Dr. KD and Mother’s advocate RH.

In *Gill v. Columbia 93 School District*, 217 F.3d 1027 (8th Cir. 2000), the Eighth Circuit affirmed a judgment upholding the exclusion of expert testimony as irrelevant where its subject had not been brought up at the student’s IEP meeting. The logic of *Gill* is that IEPs are to be developed in a collaborative process, and thus parental requests and concerns should be raised during the

development process in order to allow the School District an opportunity to respond. Without any indication that Student's home behaviors were impacting his school behaviors and educational experience, or a request from Student's Mother that the District provide in-home behavioral or counseling services, the District had no duty to offer those services, and a due process hearing is not the appropriate place to initiate a request for such services.

Further, the Panel notes that the services of Dr. KD were already paid for by the Missouri Department of Mental Health. Tr. 4:825-826. Student and Mother can presumably still receive those services from DMH, regardless of where Student is educated. There was testimony that Sherwood contracts with the Department of Mental Health to provide in-home services for parents who need them. Tr. 5:908.

The Hearing Panel unanimously finds no IDEA violation with respect to the provision of counseling or in-home behavioral services.

5. Is a transition plan and/or behavior intervention plan necessary for Student to receive FAPE, and if developed, were they adequate to provide FAPE?

a. Transition Plan.

A transition plan is only mandated by the IDEA under limited circumstances for students age 16 and older, to set forth postsecondary goals for the student and a statement of the transition services necessary to assist the student in meeting those postsecondary goals. 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320; State Plan, Regulation IV, Page 42-43. Congress included a rule of construction (20 U.S.C. §1414(d)(1)(A)(ii)) to guide hearing panels and the courts when faced with questions about the required content of IEPs:

Nothing in this section shall be construed to require that additional information be included in a child's IEP beyond what is explicitly required in this section.

Hearing panels may not read additional requirements into IDEA without running contrary to the law. *Lathrop*, 611 F.3d at 425 (8th Cir. 2010) (“[W]e will not compel a school district to put more in its IEPs than is required by law.”)

“Transition services” is a defined term in 20 U.S.C. §1401(34) of IDEA, and reflects the congressional intent that school districts consider “transition services” only for older students:

The term “transition services” means a coordinated set of activities for a child with a disability that—

(A) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to postschool activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and

adult education, adult services, independent living, or community participation;
(B) is based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests; and
(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation. (emphasis added.)

Transition plans are not statutorily required for students as young as Student. See *Bradley v. Arkansas Dept. of Education*, 443 F.3d 965, 970 n. 9 (8th Cir. 2006) (“A transition plan should call for services that assist the disabled child in preparing for life after school.”). At least two other courts have explicitly held that transition plans are not required for students such as Student. See *Robert B. v. West Chester Area School District*, 2005 WL 2396968, *8 (E.D. Pa. 2005) (“The IDEA only requires a ‘transition plan’ for an impending transition from school to post-school (i.e., adult) activities, not for transfers between schools”); *Bock v. Santa Cruz City Schools*, 1996 WL 539715, *5 (N.D. Cal. 1996) (“Federal law does not require a transition plan back to the public school.”).

In a recent Eighth Circuit Court of Appeals case involving the same counsel as before this hearing panel, *Park Hill School District v. D. D. and K.D.*, Nos. 10-2187 and 10-2189 (decided September 9, 2011), the school district had appealed the decision of the district court upholding a hearing panel’s determination that a FAPE was denied the students, not because of the failure of the school district to offer a program that in essence mimicked the Milestones’ program where the students were enrolled with respect to 1:1 errorless teaching, low sensory environment and positive reinforcement, but because the IEPs did not include strategies that would have adequately addressed the transition to public school and did not include a behavior intervention plan or otherwise adequately address behavior issues. The Eighth Circuit overturned the district court’s decision holding:

The IDEA only *requires* than an IEP include “transition services” and a “behavior intervention plan” in limited circumstances not present in this case. . . [emphasis in original].

....

The absence of IEP provisions addressing transition and behavior issues does not, standing alone, violate the IDEA or deprive the disabled child of a FAPE. [citations omitted]. In other words, as numerous cases confirm, the absence of these provisions in the 2005 IEPs was at most a procedural, not a substantive error. [citations omitted]. If [students] had attended a District school, and if the transition services or behavior interventions that the District *actually provided* were alleged to deny a FAPE, that would raise an issue of substantive error. [emphasis added] [citations omitted]. But in a case where the Parents refused to give the District an opportunity to implement the IEPs and private school

reimbursement was the issue, the Panels' failure to recognize this critical distinction was an error of law. See Ind. Sch. Dist. No. 283, 88 F.3d at 562.

From the above authorities, the District had no obligation to create, or even consider, a transition plan in conjunction with a transfer of Student from Milestones to Sherwood. However, if the School District *did* create one, it can only be reviewed as a substantive FAPE violation in its *implementation*.

Even if the Panel were to disregard the Court's decision in *Park Hill* suggesting the analysis is purely of the plan as it is implemented, the Panel's review of the School District's transition plan (R-561) finds it sufficient. It incorporates many features of Milestones' proposed plan. It includes provisions for coordination between Milestones and Sherwood staff, observations by Sherwood's teacher of Student while receiving services at Milestones, training of Sherwood's staff, ongoing support, and visits by Student to Sherwood before starting instruction there. Further, it provides for Student initially to attend each school for a half day for the first 12 school days, except for those days each week when his Sherwood class is on community outings, when Student will attend Milestones the entire day. Dr. CH attested to the District's readiness to implement the transition plan when the transition commences (Tr. 7:1137-1142), including the ability to hire any staff required with 30 days' notice. Tr. 7:1142. The District had recently hired several additional personnel to assist with gaining additional internal expertise for students with autism, which in turn will aid in addressing the needs of students. Tr. 7:1142-1146.

The Panel majority finds no IDEA violation with respect to the School District's development of a transition plan for Student.

b. Behavior Plan.

The *Park Hill* case also overruled the hearing panels' decisions adopted by the district court, that the "lack of a behavior intervention plan in the 2005 IEPs was a procedural inadequacy that 'compromised the pupil's right to an appropriate education.'" The IEPs did reflect strategies to address behaviors. District personnel had testified that if the strategies were unsuccessful that they would conduct a functional behavioral assessment and develop an individualized behavior intervention plan. Noting that the Milestones' staff had first observed the students and then developed a written behavior plan, the Eighth Circuit noted: "The Panels had no reason not to assume the same process would have occurred had the Parents enrolled [students] at [the public school]."

The holdings of the *Park Hill* court regarding substantive FAPE violations being predicated on the actual implementation of an IEP also apply to behavior plans. However, the IDEA does not require the inclusion of a BIP at any particular date. In *Lathrop*, one of the grounds for the district court overturning the hearing panel was its decision that the student in question was denied FAPE due to the failure of the district to adequately address behavior issues in the IEP. The panel had stated that the IDEA does not require a school district to create goals or objectives for behavior in an IEP, but the panel believed that the IEP should document in some way that behaviors are being addressed, through goals and behavior plan or a statement in the present levels section of the IEP. The district court disagreed, as the panel had found that the student

was continuing to progress academically. The district court stated, “if the student’s IEP is “reasonably calculated to enable the child to receive academic benefits” [quoting *Rowley*], then the IDEA’s IEP requirements have been met.” *Lathrop*, 2010 WL 2982645 *9.

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

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

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

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

Id. at 638-39.

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

While the Student’s BIP was never implemented at Sherwood, the Panel notes that the targeted behaviors and responses are the same in both the Milestones and the Sherwood/School District’s plans. The objections to the School District’s behavior plan was that it took out what the School District considered to be the methodology for how Milestones was addressing Student’s behaviors, and set them out as historical context. The discussion of methodology above also applies to the methodology of a behavior plan, whether a separate document or contained in the IEP. The proposed BIP contains appropriate positive behavioral interventions, strategies and supports to address his known behaviors, as reported by Milestones. If the implementation of the District’s BIP proves insufficient to address behaviors, then the IEP team can be reconvened.

The Parent’s main complaint with the verb tense changes relates to the behavior intervention plan drafted by PBM. However, the majority of the Panel does not believe the District’s changes were material, because they did not change in any way the actual BIP itself as it related to the interventions to targeted behaviors. The BIP drew a distinction between the interventions for the targeted behaviors, which continued to be expressed in the future tense, and the teaching strategies being employed with Student, which were properly written in the past or current tense. If particular teaching methodologies are not required to be listed in an IEP, then they are not required in a BIP which is when developed, considered a part of the IEP.¹¹

The only difference that will exist in applying the Milestones and Sherwood/School District’s BIP to targeted behaviors, is that the “safe room” in its present form will not apply. As of July 1, 2011, Milestones’ safe room is illegal under Missouri law (at least with respect to students like Student who are placed at Milestones by public school districts). Section 160.261.1 R.S.Mo. requires each Missouri school board to adopt a written policy for student discipline. Section 160.263.1 R.S.Mo. requires that each school discipline policy prohibit the confinement of a student in an unattended, locked space except for an emergency situation while awaiting the arrival of law enforcement personnel. Pursuant to Section 160.263.3 R.S.Mo., MDESE adopted a model policy on the use of restrictive behavioral interventions, which carried out the prohibitions of subsection 1 of that statute. The DESE model policy (found at <http://1.usa.gov/peitMm>) prohibits the use of “seclusion,” which is defined as “the confinement of a student alone in an enclosed space from which the student is physically prevented from leaving by locking hardware.”

¹¹ See the Special Considerations portion of the IEP form which asks, “Does the student exhibit behaviors which impede his/her learning and that of others.” If the box is checked “yes”, the form goes on to state that “strategies including positive behavior interventions and supports must be considered by the IEP team, and if determined necessary, addressed in this IEP. *If a behavior intervention plan is developed it must be a part of the IEP.*” (emphasis added). R-694 at 1006.

Public school districts placing students in a private school are required to ensure that the private school complies with applicable state law, with respect to the students placed by the public school district. See State Plan, Regulation VIII, Section 1 at p. 124 (For children placed in an approved private agency by a public school district, “Each child must be provided an education that meets the standards that apply to the education provided by the SEA and LEAs and each child has all the rights of a child with a disability who is served by the public agency.”) The District would not be permitted to use a safe room like Milestones’ if the District were educating Student in its own facilities; thus, the District may not allow Student to remain placed at Milestones if it is violating Missouri law with respect to the services it provides to Student.¹²

The Student’s BIP does not define a “safe room” to be any particular type of room, so the fact that Sherwood would implement this part of the IEP differently than Milestones does not mean that the concept would not be implemented. It is inevitable that different schools will do some things in different ways, and the legal test for whether the location of services may be changed does not require complete uniformity in approaches or philosophies among the two schools.

The majority of the Panel concludes that there was no IDEA violation in how Student’s behaviors were addressed by the School District’s November 30, 2010 IEP and its component behavior plan.

E. Stay Put.

The Panel, the majority having determined that the School District has not violated the IDEA with respect to the allegations of the due process complaint, turns its inquiry to the Student’s “stay put” placement for purposes of any appeal.

Under the “stay-put” provision of IDEA, a student is entitled to remain in his current “educational placement” during the pendency of due process proceedings. 20 U.S.C. § 1415(j).¹³ The current educational placement has been determined to be the placement set forth in the last implemented IEP, when there is an IEP. See, e.g., *Magnum v. Renton School District*, 2011 WL 307376 (W.D. Wash. 2011) (“If an IEP has been implemented, then that program’s placement will be the one subject to the stayput [sic] provision.”) ; *Johnson v. Special Education Hearing Office*, 287 F.3d 1176, 1180 (9th Cir. 2002); *Thomas v. Cincinnati Board of Education*, 918 F.2d 625 (6th Cir. 1990); *Drinker v. Colonial School District*, 78 F.3d 859, 867 (3rd Cir. 1996) (“the dispositive factor in deciding a child’s ‘current educational placement’ should be the [IEP] actually functioning when the ‘stay put’ is invoked.”). See also Federal Register, Vol. 71, No. 156, p. 46709 (2006) commenting on stay put as referring to “the setting in which the IEP is currently being implemented.”

¹² Parents contended in *Letter to Green* that a move to another private school occasioned by the private school where students were placed becoming “decertified” by the State was a change in placement. OSEP disagreed. A decertified school is no longer eligible to be considered a placement for purposes of the stay put and the school district in question was authorized to move the students in an appropriate educational program in an approved private school.

¹³ Pendency of due process proceedings also includes actions in the federal district and appellate courts. *Joshua A. v. Rocklin Unified School District*, 559 F.3d 1036 (9th Cir. 2009).

Courts have uniformly interpreted “educational placement” to refer to the services the student receives, rather than the physical location of the services. *E.g. N.D. v. Hawaii Dept. of Education*, 600 F.3d 1104, 1114-16 (9th Cir. 2010) (summarizing the various circuits’ interpretation of “current educational placement” and concluding the term refers to an educational program, not a building). Specifically, “educational placement” refers to “the overall educational environment rather than the precise location in which the disabled student is educated.” *A.W. v. Fairfax County School Board*, 372 F.3d 674, 676 (4th Cir. 2004).

A change of location of the provision of services or a change to certain services within an IEP is considered a change in “educational placement” only when the change results in a fundamental change in, or elimination of, a basic element of the student’s educational program. *Stancourt v. Worthington City School Dist.*, 2008 WL 4151623, at *7 (Ohio Ct. App. 2008); *Erickson v. Albuquerque Public Schools*, 199 F.3d 1116 (10th Cir. 1999). “Not every change to a student’s IEP constitutes a change in educational placement. . . . The focus should be on the importance of the particular modification and whether it is likely to significantly affect the child’s learning experience.” *Id.* at *6 (citing *DeLeon v. Susquehanna Cmty. Sch. Dist.*, 747 F.2d 149, 153 (3d Cir. 1984)).

The Office of Special Education Programs of the U.S. Department of Education has provided guidance on what a change in placement entails. OSEP has determined that change in placement requires the substantial or material alteration of an education program. OSEP sets forth the following areas of review:

1. The IEP is being revised concurrently;
2. The student will be educated with non-disabled peers to the same extent;
3. The student will have the same opportunities to participate in extracurricular and nonacademic services; and
4. The new location is same option on the continuum of alternative placements.

Special Education Quarterly Bulletin #4, University of Washington (January 2002) summarizing OSEP’s *Letter to Green*, 22 IDELR 639 (OSEP 1995) and *Letter to Fisher*, 21 IDELR 992 (OSEP 1994).

A move from one type of program in the continuum of alternative placements, from regular class to home instruction is considered a change in placement. *N.D. v. Hawaii Dept. of Education*, 600 F.3d 1104 (9th Cir. 2010). *See Hale v. Poplar Bluff R-1 School District*, 280 F.3d 831 (8th Cir. 2002) (concerning proposed change from homebound to public school setting); *Board of Education v. Illinois State Board of Education*, 103 F.3d 545, 548 (7th Cir. 1996) (expulsion is a change of placement). *See also Park Hill* (while stay put was not an issue in the case, the Eighth Circuit noted that Milestones was the stay put placement since the school district was proposing a move of the students from private school placement at the school district’s expense back to the public school).

The *Illinois State Board of Education* case was cited by the Eighth Circuit in *Hale* in determining that a change from homebound to public school would constitute a change in placement. The Seventh Circuit in *Illinois State Board* held that:

We accept as the outer parameters of “educational placement” that it means something more than the actual school attended by the child and something less than the child’s educational goals.

103 F.3d at 549. In that case the child had to be moved because of his expulsion but the successive transfers were appropriate to accommodate the “educational status quo for a growing, learning, and disturbed teenager, and thus do not reflect a change in educational placement.” *Id.* The Court held that in order to “effect the stay-put provisions and preserve an ‘educational placement,’” it had to “move one level of abstraction to [student’s] IEP, which establishes [student’s] educational needs and goals.” *Id.* As each successive program was able to “implement a substantively identical IEP”, there was no stay put issue regarding the transfers between programs. *Id.*

In order to determine whether the education environment has changed, the courts will look at whether the new setting “replicates the educational program contemplated by the student’s original assignment and is consistent with the principals of ‘mainstreaming’ and affording access to a FAPE.” *AW v. Fairfax County School Board*, 372 F.3d 674, 682 (4th Cir. 2004). The full honoring of an IEP at another location would indicate no change in placement. *Morris v. Metropolitan Government*, 26 IDELR 159 (M.D. Tenn. 1997). Changes in placement may be found even if the child remains at the same placement on the placement continuum, if “there is a significant change in the student’s program.” *N.D.*, 600 F.3d at 1116. The modifications that may result from a change in location are analyzed as to whether they “affect in some significant way the child’s learning experience.” *J.R. v. Mars Area School District*, 318 F.App’x 113 (3rd Cir. 2009), quoting from *DeLeon v. Susquehanna Community School District*, 747 F.2d 149, 153 (3rd Cir. 1984).

The question to be asked then is whether the change in location proposed by the move of Student from Milestones to Sherwood would result in a substantial or material alteration of Student’s education program. Petitioner contends that it would in certain significant respects: one, a change in methodology between the programs; two, the inability of the new location to implement the behavior plan; three, a change in the number of opportunities for outings in the community; and four, a change in the number of hours of programming

Petitioner relies heavily on *Hale* and its language suggesting that no change in location can occur if it is not for “fiscal or other reasons unrelated to the disabled child” and that a change in location made “on account of the disabled child or his behavior has *usually* been deemed a change in educational placement that violates the stay-put provision if made unilaterally.” (emphasis added). 280 F.3d at 834. According to this argument, a child can never be moved unless there is a fiscal or other business reason unrelated to the child. A reading of *Hale* suggests that the Court spoke in broad generalities and it noted that the district court below had made “specific findings as to the impact of this change [in location] on [student’s] education.” *Id.* The change in location in *Hale* was from a home environment to the public school, which is a change on the continuum of education placements in Missouri (State Plan at Regulation IV, p. 56) where the *Hale* school district (Poplar Bluff) was located. In its citation of the *Illinois State Board* case, the *Hale* court did not seem to note its ultimate finding or the holdings of the cases

cited therein. In any event, the Panel does not believe a fair reading of *Hale* with its reference to what has *usually* been done and its emphasis on the *impact* of a change in location for the particular student, will prevent if appropriate a finding that stay put would be honored in the context of an alternative location for this Student's program.

Courts have reviewed the impact of a change in methodology on students. The issue in considering the impact of such a change is whether the goals and objectives of the IEP are still likely to be accomplished in the new location. See *Tuscaloosa County Board of Education*, SEA (Ala. 1994), 21 IDELR 826. As schools have discretion to change staff and methodology in order to carry out the goals and objectives of an IEP, such changes do not constitute a change in placement. In *Dong v. Board of Education*, 197 F.3d 793 (6th Cir. 1999), the Sixth Circuit held that a change in methodologies for an autistic child which reduced the amount of one-on-one behavioral therapy and reduced the number of weekly programming hours did not constitute a change in placement.¹⁴

In a case cited by Petitioners, *Erickson v. Albuquerque Public Schools*, 199 F.3d 1116, 1122 (10th Cir. 1999), the Court stated that “[a]n educational placement is changed when a fundamental change in, or elimination of, a basic element of the educational program has occurred.” The parents argued in this case that a change in the modality of occupational therapy provided to the student through an elimination of hippotherapy constituted a change in placement. The Court found otherwise, finding that occupational therapy continued to be provided “although in a different form than hippotherapy” and that “the therapy was intended to address the same therapy issues as hippotherapy without changing a basic element of [student’s] educational program.” *Id.*

The majority of the Panel does not find a change in methodology to be a change in placement. The IEP for Student that will be the stay put IEP, the IEP of December 1, 2009, will not change. The stay put IEP does not specify methodology, indeed the subsequent November 30, 2010 IEP was more specific in that regard with the addition of the requirement on Form F that consistent staff be present at the introduction of new skills. R-694 at 1028.

A concern about transition to a new location does not drive a determination of whether the change then would be a change in placement. *L.M. v. Pinellas County School Board*, 54 IDELR 227 (M.D. Fla. 2010). Autistic children who experience difficulties in transition may still be relocated if the relocation does not constitute a change in placement without reference to the transition difficulties.

The School District did have a transition plan proposed in an attempt to ease the Student's entry into the new location. That may still be followed as it does not alter the goals and objectives of the IEP and further shows the School District's intent to replicate much of the methodology experienced by the Student at Milestones while adjusting to new surroundings. In fact, the School District and Sherwood representatives indicated that Student would continue to receive

¹⁴ This court noted the district court's conclusion that the change from the Lovaas style program to the District's mix of one-on-one and small group instruction would further the goals of the IDEA of providing services in the LRE and was better designed to develop student's potential. 197 F.3d at 803.

1:1 instruction and not be moved into group instruction until the data suggested that Student could tolerate such a move.

The majority of the Panel does not find a change in placement would occur by virtue of any difference in methodology between the Milestones and Sherwood programs.

With respect to the behavior plan, Sherwood representatives advised that it would be followed, save for the “safe room.” As it appears that this “safe room” would likely violate Missouri law and because a “safe area” at Sherwood exists that could be used for the same purposes of the “safe room,” the majority of the Panel finds no change in placement as a result of the inability to provide a “safe room.”

The argument regarding the change in hours and length of program does not cause the majority of the Panel to find a change in placement. In accordance with the *Dong* case, the question is whether the change in hours would affect the student’s learning experience in some way. The Panel does not find the change in hours to adversely affect the Student’s learning. On a weekly basis the change is just over an hour per week. There was no evidence that the “mini breaks” at Milestones would be any different in overall amount than the two two-week breaks built into the Sherwood program.

Similarly the Panel majority does not find that a change in the number of outings constitutes a change in placement. The IEP does not state the number of outings per week to be provided to Student or whether for that matter there will be outings at all. As long as the goals and objectives of the stay put IEP can be accomplished, the method of accomplishing them is up to the discretion of the professional educators.

Overall, the evidence in this case does not support a conclusion by the Panel majority that moving Student from Milestones to Sherwood pursuant to the April 1, 2010 Notice of Action would have resulted in a change of placement subject to the stay put provisions of the IDEA. When the School District first issued the Notice of Action for the move, there was no discussion of changing the IEP at that time. Student’s goals and objectives were to remain the same. Student would have received the same services at both locations, and at least initially, he would have been taught at Sherwood in a cubicle, solely on a 1:1 basis, just as he was at Milestones. Any transition to group instruction at Sherwood was projected to occur gradually, if at all, and only to the extent data at Sherwood supported such a move.

The Panel majority therefore finds the Student’s stay put placement to be the December 1, 2009 IEP and that this IEP and the behavior plan which corresponded to this IEP,¹⁵ with the exception of the “safe area” in lieu of a “safe room”, may be implemented at Sherwood.

CONCLUSIONS OF LAW

The Hearing Panel makes the following conclusions of law on Petitioner’s issues:

¹⁵ From the exhibits, it appears that this Behavior Intervention Plan is the one located at R-537, dated January 7, 2009.

1. The Panel majority finds that the Petitioner did not meet her burden of proof in order to establish that the School District denied Student a free appropriate public education by procedural errors.

2. The Panel majority finds that the School District's November 30, 2010 IEP, to be implemented at Sherwood Center, provides a free appropriate public education to Student in the least restrictive environment.

DECISION

The Panel majority concludes that Petitioner has not met her burden of proof to establish IDEA violations on the issues before the Hearing Panel as raised by Petitioner's complaint as amended and thus the Panel's finding is in favor of the Kansas City, Missouri 33 School District in this matter.

A separate decision of Panel member Marilyn McClure, dissenting in part, is attached.

Pursuant to Section 162.962 R.S.Mo., the following procedures apply to requests for judicial review:

1. Proceedings for review may be instituted by filing a petition in the state circuit court of the county of proper venue within forty-five (45) days after the receipt of the notice of the agency's final decision and are governed by Chapter 536, R.S.Mo., to the extent not inconsistent with other provisions of Chapter 162 R.S.Mo. or 34 C.F.R. Part 300.
2. The venue of such cases shall be at the option of the plaintiff, be in the Circuit Court of Cole County, or in the county of the plaintiff's residence.
3. You also have a right to file a civil action in federal or state court pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(2) and 34 C.F.R. § 300.516.

McClure, Panel Member, Dissenting in part.

1. Do the IEPs proposed by the School District to be implemented at Sherwood Center provide FAPE to Student?

I believe my fellow panel members have discounted the unique needs of this student. This student has severe and dangerous behaviors that RH characterized as “very significant”, and “inappropriate and unsafe”.

The student weighs 265 pounds.

When in a setting other than 1:1, he would require significant management resulting in a staff member having to attend to him and not the other students. This would be necessary for the safety of the others. He just learned to tell others “excuse me” when bumping others.

Sherwood’s setting is more open, and a teacher to student ratio of 5:1. This looser setting would not be conducive to educational benefit for the student. Fewer outings, less time, and inability to implement the behavior plan would not be FAPE.

2. Did the School District in the IEP process consider input from persons knowledgeable about Student and his disabilities and provide the required opportunities for Student’s Mother to participate in the IEP development process?

“The differences between the present levels and the BIP were due primarily to verb tense changes, which in the opinion of the professional educators within the School District was necessary to remove methodology from the IEP. Tr. 7:1147-48, 1154-56. This was done, at least according to Mother with respect to the present, after a “plenty of debate” and that’s why the meetings for the November 2010 IEP were “three days long.” Tr. 2:179. “

Three days of meetings for a parent to endure so that the district administrators could get the wording they desired is contrary to a parent being able to effectively participate. This cannot be viewed as three days of opportunity for parental participation. The extraordinary length of these meetings brings into question the credibility of “professional educators” and intent.

Specialists in behaviors may have more expertise than “professional educators” when dealing with students with severe behaviors; thus a potential for disagreement.

It was revealed during the hearing that a school district administrator involved with this student sat on the board of Sherwood Center. This panel member sees that as a conflict of interest and that it should have been made known to the parent.

3. Are related services such as counseling or home-based supervised programs required by IDEA and if so, necessary to provide Student with FAPE?

I concur with my panel members that “The panel does not find an IDEA violation with respect to the provision of counseling or in-home behavioral services”.

4. Is a transition plan and/or behavior intervention plan necessary for Student to receive FAPE, and if developed, were they adequate to provide FAPE?

This student's primary disability is his aggressive behavior(s), thus requiring a BP.

It is erroneous here to categorize the proposed transition plan meant to transition the student with behaviors to another setting synonymous with IDEA "transition" plans to adulthood.

It is reckless to not have a plan of some sort for a student with aggressive behaviors when a move is considered. In this instance, a transition plan for such student is an extension of the Behavior Plan.

The district's pursuit of removal of future verb tense in the BP is indicative of moving toward a more generic plan; that is, it moved toward less individualization for this student.

It is not yet known to this panel member if the safe rooms/safe spots at either potential placement are affected by a new Missouri seclusion law.

STAY PUT

The issue of "stay put" has been involved in this due process proceeding. The Student's Mother's initial complaint requested that Student remain at his location of Milestones Academy pending resolution of the due process complaint. Student's Mother's complaint contended that the change of location proposed for Student would not provide FAPE and that it was not just a change in location but a change of everything in Student's program.

This panel member finds many of the cases referenced by my fellow panel members as non-binding.

The argument regarding the change in hours and length of program does rise to the level of a change in placement. I do find the change in hours to adversely affect the Student's learning. Even a change of 2 hours a week is significant.

A change in the number of outings to constitutes a change in placement. The IEP does not state the number of outings per week to be provided to Student or whether for that matter there will be outings at all. As long as the goals and objectives of the stay put IEP can be accomplished, the method of accomplishing them is up to the discretion of the professional educators.

Outings are where the student can generalize his skills; thus their importance. Placement at Sherwood would reduce the number of outings.

Petitioner contends that it would in certain significant respects: one, a change in methodology between the programs; two, the inability of the new location to implement the behavior plan; three, a change in the number of opportunities for outings in the community; and four, a change in the number of hours of programming. These four components would materially change the students "current" situation.

Since “a student is entitled to remain in his *current* “educational placement” during the pendency of due process proceedings”; what is current is his situation at Milestones. He is not currently at Sherwood. Thus, when mother triggered “stay-put” the student was attending at Milestones. Stay put is not arbitrary; how was the mother to know what stay-put would be other than to trigger it?

Stay-put is the *current* situation, regardless of where it does or doesn't fit in MODESE's “continuum of placements” chart.

Finally, I am discouraged by this panel's lack of objectivity when a student is currently in a situation that works and he and others are safe. Change for the sake of change is not always appropriate.