

school tuition during the 2012-13 school year, or to pay his private school tuition from April 2013 onward.

Procedure

On April 24, 2013, Drs. Jennifer Femiano (Mother) and Christopher Sullivan (Father) filed a due process complaint on behalf of their son, (together with his parents, “the Petitioners”), against Blue Springs R-IV School District (“the District” or “Respondent”). We sent our hearing notice to both parties on the same date. In the notice, we scheduled a prehearing conference for May 13, 2013, and ordered both parties to file a pre-hearing conference statement with this Commission three days before that date. We also scheduled the hearing for May 30, 2013.

Attorneys for the District filed a limited entry of appearance and answer on May 6, 2013. Petitioners filed a motion to continue the pre-hearing conference on May 7, 2013, because the parties had agreed to engage in mediation beginning on May 13, 2013. On May 17, 2013, Petitioners informed us that the mediation was not successful and asked for a continuance of the hearing date. The District also filed a motion for continuance, and we continued the hearing to July 15-16, 2013.

On June 7, 2013, the District filed an unopposed motion to continue the hearing. We continued the hearing to August 19-20, 2013, with a decision due date of September 13, 2013.

The District filed a motion to dismiss or in the alternative motion for summary decision on June 18, 2013. Petitioners filed their response on July 18, 2013. We denied the motion on August 1, 2013.

Petitioners filed a motion for continuance on August 2, 2013. We granted Petitioners’ motion on the same date and continued the hearing to October 8-9, 2013.

On August 28, 2013, Petitioners' counsel, Alexander Edelman, filed his motion for an out-of-state attorney, Stephen Walker, to appear *pro hac vice* on behalf of Petitioners. We granted the motion on August 30, 2013.

We held a conference call on the record with the parties on September 4, 2013. On September 6, 2013, for good cause shown during the conference call, we issued an order extending the hearing from two to four days, set for October 8-11, 2013. We held a hearing on those dates. Because the parties did not conclude the presentation of their cases during those four days, we found good cause to schedule another day of hearing. The parties also moved to extend the decision timeline.

We issued an order on October 15, 2013, setting November 12, 2013 as the last day of hearing. We also ordered the parties to file simultaneous proposed findings of fact and conclusions of law ("written arguments") on December 13, 2013. We set a decision due date of January 15, 2014.

We held the last day of hearing on November 12, 2013. On December 6, 2013, Petitioners filed a motion for a one-week extension of time to file their post-hearing written argument. The District opposed the motion. Petitioners supplemented their motion with the formal request that, should the extension be granted, the decision deadline also be extended to January 22, 2014. We granted the motion and set the decision deadline for January 22, 2014.

The District filed its written argument on December 18, 2013. On December 19, 2013, Petitioners requested an extension of time to December 23, 2013, to file their written argument. Although Petitioners' request was opposed by the District, we granted the motion. The matter became ready for decision on December 23, 2013, the date Petitioners filed their written argument.

Evidentiary Ruling

At the hearing on November 12, 2013, Petitioners offered as rebuttal evidence notes that one of their expert witnesses, Jessica Royer, had prepared concerning Student's IEP. The District objected because the document was not produced in discovery or at the last hearing and because the evidence went beyond the scope of cross-examination. Petitioners argued that they offered the evidence as rebuttal to the questions and answers of the witness on cross-examination indicating that Ms. Royer requested only a few items be included in 's final IEP that were not so included. We sustained the objection because 34 CFR 300.512(a)(3) provides that a party may prohibit introduction of evidence that has not been disclosed to the party at least five business days before the hearing. Petitioners then made an offer of proof. Tr. 1248-51. After the hearing, they supplied the document to this Commission and to opposing counsel. We received it on November 14, 2013.

Upon reconsideration, we reverse our ruling. After researching the issue, we have found no case law that would prohibit the introduction of rebuttal evidence in IDEA cases, notwithstanding the rule set forth in 34 CFR 300.512(a)(3). We mark Petitioners' offer of proof as Petitioners' Exhibit 42; we will allow the notes to be admitted into the record strictly for the purpose of rebuttal.

Findings of Fact

1. is a year-old student currently residing in the Blue Springs R-IV School District. *Resp. Ex. A at 1.*
2. is an intelligent boy with a high I.Q. who learns quickly. The evaluation of 's general Intelligence Quotient has produced scores consistently above 125, with his most recent evaluation producing a full scale score of 126. *Resp. Ex. U at 126.* However, he also has several disabilities including Asperger's syndrome (an autism spectrum disorder, or "ASD"), attention

deficit/hyperactivity disorder (“ADHD”), dysgraphia,¹ dyspraxia,² and sensory integration disorder, as well as a life-threatening allergy to peanuts and tree nuts.

3. Certain stimuli, such as clothes that are too tight or loud noises, trigger particular discomfort and anxiety for . Loud noises in particular may cause to experience a “melt down,” or explosive temper tantrum described by Father as “an order of magnitude or more higher in terms of intensity, volume, [and] duration than my wife and I have ever seen before in other children.” Tr. 635.

's Educational History

4. Due to Father's previous career in the Navy, Petitioners have moved frequently. attended several pre-schools and primary schools. He was previously identified as a child with a disability in Chesapeake, Virginia, in 2007 and in Greensburg, Pennsylvania, in 2008. *Pets. Ex. 3 at 28-34 and Pets. Ex. 4 at 35-56.*

5. Petitioners moved to Blue Springs, Missouri, on January 1, 2010. *Tr. 655.* Mother home-schooled for the remainder of the 2009-2010 school year. *Id.*

6. Parents placed at Barstow Academy and he attended Barstow Academy for the 2010-2011 school year. *Tr. 658-59; Resp. Ex. EE at 236.*

7. had no IEP during his attendance at Barstow Academy. *Tr. 875; Resp. Ex. EE at 236-43.*

8. While attending Barstow Academy and receiving regular education services, earned exemplary grades and comments from all his fourth grade teachers. *Resp. Ex. EE at 236-43.* However, was bullied at Barstow and became profoundly anxious and miserable. He stopped eating and lost weight. *Tr. 661-62.* Parents decided that Mother would homeschool him during the next academic year, 2011-12. *Tr. 666.*

¹ A disability in the area of handwriting. *Tr. 1342.*

² An abnormality in motor movement affecting the ability to plan and execute motor skills. *Tr. 1341.*

9. Mother homeschooled and his sister during the fall of 2012, but decided she could not effectively hoeschool both of them because 's behavior had become too problematic. *Tr. 667.*

10. Parents placed at Accelerated Schools of Overland Park and he attended Accelerated Schools of Overland Park during the spring of 2012. *Id; Resp. Ex. MM at 372.*

11. had no IEP during his attendance at Accelerated Schools of Overland Park. *Pets. Ex. 24 at 128.* He received regular education services there. *Id.*

12. While attending Accelerated Schools of Overland Park and receiving regular education services, earned all "As" in his fifth grade classwork, with the lone exception of one "B" earned in the area of Field Trips. *Pets. Ex. 24 at 128.* Once again, however, was a target for bullies and he experienced frequent melt-downs. *Tr. 668.*

13. Petitioners began looking into other educational options for in the spring of 2012, including Horizon Academy ("Horizon"), a private school for children with disabilities, in Roeland Park, Kansas. They were favorably impressed with Horizon and decided to enroll

14. there. *Tr. 668; Resp. Ex. I at 32-33.*

's Experience at Horizon

15. During the summer of 2012, Parents enrolled at Horizon for the 2012-2013 school year. *Tr. 685.*

16. Horizon is a private school with about 70 students, all of whom have learning disabilities. *Resp. Ex. Z at 198-204.* The Missouri Department of Elementary and Secondary Education ("DESE") has approved it for certain placements, and the District has placed students there in the past. *Tr. 35-36.*

17. Horizon developed an Individualized Education Program ("IEP") for on September 23, 2012. *Resp. Ex. Y.*

18. The Horizon IEP is two pages long. It lists five diagnoses for under the heading “Disability Information:” Asperger’s, ADHD, Dyspraxia, Dysgraphia, and Sensory Integration Disorder. *Id.*

19. The Horizon IEP summarizes ’s reading, spelling, and math test scores and contains brief comments on his written expression and communication. *Id.*

20. Under the heading, “Social/Emotional,” the Horizon IEP lists the following subcategories and comments:

Peer Group Relations – Gets along very well with class peers.

Behavior in class – Most appropriate at all times.

Behavior outside class – Most appropriate at all times.

Fine motor skills – Average range.

Gross motor skills – Average range.

Vocational/Transitional: Excellent communication skills, task completion, problem solving ability.

Resp. Ex. Y.

21. The Horizon IEP lists “Social/Emotional” under the heading “Area of Educational Difficulty.” *Id.*

22. The Horizon IEP states under “Initial Performance Level:” “Performing very well in the Horizon Academy setting in regard to needs indicated in cumulative records.” *Id.*

23. The Horizon IEP lists one “long-range goal statement:” “Maintain positive performance in areas of behavioral need.” *Id.*

24. Under “Short-term Objectives,” the Horizon IEP lists the following:

Maintain positive peer relations at school.

Maintain emotional stability at school and then at home.

Maintain a productive school environment.

Participate readily in social skills training exercises.

Id. It also states these objectives will be monitored daily for nine months and will be evaluated through charting and observation. The “criteria for mastery” is 91-100%. On each noted date, the “extent objectives met” is described as “rapid progress.” *Id.*

25. The Horizon IEP contains no behavior intervention plan.

26. At Horizon, was placed in a classroom with eight children, one teacher, and one paraprofessional. was often allowed to study independently.

27. The classrooms and atmosphere at Horizon are quiet. There are no bells for changing classes.

28. ate his lunch with the other students in his classroom.

29. After being advised that could experience a meltdown from a fire alarm, Horizon staff decided that would be removed from the school before the alarm sounded.

30. Horizon staff asked that have an epipen on his person at all times so that school staff could administer epinephrine to him on an emergency basis if needed due to his peanut allergy.

31. When another student at Horizon began bullying and threatening to touch him with peanuts, school staff took the initiative to remove the other student from 's environment.

32. made friends and developed a social life at Horizon. He was successful academically and socially in that environment.

Initial Contact with the District in 2012

33. On July 16, 2012, before ever attended Horizon, Father contacted the District to request that it provide transportation for from Blue Springs, Missouri, to Horizon. Father had heard that the District provided transportation for another student to Horizon. *Resp. Ex. I at 32.*

34. Father spoke to Dr. Annette Seago, deputy superintendent of the District, and Dr.

Jill Brown, assistant director of special education for the District, on that date. Father did not request a special education evaluation of during the teleconference on July 16, 2012. *Resp. Ex. I at 32.*

35. On July 23, 2012, Dr. Brown met with Father to discuss the request for transportation and the child find procedures required under the Individuals with Disabilities Education Act (“IDEA”). *Resp. Ex. I at 33.*

36. On July 23, 2012, Dr. Brown prepared a Consideration for Referral – Special Education Evaluation form concerning . *Resp. Ex. G at 28-30.*

37. At the July 23, 2012 meeting, Dr. Brown indicated to Father that the District was not obligated to transport students who are not enrolled in the school and who are not placed by the District in a private school. *Resp. Ex. I at 33-34.* She did, however, tell him that under certain circumstances students could be placed in private schools such as Horizon at District expense. *Resp. Ex. I; Tr. 53-54.*

38. At the July 23, 2012 meeting, Dr. Brown provided information to Father regarding the child find process and discussed several options with Father regarding how to proceed with enrollment and request evaluation of . *Resp. Ex. I at 33-34.*

39. At the conclusion of the July 23, 2012 meeting, Father requested an evaluation of . Respondent acknowledged that request in its July 24, 2012 Notification of Receipt of Request for Special Education Evaluation. *Resp. Ex. H at 31 and Resp. Ex. I at 33-34.*

The Evaluation Process

40. On July 24, 2012, Respondent mailed the following items to Petitioners as a follow up to the request for consideration for special education evaluation: Notification of Receipt of Request for Special Education Evaluation; Social History – to be completed by Petitioners; Consent for Release of Information – Special Care Pediatrics; Consent for Release of Information – Joshua Center; Procedural Safeguards Notice; and the Parents’ Bill of Rights.

Resp. Ex. I at 34-35.

41. On August 9, 2012, Respondent contacted Petitioners to indicate that Process Coordinator Elizabeth Milligan would be contacting Petitioners to discuss the referral for special education and the evaluation process. *Resp. Ex. I at 35.*

42. On August 14, 2012, began attending Horizon. *Resp. Ex. I at 34 and Tr. 732.*

43. On August 15, 2012, school began for students in the District. *Resp. Ex. I at 34.*

44. On August 23, 2012, Ms. Milligan and Mother discussed Petitioners' completion of the social history and release of information to Special Care Pediatrics, which were yet to be received by Respondent. *Resp. Ex. I at 35.*

45. Mother and Ms. Milligan set a September 6, 2012 date to review existing data for . *Resp. Ex. I at 35.*

46. On August 27, 2012, via telephone, Father requested a postponement of the September 6, 2012 meeting to review existing data until October 4, 2012. *Resp. Ex. I at 36.*

47. During the teleconference on August 27, 2012, Ms. Milligan explained the timeline requirements for the review of existing data and Petitioners agreed to move the September 6, 2012 meeting to September 4, 2012. *Resp. Ex. I at 36.*

48. On September 4, 2012, Parents met with District representatives to review existing data regarding . *Resp. Ex. I at 36; Resp. Ex. J at 44-45; and Resp. Ex. KK at 358-363.*

49. On September 4, 2012, Father signed a Notice and Consent to Evaluate form that specifically identified the areas for testing and the assessments to be administered to . *Resp. Ex. J at 44-45.*

50. At the conclusion of the September 4, 2012 review of existing data meeting, Respondent and Parents agreed to testing times for on October 11 and 12, 2012. *Resp. Ex. I at 36.*

51. After the meeting, the District began testing 's sister. Based on the sister's

reports, Parents developed concerns about the testing conditions. *Tr. 691-92.*

52. On October 8, 2012, Respondent received a letter from Parents rescinding their consent for an evaluation of based on their concerns about the testing process that occurred with their daughter. *Tr. 317-18 and Resp. Ex. K at 46.*

53. On October 11, 2012, Dr. David Brouse, Director of Elementary Education, and Dr. Brown contacted Parents regarding their rescission of parental consent, and the parties discussed ways to resolve the consent issue in order to resume the special education evaluation of . *Tr. 317-18 and Resp. Ex. I at 36-37.*

54. During the October 11, 2012 telephone conference, in discussing the possible continued special education evaluation of , Dr. Brown and Dr. Brouse indicated that 's evaluation could be completed by Respondent utilizing third-party assessments. *Resp. Ex. I at 36-37.*

55. Father concluded the October 11, 2012 teleconference by indicating that he would discuss the options presented during that conversation with Mother, and would contact Respondent with their decision as to proceeding with the assessment of . *Tr. 320-21 and Resp. Ex. I at 36-37.*

56. On October 30, 2012, Dr. Brown received a telephone message from Father. *Resp. Ex. I at 37.* On the same day, Dr. Brown returned Father's telephone call. Father informed Dr. Brown that Petitioners planned to meet with an advocate. *Tr. 321 and Resp. Ex. I, at 37.*

57. On November 6, 2012, Father telephoned Dr. Brown to indicate that Petitioners and their advocate would meet with Respondent to discuss the existing data for and how to proceed with the special education assessment of . *Tr. 321-24 and Resp. Ex. I at 37.*

58. On November 7, 2012, after consultation with their advocate regarding available dates, Parents agreed to meet with Respondent to review existing data for on November 27, 2012. *Tr. 322-23.*

59. On November 27, 2012, Father, Petitioners' advocate Rand Hodgson and District representatives Dr. Brown and Dr. Norma Anderson (the District's Director of Secondary Education) met and completed the review of existing data. *Tr. 323-24; Resp. Ex. I at 37 and Resp. Ex. L at 48-53.*

60. At the November 27, 2012 meeting, the parties present decided that Petitioners would choose the individuals to complete the assessments of . *Tr. 324; Resp. Ex. I at 37-38; and Resp. Ex. M at 54.*

61. Although they did not mention it at the November 27, 2012 meeting, Petitioners and their advocate had already selected examiners to conduct assessments of , and some of those assessments were taking place on that date. *Tr. 325-27; Resp. Ex. U at 118, 120, and 122-23.*

62. On November 28, 2012, Father e-mailed Respondent with the names of examiners and the organization (the Marian Hope Center) selected by Petitioners to complete the assessments of . *See Tr. 328-29, and Resp. Ex. FF at 323-24.*

63. On November 30, 2012, Petitioners signed and returned release of information paperwork required by the examiners. *See Resp. Ex. I at 38.*

64. On December 3, 2012, Dr. Brown contacted one of Petitioners' proposed examiners, Jessica Royer, a board-certified behavior analyst ("BCBA"), by way of telephone message, facsimile and e-mail, to discuss the evaluation of . *Tr. 331-32; Resp. Ex. I at 38; and Resp. Ex. FF at 321-22.*

65. On December 10, 2012, Dr. Brown provided Notice and Consent to Evaluate paperwork to Petitioners regarding . *Tr. 329-30; Resp. Ex. FF at 321; and Resp. Ex. I at 38.* She also informed Petitioners that Respondent had not heard back from Ms. Royer. *Resp. Ex. FF at 321 and Resp. Ex. I at 38.*

66. On December 15, 2012, Father informed Dr. Brown that Petitioners would “touch base” with Ms. Royer. *Resp. Ex. FF at 321*, and that Petitioners would review and return the consent form to evaluate shortly. *Resp. Ex. FF at 321; Resp. Ex. I at 38; and Tr. 751-52.*

67. On December 20, 2012, Dr. Brown informed Petitioners that arrangements had been made for Jamie Prestage and the Marion Hope Center, examiners selected by Petitioners, to evaluate . She also informed Petitioners once again that a signed consent form was needed in order to proceed with the evaluation of . *Tr. 332; Resp. Ex. FF at 308; and Resp. Ex. I at 38.* Father again stated that Petitioners would return the signed Notice and Consent to Evaluate form soon. *Resp. Ex. FF at 300.*

68. On January 2, 2013, Father once again indicated via e-mail that Petitioners would review, sign and return ’s consent form soon and contact Ms. Royer to request that she contact Dr. Brown. *Tr. 332-33; Resp. Ex. FF at 307-08; and Resp. Ex. I at 38.*

69. On January 9, 2013, Father informed Dr. Brown that had already been evaluated by Ms. Royer and the Marion Hope Center, and he was scheduled to be tested by a psychologist, Jamie Prestage, on Friday, January 11, 2013. *Tr. 333; Resp. Ex. FF at 306.*

70. On January 9, 2013, Dr. Brown once again informed Petitioners that she had still received no response from Ms. Royer. Ms. Royer finally responded to Ms. Brown later that day.

71. On January 10, 2013, Petitioners returned the signed Notice and Consent to Evaluate form. *Tr. 337; Resp. Ex. M at 54-56; Resp. Ex. FF at 302; Resp. Ex. I at 39.*

72. The Notice and Consent to Evaluate form executed by Petitioners and returned to Respondent on January 10, 2013 specifically stated the areas of assessment and evaluations to be completed for 's evaluation. *Resp. Ex. M, at 54-56.*

73. Tests, assessments and observations of to determine his eligibility for special education were completed during January and February of 2013. *Resp. Ex. U, at 125-144.* Most of the tests, assessments and observations were completed by Petitioners, their chosen examiners, and 's teacher at Horizon Academy. *Resp. Ex. U, at 115-146.*

74. District staff member Elizabeth Milligan, a "process coordinator," assisted in the assessment of by collecting the data provided by the assessments and scoring those assessments. *Tr. 574-75.*

75. On February 28, 2013, Ms. Milligan provided a Notification of Meeting to Petitioners for the March 5, 2013 meeting to determine 's eligibility for special education. *Tr. 576; Resp. Ex. FF at 268.*

76. Father attended the March 5, 2013 eligibility meeting, along with Petitioners' invited guests, Mr. Hodgson (their advocate), Ms. Royer, and Tammy Kravitz, another BCBA. *Resp. Ex. U at 146).*

77. The information gathered and presented regarding for the March 5, 2013 eligibility meeting was compiled in an Evaluation Report. *Resp. Ex. U at 115-146.*

78. After reviewing the information gathered during the special education evaluation of M, the eligibility team, including Father and his three invitees, determined that met the Missouri eligibility criteria for Autism. *Resp. Ex. U at 115-146; Tr. 340, 755-56, 1195-96.*

79. No one attending the March 5, 2013 eligibility meeting requested that further testing be completed in regards to 's possible qualification under Missouri criteria for Other Health Impairment (OHI) because of his medical ADHD diagnosis. *Tr. 339-40, 756, 1196.*

's Evaluation

80. The District's evaluation report incorporated the results of a number of tests administered to from November 2012 through February 2013, including: the Wechsler Intelligence Scale for Children IV, the Leiter International Performance Scale, Revised, the Woodcock-Johnson Test of Achievement-III, the Vineland Adaptive Behavior Scales-II ("Vineland"), the Behavior Assessment System for Children 2 ("BASC-2"), the Clinical Evaluation of Language Fundamentals 4, the Comprehensive Assessment of Spoken Language, the Test of Pragmatic Language, the Adolescent/Adult Sensory Profile, and the Beery-Buktenica Developmental Test of Visual Integration.

81. Results of some of these tests indicated disparities between Parents' assessment of and Horizon's assessment.

82. For example, the Vineland contains nine areas of Subdomain/Domain scores, three areas of sum scale scores and one Adaptive Behavior Composite. *Resp. Ex. U at 129-34.*

On the Vineland:

- a. Mother rated as "Low" or "Moderately Low" in eight of nine Subdomain/Domain scores. *Id. at 129.*
- b. 's teacher at Horizon, Doug McFarland, rated as "Adequate" or "Moderately High" in eight of nine Subdomain/Domain scores. *Id. at 131.*
- c. Mother rated as "Moderately Low" in the Sum Scale score of Communication and "Low" in the Sum Scale scores of Daily Living Skills and Socialization. *Id.*
- d. McFarland rated as "Moderately High" in the Sum Scale score of Communication and "Adequate" in the Sum Scale scores of Daily Living Skills and Socialization. *Id.*
- e. Mother rated as "Low" in the Adaptive Behavior Composite. *Id.*
- f. McFarland rated as "Adequate" in the Adaptive Behavior Composite. *Id.*

83. As another example, the BASC-2 assesses the behavior and self-perceptions of children and young adults. *Id. at 134.* Parents completed the BASC-2 in September 2012 and McFarland completed it in February 2013. On the BASC-2:

- a. McFarland rated as “average” in the areas of hyperactivity; both Parents rated him as “at risk.” *Id. at 135.*
- b. McFarland rated as average in the areas of anxiety, depression, and somatization; both Parents rated as “at risk” in all these areas. *Id.*
- c. McFarland rated as average in the areas of atypicality, withdrawal, and attention problems; both parents rated as “at risk.” *Id.*
- d. McFarland rated as average in the areas of adaptability, social skills, and functional communication. Parents rated as either “clinically significant” or “at risk” in all of these areas. *Id. at 136.*

84. The evaluation report also incorporated the observations and opinions of Jamie C. Prestage, a licensed psychologist. They include the following:

In the clinical judgment of this examiner, the primary factors which most significantly impact [] are the ramifications associated with Asperger Syndrome, Attention-Deficit/ Hyperactivity Disorder, Predominantly Inattentive Type, and sensory integration dysfunction. In addition, deficits in the processes involved in executive functioning further compound the difficulties he encounters in all aspects of his life.

[] demonstrates impairments in his ability to relate to others and to correctly interpret social cues and interactions with others. He has difficulty with reading the nonverbal cues of others such as body language, facial expression and inflections in their voices. He is easily overwhelmed and has difficulty managing his emotional responses. [] has a tendency to be inflexible and demonstrates a narrow range of interests which he attempts to impose on others.

* * *

In the clinical opinion of this examiner, for [] to be able to attain his maximum potential in an education setting, he requires a

program that is specifically designed to address his issues that are associated with Aspergers Syndrome, Attention-Deficit/Hyperactivity Disorder, Sensory Integration Dysfunction, and difficulties in his executive functioning skills. [] would benefit from a well-structured setting that utilizes a multi-sensory approach to learning. Furthermore, he requires a classroom room [sic] setting with a small student to teacher ratio and minimum distractions. [] requires a setting that is familiar and predictable.

Id. at 128.

85. As a part of the evaluation process undertaken for 's special education eligibility determination, Ms. Royer completed an observation and provided a list of impressions which were also included in the evaluation report. Those impressions are:

I believe that [] would be a target for bullying in a larger and/or less supervised setting.

I believe that without the consistent adult redirection that [] receives [at Horizon] that he would exhibit moderate to severe behavioral problems.

The small class size, extreme predictability in the routine, very clear expectations, working at his ability level academically and working mostly independently all contribute to []'s behavioral and academic success [at Horizon].

I think it is imperative that [] remain with same age peers even though his academic levels could suggest higher grade placement. His social skills do not warrant higher placement.

Id. at 144.

86. The evaluation team also considered a report prepared by Matthew Reese, PhD, and two of his colleagues at the University of Kansas Center for Child Health and Development, who had evaluated in May of 2012. *Resp. Ex. U. at 133-34.*

87. Dr. Reese and his colleagues made recommendations for at the conclusion of their report. *Resp. Ex. CC at 223-25.* The recommendations that could be used in the school environment were as follows: social skills training; the use of "Social Stories," a trademarked program for social skills training; should learn to self-monitor his adaptive skills so that he can independently go through the activities of daily living; needs to learn to recognize and self-monitor his emotions; use of visual supports to make transitions easier to anticipate, promote

task completion, plan and monitor goal setting, and increase independence, consideration of assistive technology. *Resp. Ex. CC at 223-24*).

88. On March 19, 2013, Respondent mailed a final copy of the Evaluation Report to Petitioner. *Resp. Ex. FF at 253; Resp. Ex. I, at 42*.

The IEP Meetings

89. After was determined to be eligible for special education as a child with autism, Ms. Milligan contacted Petitioners to establish an IEP meeting time to discuss the creation of 's IEP. *Resp. Ex. I at 41-42*.

90. Two separate IEP meetings were held and attended by 's IEP team in the spring of 2013, one on March 26, 2013 that lasted one and a half hours, and one on April 3, 2013 that lasted about two hours. *Resp. Ex. B at 18-19; Resp. Ex. C at 20-21; Resp. Ex. I at 42-43; Resp. Ex. GG at 333-37; and Resp. Ex. HH at 338-41*.

91. Ms. Milligan provided notice to Petitioners of the 3/26/13 IEP meeting on March 13, 2013 and notice of the 4/3/13 IEP meeting on March 26, 2013. *Resp. Ex. B at 18-19; Resp. Ex. C at 20-21*.

92. Father attended both the 3/26/13 and 4/3/13 IEP meetings with his invited participants, advocate Rand Hodgson and BCBA Jessica Royer. *Tr. 348; Resp. Ex. A at 17*.

93. Ms. Royer brought a list of recommended items to include in the IEP with her to the IEP meetings. The list included two pages of "present level" items to include and 50 proposed modifications for .

94. The following individuals attended the 3/26/13 and 4/3/13 IEP meetings on behalf of the District: Steve Cook, the principal of Delta Woods Middle School (the school would attend in the District) and the Local Educational Agency ("LEA") Representative; Lynn Hines, Special Education Teacher and 's prospective case manager; Kendal Koch, Regular Education Teacher; Ms. Milligan, as "Process Coordinator and Individual Interpreting Instructional

Implications of Evaluation Results;” Chris Workman, Occupational Therapist; Erin Thomas, Speech Language Pathologist; and Dr. Brown. *Resp. Ex. A at 17*.

95. The District’s staff members, including Ms. Milligan and Dr. Brown, created a draft IEP prior to the 3/26/13 IEP meeting, which was utilized as a starting point for both the 3/26/13 IEP meeting and the 4/3/13 IEP meeting. *Tr. 346-48, 945-46; Resp. Ex. II at 342-55*.

96. The draft IEP created by Respondent’s staff members utilized the information gathered during ’s eligibility determination, information from ’s educational placement at Horizon Academy, and information provided by the examiners who completed assessments during the eligibility determination process. *Tr. 346-48, Resp. Ex. II at 342-55*.

97. The IEP team met again on April 3, 2013. The two IEP meetings resulted in a number of changes to the draft IEP, as reflected by the final IEP document.

98. During both the 3/26/13 and 4/3/13 IEP meetings, the IEP team, including Father and his two invited participants, reviewed and discussed all required sections of an IEP. Father and his two invited meeting participants were provided the opportunity to offer input on all sections of ’s IEP. *Tr. 760,-61, 1196-98*. A number of changes were made to ’s IEP as a result of their suggestions and requests. *Tr. 947, 100-01; Resp. Ex. II at 349; and Resp. Ex. A at 10*).

99. In the 3/26/13 and 4/3/13 IEP meetings, Petitioners proposed that no services be provided to in the regular education classroom environment and instead requested that be placed in a self-contained classroom with one teacher and no more than four students. *See gen. Pets. Request for Due Process Hearing; Tr. 382, 712*. They also requested that a full-time one-on-one paraprofessional be assigned to .

100. ’s prospective case manager at Delta Woods, Lynn Hines, felt that the assessments, evaluation information, and reports from Horizon indicated that could attend school in the regular education environment full time. *Tr. 960-61, 1314-17*.

101. ’s IEP team created a school day for that included 765 minutes in the special

education environment (195 minutes per week of specialized instruction in area of social skills, behavior, and organization in the Resource Classroom; 450 minutes per week of specialized instruction in area of social skills, behavior, and organization in the Special Education Classroom; 90 minutes per week of Adapted Physical Education instruction; 30 minutes per week of language therapy in the Therapy Room) and 450 minutes per week in which a paraprofessional would assist and other special education students in the regular education classroom. *Resp. Ex. A at 14*. A normal school week at Delta Woods is 2050 hours, so this left 835 hours of the school week in which would neither be in special education nor have assigned paraprofessional support. The 835 minutes included lunch, homeroom, passing times between classes, and an elective computer class. *Tr. 197-202; Resp. Ex. A at 14*.

102. Neither Father, nor his invited meeting participants, specifically requested either reimbursement for 's tuition at Horizon for the 2012-13 school year or 's placement at Horizon during the 3/26/13 or 4/3/13 IEP meetings.

103. 's IEP team did not discuss making an educational placement at Horizon or tuition reimbursement for the 2012-2013 school year. *Tr. 1000, 1021-22; Resp. Ex. GG at 333-37; and Resp. Ex. HH at 338-41*.

104. Delta Woods Middle School has about 800 students. *Tr. 1025*. Regular education classes range, typically, from 15 to 25 students. If special education students are in a regular education classroom, a second teacher or paraprofessional is often assigned, and sometimes both. Special education classrooms are much smaller. The special education classrooms to which was assigned would have ranged from four to seven students.

Differences Between the Draft IEP and the final IEP

105. Both the draft IEP and the final IEP for contained a number of sections as required by law. As relevant to this case, the draft IEP contained three goals for :

- 1) The student will demonstrate acceptable ways to handle frustration/anger/stress in the classroom with 90% accuracy within

one year based on data collection records.

2) The student will utilize conversational rules participating in a communicative exchange with 80% accuracy within one year based on data collection records.

3) The student will demonstrate understanding of others' perspectives and needs when a situation is presented with 80% accuracy within one year based on data collection records.

Resp. Ex. II at 349. The final IEP added a fourth goal:

4) The student will transition from routine task to task within the classroom with no more than 2 verbal prompts on 4 out of 6 data collection days within one year based on data collection records.

Resp. Ex. A at 10. Also in the final IEP, the measurement technique for collecting data on goals 2 and 3 was changed from "with 80% accuracy" to "on 3 out of 5 consecutive data days." *Id.*

106. Each goal in the final IEP was prefaced with "baseline" information based on 's evaluation and progress reports from Horizon. With respect to goals 1, 3, and 4, the baseline information noted that was making "rapid progress" on "maintaining emotional stability at school and then at home," "participating readily in social skills training exercises," and "maintaining positive peer relations at school." *Id.* The District representatives on the IEP team relied on these reports of rapid progress in determining 's placement.

107. The draft IEP contained no information under the heading "Related Services." Under this heading, the final IEP provided for language therapy for 30 minutes per week in the therapy room. *Id.* at 14.

108. The draft IEP contained no information under the headings "Special Education Services." The following "Special Education Services" were added to the final IEP:

- Specialized instruction in social skills, behavior, and organization for 195 minutes per week in the Resource Classroom;
- Specialized instruction in social skills, behavior, and organization for 450 minutes per week in the special education classroom; and

Adapted physical education for social skills and behavior for 90 minutes per week in the special education classroom.

Id.

109. The draft IEP contained no information under the heading “Supplementary Aids/Services.” Under this heading, the final IEP provided for paraprofessional support for 450 minutes per week in the regular education classroom. *Id.*

110. Under the heading, “Extent of Participation in Regular Education,” a form question appears: “For K-12: The regular education environment includes all academic instruction as well as meals, recess, assemblies, field trips, etc. Will this student participate 100% of the time with non-disabled peers in the regular education environment?” The answer on the draft IEP is “Yes.” The answer in the final IEP is “No . . . will participate in regular education 62.68% of the time.” *Id.* at 15.

111. In the draft IEP, under the heading “Special Considerations,” the following question appears: “Does the student exhibit behaviors that impede his/her learning or that of others? The question is answered “Yes.” The following information also appears:

If yes, 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. A BIP is required as a result of a Manifestation Determination when behavior is found to be related to the student’s disability.

Was a BIP developed?

Resp. Ex. II at 348. The last question was answered “No.”

This section was left unchanged in the final IEP.

112. In the draft IEP, the section, “Student Participation in PE” was left blank. In the final IEP, this section was changed to “ will participate in adapted physical education due to decreased social/behavioral skills.” *Resp. Ex. A at 15.*

113. In the draft IEP, the section heading “Participation in Program Options, Nonacademic, and Extracurricular Activities” was left blank. In the final IEP, the following sentence was added: “The district assures that this student will have an equal opportunity to participate in program options, nonacademic and/or extracurricular activities and services offered by the district.” *Id.*

114. The following information was added to the final IEP under the section, “How the Student’s Disability Affects Involvement and Progress in the General Education Curriculum:”

- ’s perceptions of situations can be inaccurate and affect his ability to form relationships with people.
- may perseverate if he believes others are not following his perceptions of the rules.
- may have difficulty transitioning from task to task within the classroom.
- Positive behavior supports and interventions will be in place to assist with social situations in which he needs assistance processing and responding. These supports may include: preparing ahead of time for changes in schedule; preparing for bell tones signally [sic] beginning and ending of class as well as lunch; teacher redirection; a place to calm down both in the classroom and outside of the classroom; access to an adult to discuss a situation; access to an adult for triage; planned ignoring of attention-getting behaviors; home-school communication of behaviors; alternate passing time; and use of headphones to minimize distractions.

Id. at 6.

115. Under the section, “Additional Information,” the following was added to the final IEP:

According to information provided by parents, ’s past medical history is significant for recurrent otitis media that improved after removal of his tonsils and adenoids at age 5 years. He has history of asthma, seasonal allergies, and food allergies including peanuts and tree nuts. reportedly had long standing problem with generalized hypotonia. No history of injury reported. was diagnosed with ADHD primarily inattentive type around age 5 years. He was diagnosed with dyspraxia, dysgraphia, sensory integration disorder, and intellectual giftedness. has previously been on Focalin XR, Intuniv and various nutritional supplements

as well as casein free and gluten free diet. Currently he only takes fish oil, multivitamins and low dose Amantadine. The Amantadine has reportedly helped with impulse control and hyperactivity. The benefit in improving attention is reported to be suboptimal [sic].

Id.

116. The following “Modifications/Accommodations” were added to the final IEP:

- Under “Response:”
 - Provide access to word processor/keyboard for longer written responses
- Under “Classroom Assignments:”
 - Break down large assignments into smaller steps
 - Provide access to word processor/keyboard for longer written responses
 - Reduce class assignments given as homework as long as class time was used appropriately
- Under “Environment:”
 - Allow for frequent breaks
 - Allow for frequent parent-provided snacks
 - Provide assistance getting from one classroom location to the next
 - Provide opportunity to organize materials”
- Under “Presentation:”
 - Provide copy of notes
 - Utilize small step directions
 - Use simple concrete language
- Under “Reinforcement:”
 - Frequent reminders of the rules
- Under “Text:”
 - Provide textbooks for home use

Id. at 12-13.

117. The following question appears under the heading “Transportation as a Related Service” in both the draft and final IEPs: “Does the student require transportation as a related service?” In the draft IEP, the question was answered, “No.” In the final IEP, the question was answered, “Yes.” A transportation accommodation/modification was added: “Curb to curb pick-up and drop-off.” *Id. at 14.*

118. In the final IEP, the following was added under “Supports for School Personnel:” “Consultant Services: District specialists provide behavior consultation to teachers and paraprofessionals.” *Id.*

119. In the final IEP, the following information was added under “Placement Considerations and Decision:”

The following placement options were considered:

Inside Regular class more than 80% of the day (1100)

Inside Regular class 40 to 79% of the day (1201)

Inside Regular class less than 40% of the day (1301).

Id. at 16.

120. The following was added to the final IEP under “Placement Category:”

“Inside Regular class 40 to 79% of the day (1201) – From 4/13/2013 To 4-3-2014.” *Id.*

121. In the draft IEP the section “Concerns of the Parent” was left blank. In the final IEP, a lengthy section explaining parent concerns was added, listing the following concerns and the District’s responses to those concerns:³

a. Concern: ratio of students to adults; was successful at Horizon because he was in a classroom with a 1:4 teacher/student ratio. Response: “The district staff responded that evaluation indicates that there were up to 8 students in the classroom with a classroom teacher and a paraprofessional. In addition, was not receiving special education or related services or documented positive supports and interventions to support socially and behaviorally.”

b. Concern: often perseverates and requires one-to-one assistance to get him back on task. Response: “Positive behavior supports were discussed.” The positive behavior supports were outlined at greater length under the section “How the Student’s Disability Affects Involvement and Progress in the General Education Curriculum.”

c. Concern: requires preparation for transitions/changes from preferred to nonpreferred activity, such transitions can lead to inappropriate behaviors such as melt-

³ Because they are lengthy, in most cases the parent concerns have been paraphrased here. The concerns and District responses appear on pp. 7-8 of Resp. Ex. A.

downs. needs supports in place for these behaviors. has difficulty with perceived injustices or infractions of the rules. Horizon removed the triggers from 's environment. Response: "Positive behavior supports were discussed as well as the need for special education." The positive behavior supports were outlined at greater length under the section "How the Student's Disability Affects Involvement and Progress in the General Education Curriculum." *Resp. Ex. A at 6.*

d. Concern: is organizationally challenged, has trouble moving from room to room, requires clear homework directions and requires directions verbally and in writing, and requires someone to triage with him at the end of his day. Response: "Modifications /accommodations were discussed as well as the need for special education services." 's organizational needs were also addressed elsewhere in the final IEP with special education services in organization and the accommodation/modification of providing opportunity to organize materials. His trouble in moving from room to room was addressed by alternative passing time and accommodation/modification of providing assistance getting from one classroom location to the next. The concerns regarding the provision of directions to were addressed by the accommodations/modifications of giving instructions through a variety of channels (written, oral, etc.), breaking down large assignments into smaller steps, utilizing small step directions, using simple concrete language, and checking often for understanding. 's need for triage at the end of the day was addressed by the positive behavior support of triage with an adult. *Resp. Ex. A at 6, 7, 10-14.*

e. Concern: fine motor skills. Response: "Fine motor assessments completed show functional capability; however, the team decided to add an accommodation for writing. Dr. Sullivan reports has rudimentary keyboarding skills." *Resp. Ex. A at 7.*

In addition, was provided access to a word processor or keyboard for longer written responses and given copies of notes.

f. Concern: demonstrating acceptable ways to handle frustration/anger/stress at home. Response: “While the IEP cannot add goals for the home environment, supports can be put in place regarding transition from school to home such as home school communication.” *Resp. Ex. A at 7.*

g. Concern: sensory concerns, perseverates on germs and dirty hands; avoids noise in the hallway and crowds, noisy areas and unstructured environments; Father also stated that needs to work in a quiet, alternative setting. Response: “Accommodations /modifications, such as use of headphones to assist in blocking out noise, were discussed as well as alternate passing time. Dr. Sullivan expressed his concern that would be upset that he would miss out on instruction by doing this. It was determined that would be asked whether he wanted alternate passing time at the end of class or at the beginning of the next class to provide him choice.” *Id.* In addition, the final IEP provided for accommodations/modifications to address ’s sensory issues such as providing frequent breaks, keeping distractions to a minimum, providing preferential seating, allowing for frequent parent-provided snacks, and providing assistance getting from one classroom location to the next. *Resp. Ex. A at 6, 7, 12-14.*

h. Concern: requires one-on-one assistance and constant redirection in the classroom, he must be prepped for fire drills and bells signaling a change in classes, and requires one-on-one assistance on the bus. Response: “District staff noted that does not currently has [sic] one-on-one assistance. Positive behavior supports and accommodations/modifications were discussed as a team to address concerns.” *Resp. Ex. A at 7.* The final IEP placed in special education classrooms with 4-6 students for part of the day and assigned a paraprofessional to two of his other classes. Teacher

redirection and access to an adult to discuss situations or triage were provided to assist in his need for redirection. The final IEP also provided that would be prepared ahead of time for bells and would be provided with curb-to-curb pick-up and drop-off as a related transportation. *Id.* at 6, 7, 14.

i. Concern: is not able to interact with peers. Response: “Special education and related services were discussed in the area of social skills.” *Id.* at 7. This concern was also addressed in a variety of ways including the creation of two directly related IEP goals, specialized instruction in the area of social skills and behavior, and the inclusion of with his peers in the regular education environment with supports. *Resp. Ex. A at 7, 10, 14.*

j. Concern: Father expressed concern with ’s peanut allergy, that he perseverates on touching things containing peanuts, and is not able to use an Epi-Pen. “District staff responded that District health staff will develop a health plan which will address ’s peanut allergies.” *Id.* at 7.

k. Concern: Father requested that the following diagnoses be included in the IEP: global dyspraxia, dysgraphia, hypotonia and anxiety disorder, and expressed specific concerns about ’s ability to take notes. Response: “The district staff requested a copy of the diagnosis of anxiety disorder as there is not current documentation in the student’s record of this . . . Accommodations/modifications were discussed. The parent advocate indicated that assistive technology may be something to consider in the future.” *Id.* The IEP also included the accommodation that would be provided a copy of class notes and would have access to a word process/keyboard in place of hand-writing notes and long written responses in class. *Resp. Ex. A at 6-7, 13.*

l. Concern: has difficulty adapting to new environments. Response: “The special

education teacher requested Dr. Sullivan bring to school, so she could meet him.” *Resp. Ex. A at 7-8; Tr. 952, 367-68, 862.*

m. Concern: will be upset about missing academic time if he is pulled out for language therapy during academic time. Response: “This will be taken into consideration when scheduling.” *Resp. Ex. A at 8.*

n. Concern: Petitioners were concerned that all staff working with have knowledge of Autism Spectrum Disorders. Response: “The school and teachers have had experience with students with Autism. The District also has two consultants who can provide training to the staff. Consultant services were added to the IEP.” *Resp. Ex. A at 8, 14).*

o. Concern: The advocate asked about the District’s gifted program. Response: “The district staff responded with information about the district’s gifted program (Stretch program). The district staff also informed the parent that the district is adding advanced classes at the middle school level for the 2013-2014 school year.” *Resp. Ex. A at 8.*

p. Concern: perseverates if he has more than 30 minutes per night of homework and may have meltdowns if given extra homework. Response: “District staff responded that modifications can be put in place to reduce homework assignments when appropriate.” *Id.* The proposed IEP included an accommodation/modification reducing class assignments given as homework for , as long as class time was used appropriately. *Id. at 8, 12.*

q. Concern: Petitioners expressed a concern with regular PE classes for and his physical inability to handle the activities of a regular PE class. No District response was added to this section, but was placed in adaptive physical education class. *Resp. Ex. A at 8, 15.*

r. Concern: Petitioners expressed concerns with 's diet and the occurrence of meltdowns due to low blood sugar. No district response was added to this section, but in the final IEP was provided with the accommodation/modification of frequent parent-provided snacks. *Resp. Ex. A at 8, 12.*

122. Petitioners requested, but did not receive, the following in the final IEP:

- A Behavior Intervention Plan
- A one-on-one paraprofessional
- One-on-one instruction
- 100% special education
- A Student-teacher ratio of 4:1 or less in all settings

123. In addition, Petitioners requested goals relating to 's transitioning from preferred to non-preferred tasks; his organization skills; his fine motor skills; and more detailed goals relating to social skills. These were not included in the IEP as goals *per se*.

Finalization of the IEP and Petitioners' Appeal

124. On April 12, 2013, Elizabeth Milligan mailed a Notice and Consent for Initial Placement and Services to Petitioners. *Resp. Ex. E at 25-26; Resp. Ex. I at 43.*

125. On April 15, 2013, Elizabeth Milligan mailed a Notice of Action Refused to Petitioners refusing their request for inclusion of a Behavior Intervention Plan (BIP) in 's proposed IEP. *Resp. Ex. F at 27; Resp. Ex. I at 43.*

126. The Notice of Action Refused indicated why the BIP was rejected:

The IEP team considered adding a Behavior Intervention Plan to the IEP, and the IEP team considered adding positive behavior interventions and supports to the IEP.

Adding a Behavior Intervention Plan to the IEP was rejected. is making academic, social, and behavioral progress in his parentally placed private school according to school records without a

Behavior Intervention Plan or special education and related services in place. The parent advocate indicated positive supports are in place at the parentally placed private school although they have not been written down for reasons of which he was unaware. In addition evaluation results on assessments completed by the parentally placed private school staff do not indicate clinically significant externalizing or internalizing problems. One area, anxiety, was in the at-risk range was indicated by parentally placed private school staff. It was determined 's social and behavioral needs as outlined in his IEP could be addressed by providing special education and related services on IEP goals and through the implementation of positive behavior supports and interventions.

Resp. F at 27.

127. On April 18, 2013, Elizabeth Milligan mailed the final copy of the proposed IEP, Procedural Safeguards, Parent's Bill of Rights, and Medicaid Waiver to Petitioners. *Resp. Ex. I at 43.*

128. Petitioners received the final copy of the proposed IEP, Procedural Safeguards, Parent's Bill of Rights, and Medicaid Waiver on Saturday April 20, 2013. *Pets. Ex. 37 at 215.*

129. Upon receiving 's proposed IEP on April 20, 2013, Petitioners made no request to discuss the contents of the document with 's IEP team or to convey their disagreements to Respondent prior to filing their Due Process Hearing Request. *Tr. 865, 386-87.*

130. On Tuesday, April 23, 2013, the Petitioners filed a Due Process Hearing Request. *Pets. Ex. 37 at 215.*

Experts at the Hearing

131. Petitioner's expert Dr. Matthew Reese has a PhD in developmental psychology. He is the Director of the University of Kansas Center for Child Health and Development. He evaluated in May 2012.

132. Petitioner's expert Ms. Royer is a BCBA with a master's degree in applied behavioral analysis. She has extensive experience working with children with autism and founded an organization called Partners in Behavioral Milestones, which includes group homes and private schools. Ms. Royer was acquainted with and his family prior to this case because

her daughter and 's sister took dance classes together. She observed at Horizon for approximately three hours one day.

133. Dr. Theresa Vollrath, the District's expert, has a PhD in special education and is a professor at the University of Central Missouri. Dr. Vollrath had a previous consulting relationship with the District. She consults the District on a regular weekly basis and is paid to do so. She has not met and was not part of his IEP team. Her testimony was based on her review of 's evaluation, the draft IEP, the final IEP, the Horizon IEP and progress report, and Dr. Reese's evaluation. *Tr. 1282, 1322.*

Conclusions of Law

The Administrative Hearing Commission has jurisdiction over this case. § 162.961, RSMo Cum. Supp. 2012. The burden of proof in an administrative hearing challenging an IEP is on the party seeking relief, in this case the Petitioners. *Schaffer v. Weast*, 546 U.S. 49, 6206 (2005).

Under the IDEA, all children with disabilities are entitled to a free appropriate public education (FAPE) designed to meet their unique needs. 20 U.S.C. § 1412. The IDEA defines FAPE as specialized special education and related services that: have been provided at public expense, under public supervision and direction, and without charge; meet the standards of the state educational agency; include an appropriate preschool, elementary school, or secondary school education in the state involved; and are provided in conformity with the individualized education program. *See* 20 U.S.C. § 1401(9). The IDEA does not prescribe any substantive standard regarding the level of education to be accorded to disabled children. *Board of Education of Hendrick Hudson Central School District, Westchester County, et al. v. Rowley*, 458 U.S. 176, 189, 195 (1982). Rather, a local educational agency ("LEA") fulfills the requirement of FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203. The IDEA does not

mandate that special education “maximize the capabilities” of disabled children, nor is a school district required to furnish every service necessary to maximize a child's educational potential.

Id. at 198.

The primary vehicle for carrying out the IDEA’s goals is the IEP. 20 U.S.C. § 1414. An IEP is a specialized course of instruction developed for each disabled student, taking into account that child's capabilities. 20 U.S.C. § 1414(d)(1)(A). The IEP is not required to maximize the educational benefit to the child, nor to provide each and every service and accommodation that could conceivably be of some educational benefit. *Rowley*, 458 U.S. at 199; *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997) (IDEA does not require a school district to maximize a student’s potential or provide the best education possible); *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027 (8th Cir. 2000) (Missouri requires an appropriate and not a maximizing standard).

If a child's special education program or placement, as defined in the child’s IEP, is disputed by the child's parents, the IDEA provides for a review procedure. 20 U.S.C. § 1415(a), (b), (d); 34 C.F.R. §§ 300.500–.580. The key inquiry in determining whether a district is providing FAPE is to assess “whether a proposed IEP is adequate and appropriate for a particular child at a given point in time.” *Burlington v. Dep’t of Educ.*, 736 F.2d 773, 788 (1st Cir. 1984), *aff’d*, 471 U.S. 359 (1985). 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. *Gill*, 217 F.3d at 1035.

Credibility of Witnesses

One of our tasks is to determine the credibility of witnesses. *J. L. v. Francis Howell R-3 School Dist.*, 693 F. Supp.2d 1009, 1033 (E.D. Mo. 2010). Both parties attack the credibility of

the others' witnesses, but we find all the witnesses who testified at the hearing to be credible and sincere.

Two key witnesses directly contradicted each other on one point. Father testified that Dr. Brown asked him to delay signing consent forms for 's evaluation around the Christmas holiday so that the statutory time frame for completing an evaluation would not begin to run until January. Dr. Brown denied making such a request. Their statements cannot be reconciled.

Given our finding that both these witnesses were truthful and sincere, we can only conclude that these disparate understandings resulted from a misunderstanding or poor communication. The point is only significant in the context of Petitioners' issue #3, and we discuss it further in that section of this decision.

Expert Testimony

Courts lack the specialized knowledge and expertise necessary to resolve persistent and difficult questions of educational policy. *Gill*, 217 F.3d at 1036-37. Congress therefore created a comprehensive scheme that enables parties to a due process hearing to present their views and those of experts in the field of special education in order to effectively review a child's education plan. *Id.* At the hearing, two issues arose regarding the parties' experts.

Both Ms. Royer and Dr. Vollrath had pre-existing relationships with the parties on whose behalf they testified. We consider the potential effect those relationships might have had on their testimony as we weigh it, but found the testimony of both to be helpful and informative.

Petitioners also objected that Dr. Vollrath's testimony should not be considered because she had never met or observed , nor been involved in the IEP process. They rely on *Gill*.

In *Gill*, parents offered testimony on a teaching method from experts who had not participated in their son's program or the IEP discussions. *Id.* at 1033. The administrative panel excluded the evidence because it had not been brought up at the IEP meeting and was therefore not relevant to the appropriateness of the IEP. *Id.* Parents made an offer of proof, but the district

court also declined to expand the record to include the proposed expert testimony. *Id.* at 1033-34. On appeal, parents claimed the evidence should not have been excluded. *Id.* at 1034.

The court of appeals noted the extensive record before the district court and the district court's extensive factual findings. *Id.* at 1037. It held that the district court did not abuse its discretion when it concluded the record was sufficient to evaluate the educational program offered to student. *Id.* at 1038.

Gill does not stand for the proposition, as Petitioners urge, that an expert who was not involved in the IEP process may not testify at a due process hearing. The most restrictive inference that could be drawn from *Gill* is that an administrative tribunal or court should not judge the product of an IEP team based on evidence not available to that team. Dr. Vollrath offered no such evidence through her testimony.

In addition, we note that one of Petitioners' experts, Dr. Reese, observed for two and a half hours, and was not a member of 's IEP team. Given the circumstances, we consider Dr. Vollrath's testimony and assign it an appropriate level of weight when rendering a decision in this case.

Petitioners' Complaint

In their due process complaint and their pre-hearing conference statement, Petitioners raise four main points. The first point, denial of FAPE, contains a number of subparts, and may be liberally construed to include others not specifically mentioned in their complaint, but which may fall under the umbrella of FAPE. At the hearing, however, Petitioners raised other issues that were not set forth in their complaint, some of which were highly specific, and Respondent objected. The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint unless the other party agrees otherwise. 20 U.S.C. § 1415(f)(3)(B); 34 CFR 300.511(d). We consider these additional issues to the extent that we may liberally, but fairly, construe Petitioners' complaint to include them. We set forth

Petitioners' issues and proposed resolutions substantially as they appear in the pre-hearing conference statement filed on August 21, 2013.

A. Petitioners' Issue #1

Despite significant efforts on the part of Petitioners to work collaboratively with the BSSD, the Individualized Education Program (IEP) unilaterally crafted and proposed by the BSSD does not offer the student a Free Appropriate Public Education (FAPE). As described in the Petitioner's Due Process Hearing Request, the IEP as proposed by the BSSD does not offer the Student a FAPE because it proposes unattainable and unrealistic goals and objectives, does not include a behavioral intervention plan, does not provide for a small class size, does not include positive reinforcement and support (as those terms are understood within the context of Applied Behavior Analysis), and does not provide the environment, plans, structure, resources, or supports necessary to appropriately meet the needs and educate a Student like with an autism spectrum disorder. The goals proposed in the IEP do not take into consideration the impact of 's disabilities or the reports of experts who evaluated him. Similarly, despite 's profound deficits, only four goals were proposed, and all four fail to encompass the impact of M's disabilities. 's diagnoses, behaviors, anxiety, and failures, along with the assessments and recommendations of the multidisciplinary teams that have evaluated him, could have formed the basis for a comprehensive IEP that meets 's unique needs. Unfortunately, the IEP as crafted by the BSSD proposes inadequate and insufficient goals, accommodations, and supports that do not meet 's needs or meaningfully address his disabilities and will not result in meaningful progress being obtained or the provision of a FAPE.

Proposed Resolution: Placement at Horizon, with transportation as a related service.

We construe this issue statement to mean that Petitioners allege the District denied FAPE for six primary reasons: inadequate and unrealistic goals; lack of a behavior intervention plan; lack of small class size; lack of positive reinforcement and support as understood within the context of Applied Behavior Analysis; failure to address the impact of 's disabilities; and failure to provide the environment, plans, structure, resources, or support necessary to educate because of his autism spectrum disorder. We address each of these points below.

Goals

The IDEA requires that an IEP contain a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability so as to enable the child to be involved in and make progress in the general education curriculum and meet each of the child's other educational needs that result from the child's

disability. 20 U.S.C. § 1414(d)(1)(A)(i)(II). In addition, DESE publishes Compliance Standards and Indicators that direct Missouri school districts in the implementation of special education services. Pursuant to the Compliance Standards and Indicators, the IEP must include goals that are written in terms that are specific to a particular skill or behavior to be achieved, measurable, attainable, results oriented, and time-bound. *See* Compliance Standards and Indicators, 200.810 (<http://dese.mo.gov/se/compliance/StandardsManual/>). Annual IEP goals that are properly drafted in this format are referred to informally as “SMART goals.” Additionally, annual IEP goals must demonstrate consistency with the content of the student’s present level of performance, enable the child to be involved in the general education curriculum as appropriate, and address the child’s other educational needs resulting from her/his disability. *Id.*

In Petitioners’ complaint, they allege the IEP goals were unattainable and unrealistic, and that only four goals were proposed, all of which failed to encompass the impact of ’s disabilities. In their written argument, they rely primarily on the testimony of Dr. Matt Reese, the KU psychologist who evaluated , and Ms. Royer. Petitioners complain that the recommendations made by Dr. Reese, Jamie Prestage, and Ms. Royer in their evaluations of were not considered or incorporated into ’s final IEP.

Of the ten recommendations that appear at the end of Dr. Reese’s report, several were either not designed for a potential school environment (such as #1, “Consider appointment with pediatric geneticist for further evaluation for any possible genetic syndromes”) or were resource suggestions (such as #s 8 and 10, resources for further assistance to and his family). One was as a possible tool to assist and his family (#6, behavioral contracting). Petitioners complain that the school ignored the others, which we paraphrase below:

#2, Social skills training

#3, “Social Stories,” a trademarked program described as “a visual way to inform others about specific situations;” *Resp. Ex. CC at 223*.

#4, Learning to self-monitor adaptive skills in order to independently go through activities of daily living;

#5, Learn to recognize and self-monitor emotions;

#7, Use visual supports to make transitions easier to anticipate; promote task completion, plan and monitor goal setting, and increase independence;

#9, Possible use of technology applications to build social and academic skills.

Several of these are phrased as recommendations and potential tools, such as the use of a particular program like Social Stories or potential technology applications. The others are addressed in the final IEP. Some are contained explicitly in the IEP’s goals (goal #1 in the final IEP, “demonstrate acceptable ways to handle frustration/anger/stress in the classroom” is obviously similar to KU recommendation #5, and goals 3 and 4, relating to demonstrating an understanding of others’ perspectives and needs, and utilizing conversational rules addresses the concern for social skills training in KU recommendation #2.) There is no mention of visual supports for transitions and goals in the IEP goals, but the IEP does contain a goal that be able to transition between tasks in the classroom. In other words, the KU recommendations may not be followed to the letter in the final IEP, but they were not ignored, either. Furthermore, specific methodologies – such as “Social Stories” – need not be adopted by an IEP team. Parents “do not have a right under the [IDEA] to compel a school district to provide a specific methodology in providing for the education of their handicapped child.” *Gill v. Columbia 93 School District* 1999 WL 33486649, *14 (W.D.Mo.,1999) *citing Lachman v. Illinois Bd. of Educ.*, 852 F.2d 290 (7th Cir.), *cert. denied*, 488 U.S. 925 (1988).

At the IEP meetings, Ms Royer made a number of additional recommendations as to goals and modifications to be included in 's IEP. She attended the meeting with a list of 50 such recommendations. Of the 50, approximately half were incorporated in some fashion in the IEP, although not necessarily in the "Goals" section. For example, she requested goals relating to strategies for coping with 's concerns about social injustice and rule infractions (Tr. 1114), organizational skills (Tr. 1116), fine motor skills (Tr. 1120), transitioning between preferred and unpreferred tasks (Tr. 1112), and an additional social skills goal. The final IEP addressed the last of these through an explicit goal regarding transition between "routine" tasks and use of positive behavior supports to aid in transitioning between preferred and unpreferred activities. Ms. Royer's other requests were not added as goals *per se*, but noted as parental concerns, with proposed ways to address them. Some of the responses were admittedly quite terse, such as "positive behavior supports were discussed." (Resp. Ex. A at 7). Others were more formal, such as special education for 645 minutes per week in "social skills, behavior, and organization."

Approximately half of Ms. Royer's additional requests and recommendations were not incorporated into the IEP. Many of those that fall into the latter group fall into the category of advice or instructions to teachers that may not be required to be in an IEP (such as "avoid vague terms like "later" and "maybe;" or "use concrete situations to teach skills"). To the extent that Petitioners suggest that all such suggestions must be incorporated into an IEP, they cite no authority for the proposition that an IEP "must set forth every detail about every adaptation that could provide a child with an educational benefit." *See K.E. v. Independent Sch. Dist no. 15*, 647 F.3d 795, 809 (8th Cir. 2011). However, some of Petitioners' requests are features of such importance that they would logically have to be included in an IEP, such as one-on-one supervision for unstructured time and one-on-one instruction for new concepts; assigning a primary teacher with an advanced degree in special education and experience teaching students

with ASD; a standing weekly appointment with a counselor at the school; a teacher/student ratio of no more than one to four; and one-to-one supervision on the school bus.

We do not find that the final IEP or its goals for were inadequate because they did not include all of Ms. Royer's recommendations, even some of her important ones such as those relating to small class size, one on one instruction, and low student/teacher ratio. We discuss this at greater length below, but we note that the IDEA requires only that the IEP team "consider" evaluators' recommendations. 20 U.S.C. § 1444(d)(3)(A)(iii); *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d at 806.

In his testimony at the hearing, Dr. Reese opined that the IEP's goals were insufficient for two primary reasons: they were too vague, and they included neither a generalization nor a maintenance component. As he explained it, children with autism spectrum disorders may be taught social skills in a controlled setting, but unless they can also maintain those skills and generalize them to settings other than school, they may do them little good. When asked about the goals contained in the Horizon IEP, Dr. Reese opined that they were also too vague.

We agree that the goals are not models of specificity, but we do not find them to be legally insufficient because they are too vague. Although Dr. Reese testified that they were, his testimony was countered by Dr. Theresa Vollrath, the District's expert, who testified that they were not, and that they met the DESE "SMART" criteria, which include specificity and measurability. Furthermore, there is no legal authority requiring a particular level of specificity in the statement of annual goals. *O'Toole By and Through O'Toole v. Olathe Dist. Schools Unified School Dist. No. 233*, 144 F.3d 692, 706 (C.A.10 (Kan.),1998), *cited by O'Dell v. Special School Dist. of St. Louis County*, 503 F. Supp.2d 1206, 1216 (E.D. Mo. 2007). *See Tr. 261*.

There is also no evidence that Petitioners asked for goals relating to generalization and maintenance of skills to be included in 's IEP. Furthermore, while they are not explicitly set

forth in the IEP, we find that generalization and maintenance are, to some extent, inherent in the goals included in the IEP. Even if they were not, “[n]o educational value or goal, including generalization, carries special weight under IDEA.” *Thompson R2-J School Dist. v. Luke P., ex rel. Jeff P.*, 540 F.3d 1143, 1154 (C.A.10 (Colo.), 2008). We do not find the IEP goals were insufficient for these reasons.

It is evident that the goals in ’s final IEP were drafted in order to address ’s academic and functional needs concerning frustration, anger, stress, transitioning, social skills, and communication skills. Additionally, each goal was crafted in accordance with an accompanying baseline, which sets forth the particular assessment result and/or concern the goal was crafted to address. *Resp. Ex. A at 10*. We see no evidence that they are unattainable or unrealistic, given ’s baseline status.

It is also evident that the goals were changed in response to Petitioners’ concerns. The draft IEP created prior to the March 26, 2013 IEP meeting contained only three goals, and the final proposed IEP contained four. *Resp. Ex. II at 349; Resp. Ex. A at 10*. Father and his two invited participants provided input related to ’s goals, including the modification of the manner in which goals 3 and 4 were to be measured, and the addition of goal 2. *Id.* Finally, the IEP created for contains a number of modifications, accommodations, and services requested by Petitioners. In other words, many of the Petitioners’ concerns regarding are addressed in other areas of the IEP outside of the annual goals, as discussed elsewhere in this decision.

We do not find that the goals in the final IEP are unrealistic, unattainable, or inadequate, or that they amount to a denial of FAPE to .

Behavior Intervention Plan

In the case of a child whose behavior impedes the child's learning or that of others, IEP teams are required to 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); 34 CFR 300.324.

Missouri's State Plan for Special Education, Part B 2013 ("the State Plan"), Regulation IV, echoes this requirement. It does not require that a Behavior Intervention Plan (BIP) must be included in a child's IEP unless a manifestation determination has occurred and the manifestation team has determined that the child's actions leading to disciplinary action related to his or her disability. *See* State Plan (Regulation IV, Section 2 at 44; and Regulation V, Section 9 at 77).

's parents, through their advocate, Rand Hodgson, and Ms. Royer, requested that a formal BIP be drafted along with 's IEP. The District rejected this request, and Petitioners allege that the IEP prepared for does not offer a FAPE because it does not include a BIP. However, the IDEA does not require IEP teams to draft a formal BIP in every situation in which a child's behavior is an issue. In most circumstances, the failure to develop a BIP does not automatically constitute a denial of FAPE. *See, e.g., CJNI v. Minneapolis Pub. Sch.*, 323 F.3d 630, 640 (8th Cir. 2003).

Public school districts are not required to develop a formal BIP, provided that the IEP team notes the student's individual behavior issues, as well as other limitations and concerns, in a manner which reflects that the IEP team considered strategies to address that behavior. *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762, 767 (8th Cir. 2011). It is acceptable practice to propose the use of teaching methods and strategies that have worked with other autistic students in the school district, and, if those strategies prove unsuccessful with the particular student, to conduct a functional behavioral assessment and develop an individualized BIP at that time. *Id.*

In this case, we find the District's refusal to develop a BIP for was reasonable because was found to be making academic, social, and behavioral progress at Horizon without a formal written BIP in place at that setting. The IEP team determined that 's social and behavioral needs could be sufficiently addressed by providing special education and related

services, behavior-oriented annual IEP goals, and the implementation of positive behavior supports and interventions. *Id.* The final IEP includes various such strategies.

In addition, it would have been difficult to develop a BIP for before he ever attended school in the District. Ms. Royer testified at the hearing that a Functional Behavior Assessment (FBA) is nearly always a prerequisite to drafting a BIP for a student. *Tr. 1210-11*. Ms. Royer also testified that in order for an FBA to be completed, would have to attend school in the District to gather information in that environment. *Id.* While courts have determined that schools may design a BIP without an FBA without violating FAPE, *See M.W. ex rel. S.W. v. New York City Dept. of Education*, 725 F.3d 131, 140-41 (2nd Cir. 2013), they have also approved the delay of the BIP and FBA until the student is in the school district where they will be implemented. *See J.C.S. v. Blind Brook-Rye Union Free School District*, 2013 WL 3975942 (S.D.N.Y. August 5, 2013); *Brett S. ex rel. Charles S. v. West Chester Area School District*, 2006 WL 680936 (E.D. PA, March 13, 2006).

We do not find that the failure to develop a BIP for was a denial of FAPE.

Class Size

's most recent school experiences at Barstow School and Accelerated Schools of Overland Park were unhappy and unsuccessful. His experience at Horizon was the opposite. Parents attribute the difference to a number of factors, but among these factors, class size and student/teacher ratio appear to be paramount. In the IEP meetings, Petitioners repeatedly emphasized their desire for small classes, a low student/teacher ratio, and one-on-one instruction or a paraprofessional. Understandably, they did not want to court a repetition of past experiences in which M had been bullied, miserable, and made to feel isolated, friendless, and worthless.

The District representatives on the IEP team believed could be placed in larger classes and regular education some of the time. In fact, based on 's progress at Horizon, Ms. Hines, his prospective case manager, believed he could succeed in regular education classes 100% of the

time. The blend of special education and regular education specified in the IEP was evidently an attempt to reach a compromise between Petitioners' desires and the opinions of the District representatives.

“Small” is in the eye of the beholder. Both Ms. Royer and Dr. Brown testified that they believed a class of ten or fewer was small; Petitioners never pinpointed a number, but clearly wanted a teacher/student ratio of 1:4 or less, similar to that at Horizon. The special education classrooms into which would have been placed in the District would have ranged from four to seven students. The regular education classes ranged, typically, from 15 to 25 students. In two of the latter, a paraprofessional would have been assigned to assist and the other special education students (typically, six to eight) in the regular education classroom. Although these are not “large” classes, neither are they small. The question is whether the District failed to offer FAPE by not granting Petitioners' request that he be in small classes or special education classes 100% of the time.

We find the District did not fail to offer FAPE on this ground. District representatives at the IEP meetings reviewed the information indicating that was doing well in small classes at Horizon, and Ms. Royer stated that small classes contributed to his success there. In addition, psychologist Jamie Prestage recommended a small student to teacher ratio for 's educational setting. But the IDEA states that, to the maximum extent appropriate, children with disabilities must be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should 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.”** 20 U.S.C. § 1412 (a)(5)(A) (Emphasis added). This concept, known as the “least restrictive environment” (LRE), is the vehicle through which Congress sought to bring

children with disabilities into the mainstream of the public school system. *See Mark A. v. Grant Wood Area Education Agency*, 795 F.2d 52, 54 (8th Cir. 1986); *Rowley*, 458 U.S. at 189. The concept of educating students in the LRE reflects a “strong preference” that disabled children attend regular classes with non-disabled children and a presumption in favor of placement in the public schools. *T.F. v. Special Sch. Dist. of St. Louis Cnty.*, 449 F.3d 816, 820 (8th Cir. 2006). Children who can be mainstreamed should be mainstreamed, if not for the entire day, then for part of the day. *Id.* *See also Reese ex rel. Reese v. Bd. of Educ. of Bismarck R-V School Dist.*, 225 F.Supp. 2d 1149, 1159-60 (E.D. Mo. 2002) (hearing officer may consider LRE in determining whether placement is appropriate).

In the IEP meetings, Petitioners proposed that no services be provided to in the regular education classroom environment and instead requested that be placed in a self-contained classroom with one teacher and no more than four students. *See gen. Pets. Due Process Hearing Request; Tr. 382, 712.* Petitioners argue that such an environment would be the LRE for because the LRE is “the one that offers the child the greatest opportunity to succeed.” Although both Dr. Reese and Ms. Royer agreed with this statement (*Tr. 814, 1172, respectively*), it clearly departs from the mandate set forth in 20 U.S.C. § 1412 (a)(5)(A), and Dr. Reese later modified his testimony to define the LRE as “**a balance** of the greatest opportunity to learn and succeed, and the greatest opportunity for the benefit from the general education curriculum and the greatest opportunity to interact with peers who don’t have disabilities.” *Tr. 832* (emphasis added).

Furthermore, Petitioners’ corollary to this proposition was that the environment that offered the best opportunity to succeed was either Horizon or a program very similar to Horizon’s. But Dr. Reese testified that the goal of educating special education students is to begin, if necessary, in a small classroom environment with transition to a larger or more typical regular education environment. *Tr. 849-52.*

Finally, we note that in addition to the very positive reports about 's progress from Horizon, the District members of the IEP team also reviewed 's evaluation. They would thus have also been aware that in some instances, Parents perceived 's disabilities to affect him more severely than did his teacher at Horizon. Although this could be attributed to Horizon's supportive environment, it could also be attributed to disparities between 's behavior and functioning at home versus at school. Again, the District members of the IEP team could have taken this into account in determining that could be placed in regular education for a portion of the school day.

Given the information they reviewed during 's evaluation process, and the mandate to provide education to children with disabilities in the LRE, the District's representatives on the IEP team are not to be faulted for concluding that 's educational environment should include some time in regular education, with supports as needed.

The IEP prepared for calls for special education services to include 195 minutes per week of specialized instruction in the areas of social skills, behavior, and organization in the Resource Classroom; 450 minutes per week of specialized instruction in the areas of social skills, behavior, and organization in the Special Education Classroom; 90 minutes per week of Adapted Physical Education instruction; 30 minutes per week of language therapy in the Therapy Room; and 450 minutes per week of Paraprofessional Support in the Regular Education Classroom. *Resp. Ex. A at 14.* Outside of these proposed special education and related services, it was determined by the IEP Team that should participate in regular education 62.68%. District staff testified that they made this determination by starting at the absolute LRE (ie: 100% regular education with no special education services) and working backward towards reduced time in the regular education environment, as appropriate considering 's special needs and the Petitioners' concerns and requests. *Tr. 384-86.* We cannot say this approach is inappropriate given the IDEA's preference for LRE and 's recent social and behavioral progress.

We find that the IEP's failure to place in small classes or special education classes 100% of the time, or to assign him a one-on-one paraprofessional, did not constitute a denial of FAPE.

Lack of Positive Reinforcement and Support

Petitioners complain the IEP was inadequate because it did not include positive reinforcement and support as those terms are understood within the context of Applied Behavior Analysis. Once again, however, parents "no matter how well-motivated, do not have a right under the [IDEA] to compel a school district to provide a specific methodology in providing for the education of their handicapped child." *Gill*, 1999 WL 33486649 at *14. In addition, Petitioners never clearly presented evidence as to what methods of positive reinforcement and support are included in Applied Behavioral Analysis.

The final IEP contains a number of positive behavior supports such as preparing ahead of time for bells or changes in schedule; providing him a place to calm down and access to an adult to discuss situations; teacher redirection, and allowing him to use headphones to block noise. Based on Petitioners' complaint, we assume these are not types of positive behavior supports specified under Applied Behavior Analysis. But that does not mean the District did not offer FAPE to .

Furthermore, we reject Petitioners' repeated arguments at the hearing and in written argument that the IEP lacks positive behavior supports because the sentence providing for them uses the word "may." The preface to the description of the positive behavior supports is: "Positive behavior supports and interventions **will be in place** to assist with social situations in which he needs assistance pressing and responding. These supports **may include:**" (emphasis added). We credit the District's argument that it committed to use these and similar positive behavior supports but wished to exercise flexibility and discretion in determining which to use in

a given situation; it is the most logical interpretation of the sentence. Petitioners' argument to the contrary lacks merit.

Failure to Provide Environment to Meet Needs of Student with ASD

Petitioners did not specify in their complaint or in their written argument the particular ways in which the District failed to provide an environment that would meet the needs of a student with ASD. However, of the various concerns they voiced, several may fall into this category. For example:

Petitioners were concerned that the bells that signal the time to change classes would bother and perhaps even trigger a meltdown. The District offered to prepare for bells and transitions, but this was not satisfactory to Petitioners. At the hearing, Dr. Brown was asked whether the District was willing to eliminate bells at Delta Woods. She answered no. *Tr. 164.*

Petitioners were concerned that the noise and crowded conditions occurring while students change classes would also be a trigger for 's anxiety and could cause a meltdown. The District offered to have a teacher accompany from one class to another class either before or after the class-changing time so that he would not be exposed to this, but Father rejected this accommodation because it would also cause to suffer anxiety if he missed any class time. The District staff then offered to discuss the issue with when he came to the school to try to resolve the dilemma with him.

Because noise bothers , the final IEP provided that could wear headphones to block noise. Father testified that this was not satisfactory because was also sensitive to the pressure caused by headphones resting on ears and because headphones were noticeable and possibly stigmatizing, and preferred ear buds to headphones. But Father also testified that there was not a specific discussion at the IEP meetings that would be required to use headphones in lieu of ear buds. *Tr. 776-78.*

It is undoubtedly true that a middle school with 800 children will be filled with more

noise, crowding, and sensory assaults than a school with 70 disabled students that has eliminated bells because many of its students have sensory issues, and those noises and sensations may be bothersome or worse for students with ASD. However, the record indicates that the District made a good faith effort to address these issues in the IEP meetings and in the final IEP. That they did not agree to eliminate all possible triggers for 's anxiety and meltdowns does not mean the District did not offer FAPE: Dr. Reese testified that the District's goal should be to help cope with those triggers for his anxiety and meltdowns rather than to simply try to remove all of them. *Tr. 830-31*. The final IEP contained mechanisms to help cope with his triggers.

We do not find that the District failed to provide a suitable environment for a student with ASD.

Failure to Address the Impact of 's Disabilities

Petitioners claim that 's IEP is inadequate because it fails to address the impact of all of 's disabilities, particular his ADHD. The IDEA defines the term "child with a disability" as a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3). The State Plan recognizes the following disabilities for purposes of special education eligibility: Autism, Deaf/Blindness, Emotional Disturbance, Hearing Impairment and Deafness, Intellectual Disability, Multiple Disabilities, Orthopedic Impairment, Other Health Impairment, Specific Learning Disability, Speech or Language Impairment, Traumatic Brain Injury (TBI), Visual Impairment/Blindness, Young Child with a Developmental Delay. State Plan, (Regulation III, p. 19).

Although ADHD is not listed above, it may be a disability that qualifies a student for special education under the category “Other Health Impairment,” (“OHI”), which means “having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that is due to chronic or acute health problems . . . and adversely affects a child’s educational environment.” State Plan, Part III, at 23.

There is no evidence that Petitioners ever asked that be found eligible for special education under his ADHD diagnosis. Even if there were, the IDEA does not require an IEP to assign a student a particular disability classification or to formally recognize each of the student’s disabilities and diagnoses so long as each child who has a disability and who, by reason of that disability, needs special education and related services, is regarded as a child with a disability. 20 U.S.C. § 1412(a)(3)(B); *G.I. by G.I. and K.I. v. Lewisville Indep. Sch. Dist.*, 2013 WL 4523581 (E.D. Tex. 2013). In fact, “the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child’s specific needs.” *Fort Osage R-1 School District v. Sims ex rel. B.S.*, 641 F.3d 996,1004 (8th Cir. 2011).

In *G.I. and K.I. v. Lewisville*, the court held that a school district’s failure to identify a 12-year-old autistic student as also having ADHD did not require the district to reimburse the student’s parents for private school tuition because the IEP prepared for the student addressed the student’s ADHD-related needs by providing numerous accommodations to keep the student on task. The court explained:

Various courts throughout the nation have also held that school districts are not required to classify a student into a particular category, or affix that student with a particular label. Instead, the IDEA only requires that the school district provide an appropriate education. For example, in *Heather S. v. Wisconsin*, 125 F.3d 1045, 1055 (7th Cir. 1997), the Seventh Circuit stated: “[i]n any event, whether Heather was described as cognitively disabled, other health impaired, or learning disabled is all beside the point.

The IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe Heather's multiple disabilities." . . . In *Klein Indep. Sch. Dist. V. Hovem*, 745 F. Supp. 2d 700, 708 (S.D. Tex. 2010, *rev'd on other grounds*, 690 F.3d 390 (5th Cir. 2012), the district court stated that although the school district and experts may disagree over the diagnosis of a student's disability, "the IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe [the child's] multiple disabilities." (quoting *Heather S*, 125 F.3d at 1055.)

Id. at *10.

As with the *Lewisville* case, although Respondent did not specifically identify as eligible for special education because of his ADHD, the IEP proposed for addressed his ADHD-related needs. *Tr. 1285-90*. Even without finding that met Missouri eligibility criteria as a child with OHI based upon his medical diagnosis of ADHD, the proposed IEP for addressed his ADHD symptoms in several different ways: preparing ahead of time for changes in schedule; teacher redirection; providing him with a place to calm down both in the classroom and outside of the classroom; providing access to an adult to discuss a situation and for triage; allowing use of headphones to minimize distractions; providing frequent breaks; testing in small groups; administering assessment using additional testing periods; extending the time allotted for completing the exam; keeping distractions to a minimum; providing preferential seating; allowing for frequent parent-provided snacks; checking often for understanding/review; and giving frequent reminders of the rules. *Resp. Ex. A at 6, 12-13*.

We note that 's other diagnoses were addressed as well. Relating to his diagnosis of dysgraphia, was to be provided a copy of notes as a modification/accommodation and access to assistive technology in the form of a keyboard for questions requiring lengthy responses. (*See Resp. Ex. A at 7, 12-13*. 's dyspraxia would also be addressed by those accommodations as well as his placement in adaptive physical education, and assistance with passing times. Finally, 's sensory integration disorder was also addressed by the proposed IEP by preparing ahead of time for changes in schedule, preparing him for bell tones signaling beginning and ending of

class as well as lunch, providing him a place to calm down both in the classroom and outside of the classroom, access to an adult to discuss a situation and for triage, allowing him to use headphones to minimize distractions, providing frequent breaks, minimizing distractions, and providing preferential seating.

Finally, at the hearing Petitioners also complained that the final IEP did not diagnose with intellectual giftedness. Neither the IDEA nor the Missouri State Plan recognizes intellectual giftedness as a disability.

Issues Raised at the Hearing, but not in the Complaint

Transition Plan

At the hearing, Petitioners alleged that the IEP created for was insufficient because it did not include a written “transition plan” to facilitate ’s move from Horizon to the District. They failed to raise this until the hearing, and Respondent argues that we should not consider it under 20 U.S.C. 1415(f)(3)(B); 34 CFR 300.511(d). Although this is an arguable point, we consider it because it relates to whether the District offered FAPE to .

When a child with a disability reaches age sixteen, that child’s IEP must include appropriate measurable post-secondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills. 20 U.S.C. § 1414(d)(1)(A)(i)(VIII); State Plan, Regulation IV, p. 43. The transition services required under the IDEA aim to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. 34 CFR 300.43. The IDEA does not require a transition plan when a student is moving from one school to another, only when the student is transitioning from

school to post-school activities. *See, e.g., E. Z.-L. ex rel. R.L. v. New York City Dep't of Educ.*, 763 F. Supp. 2d 584, 598 (S.D.N.Y. 2011) *aff'd sub nom. R.E. v. New York City Dep't of Educ.*, 694 F.3d 167 (2d Cir. 2012) *cert. denied*, 133 S. Ct. 2802, 186 L. Ed. 2d 861 (U.S. 2013); *N.W. v. Poe*, 2013 WL 5936980, No. 13-07 (E.D. Ky. Nov. 4, 2013). *See also Park Hill v. Dass*, 655 F.3d at 766 (“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.”)

The IEP developed for was not required to contain updated post-secondary goals because was only eleven years old at the time the IEP was developed. *Resp. Ex. A at 1*. Additionally, although a written transition plan was not prepared, the IEP team discussed 's potential transition to public school. Case manager Lynn Hines invited to tour Delta Woods Middle School and meet his future teachers, but Parents never brought to the school. In *Park Hill v. Dass*, the court questioned “whether the District was required to ‘design a transition plan until the parties had agreed on [the student’s] actual placement.’” *Id.* at 767 n.2, *citing Brown v. Bartholomew Consol. Sch. Corp.*, 442 F.3d 588, 595 (7th Cir. 2006). Thus, for a number of reasons, the lack of a written transition plan does not amount to a denial of FAPE by the Respondent.

Health Plan

At the hearing, the Petitioners argued that the IEP created for was insufficient because the IEP did not include a written “health plan” to address 's peanut allergy. Again, Petitioners failed to raise this issue until the hearing, but we briefly consider it nonetheless.

Neither the IDEA, the Missouri State Plan for Special Education, nor the Missouri Office of Special Education Compliance Standards and Indicators require that a formal “health plan” be incorporated into an IEP. Regardless, the parent concern regarding 's peanut allergy was acknowledged in the IEP prepared for . *Resp. Ex. A at 7*). To address this concern, district staff informed the Petitioners that district health personnel would develop a health plan to

address ' peanut allergy upon his enrollment in the District. This was noted in the IEP prepared for . *Id.* Because Petitioners never agreed to place at a school in the District, a health plan was never created.

In *Bell v. Franklin Township Community School Corp.*, 898 F. Supp.2d 1067, (S.D. Ind. 2012), the parents objected to the school district's suggested change of placement from private to public school. At a meeting to discuss the proposed IEP for the next year, the parents left the meeting and informed the school that the student would not be attending public school for the next few years. The parents then filed a due process complaint alleging that the school denied their child FAPE. One of the issues was whether the lack of a complete medical plan in the IEP constituted a denial of FAPE. The Court found that it did not, citing such factors as the school's attempts to address the issue and the parents' failure to discuss the health care plan with the school. *Id.* at 1080-81.

This case is similar. Petitioners met twice to discuss the IEP, disagreed with the proposed IEP, and filed a due process complaint. The District acknowledged 's health issues in the IEP by noting that it would implement a health care plan. A claim of denial of FAPE might be viable if had presented himself at Delta Woods without a health plan, or if the District failed to adhere to a health care plan. See *P.K. ex rel. J.K. v. Middleton School District*, 2011 WL 839711 (D.N.H. March 9, 2011) (Parent argued Student was denied FAPE because school district did not follow health care plan concerning Student's allergies). Such is not the case here. We do not find a denial of FAPE because the District had not yet developed a health care plan for a student who had not agreed to attend a school within the District.

Summary of Issue #1

We find the District offered FAPE to .

B. Petitioners' Issue #2

Parents were not treated as equal partners in the IEP process, and the recommendations of the Parents, the Student's advocate, and evaluating experts were not fully nor fairly considered. The IEP created for our son was created unilaterally by Dr. Jill Brown and Elizabeth Milligan without consideration of what the parents or our disability advocate had to contribute, and with insufficient understanding and consideration of the data and opinions of experts. Father's concerns were summarily dismissed without explanation by Dr. Jill Brown and Elizabeth Milligan. The failure on the part of the BSSD to acknowledge these important aspects of 's case is central to our argument that the IEP, as proposed by the BSSD, was not agreed upon by the IEP "team" but rather was a product solely and unilaterally of Dr. Jill Brown and Elizabeth Milligan, and fair consideration to our concerns was not given.

Proposed Resolution: A finding that the District failed to offer FAPE, placement at Horizon, and transportation as a related service.

The IDEA requires an opportunity for the parents of a child with a disability to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child. 20 U.S.C. § 1415(b)(1); 34 CFR 300.501. Public agencies are required to take steps to ensure that one or both of the parents of a child with a disability are present at each IEP team meeting or are afforded the opportunity to participate. 34 CFR 300.322. "Parents and guardians play a significant role in the IEP process," and a school district cannot refuse to consider their concerns or evidence when drafting an IEP. *Schaffer v. Weast*, 546 U.S. at 53; *Ft. Osage*, 641 F.3d at 1005.

School districts comply with the parental participation provisions of the IDEA where considerable time is spent trying to develop an IEP for a child during conferences at which parents and their advocates participate. *See, e.g., Evanston Cmty. Consol. Sch. Dist. No. 65 v. Michael M.*, 356 F.3d 798, 804 (7th Cir. 2004) (School district did not seriously infringe on parents' participation in IEP process, in violation of IDEA, where considerable time was spent on trying to work out an IEP for child in conferences at which both parents and their advocate participated); *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 (2d Cir. 2005) (Parents of

learning disabled student were not denied an adequate opportunity to participate in the development of the student's IEP where the parents had numerous opportunities to participate in meetings with respect to the identification, evaluation, and educational placement of the child). In this case, it is clear that the District complied with the necessary steps and notifications to ensure Parents had an opportunity to participate in 's evaluation and IEP process, and Father participated at every step.

Although parental participation and collaboration is mandated, the IDEA does not grant parents veto power over IEP team decisions. *See, e.g., White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003); *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1489 (9th Cir.1986); *J.L. v. Francis Howell R-3 School Dist.*, 693 F.Supp.2d 1009, 1013-14 (E.D.Mo., 2010). The IDEA mandates individualized appropriate education for disabled children; it does not require a school district to provide a child with the specific educational program that his parents prefer. *T.F. v. Special Sch. Dist. of St. Louis Cnty.*, 449 F.3d 816, 821 (8th Cir. 2006). The right to provide meaningful input is simply not the right to dictate an outcome and cannot be measured by such. *See, e.g., Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 656 (8th Cir.1999) (where no "serious hamper[ing]" of parent's opportunity to participate in the formulation process occurred, IDEA requirement of meaningful parental input satisfied notwithstanding that parent's desired program not selected).

One of the striking features of this case is the wide divergence between the impressions of Father and Ms. Royer and those of the District IEP team members regarding the IEP meetings. Petitioners argue that they were denied meaningful participation throughout the identification, evaluation, and IEP drafting process. They claim that the input of Parents and their experts were simply disregarded or at most, given lip service. Both Father and Ms. Royer testified that they

left the meetings feeling very discouraged and as if they had not been listened to at all. *Tr. 726;*

1134. Father testified:

Well, when we left the first IEP meeting, as I said, we were – I particularly was disheartened and felt that, again, my presence there and the advocate’s presence there and the BCBA’s presence there was almost unnecessary, that much of it was a foregone conclusion of what was going to be in the document. And after the second meeting, nothing had been done to reassure me that that wasn’t the case.

Really felt that we simply weren’t listened to. That our comments were used to fill in those relevant portions like the concerns of the parent. Yeah. They were put there, or small changes were made, so that it could be reflected that we had some input in the process, but no meaningful input, no substantive input. It wasn’t a team. It was adversarial, and really felt like I was on the losing team, which meant that my son was losing because of this process that was supposed to help him.

Tr. 726-27.

The District participants in the IEP meetings left with a completely different impression. Lynn Hines felt that the goals in the IEP were based on what Father and his invited participants wanted, that the placement decision was collaborative, and the parties had reached an agreement. *Tr. 947, 910, 924.* Kendal Koch, the math teacher who participated in the IEP meetings, also felt the process was collaborative and the parties had come to an agreement. *Tr. 986.* He felt there were “some disagreements to start with, but it seemed to me that there were concerns brought forth and then information shared, and it seemed like it was a consolidation of what they -- what everyone was wanting.” *Tr. 997.* Steve Cook, the principal of Delta Woods Middle School testified that he would not describe the parties’ discussions at the IEP meetings as “disagreements.”

You know, I wouldn't describe them as disagreements. I think it was, again, healthy conversation between all parties involved, and it was actually, it was kind of a pleasure to be a part of it. Mr. Sullivan brought up a lot of interesting concerns, and I felt like our team did a great job of trying to address those concerns, so it was

good conversation going back and forth, but to determine it as disagreements, I wouldn't feel comfortable saying that.

Tr. 1024.

The evidence in the record supports the District's position. Petitioners chose the people who would evaluate . Father attended the evaluation meeting and both IEP meetings. He brought several invited participants with him. There were many changes from the draft IEP as a result of their input, and the final IEP reflected most of their concerns, even if it did not give Father and his invited participants exactly what they requested. The District personnel uniformly felt that they had listened, collaborated, and changed the IEP in accordance with Petitioners' concerns. Even Ms. Royer testified that the IEP creation process was cordial and included "good dialog." *Tr. 1237-38.* We have found no bad faith exclusion of Parents from the process of forming 's IEP, or refusal to listen to or consider the Petitioners' input. Absent these factors, school districts meet IDEA requirements with respect to parental input. *White v. Ascension Parish Sch. Bd.*, 343 F.3d at 380.

Petitioners complain that the IEP was drafted before they ever met with District representatives, and that the concerns they subsequently voiced were ignored. In essence, they claim that 's IEP was predetermined by the District. We disagree.

"[W]hen a school district predetermines the educational program to be provided to a disabled student, including the student's placement, 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.'" *Ft. Osage*, 641 F.3d at 1005, *citing Lathrop R-II Sch. Dist. V. Gray*, 611 F.3d 419, 424 (8th Cir. 2010). While the draft IEP was created by District personnel on their own before the first IEP meeting, this practice does not necessarily indicate predetermination. *See G.A. ex rel. L.A. v. River Vale Bd. of Educ.*, 2013 WL 5305230, *20 (D.N.J., 2013) (That a district comes to the IEP meeting with a completed draft document, before consulting with the

parents, does not render an IEP predetermined). Dr. Brown testified that the creation of a draft IEP by school district staff prior to an IEP meeting is not only a legal practice, it is a practice that streamlines the IEP creation process a great deal. *Tr. 346-48*. We find her testimony on this point both logical and credible.

In summary, we find that Petitioners were treated as equal partners in the IEP process; that their recommendations were fully and fairly considered; and that the final IEP was neither predetermined nor a unilateral product of District staff, but a collaborative product of District staff and Petitioners.

Petitioners' Issue #3

While this process inched along, the Parents incurred certain educational and transportation expenses associated with Student's education beginning with the 2012 – 2013 academic year when for a period of time, no program had even been identified or generated and then thereafter when no adequate program was offered.

Proposed Resolution: Reimbursement for educational costs and transportation expenses beginning with the 2012-2013 school year.

Neither Father, nor his invited meeting participants, specifically requested 's placement at Horizon, or requested reimbursement for 's tuition at Horizon beginning with the 2012-13 school year during the March 26, 2013, or April 3, 2013, IEP meetings. *Tr. 1000, 1021-22; Resp. Ex. GG at 333-37; Resp. Ex. HH at 338-41*. Consequently, 's IEP team discussed neither. *Tr. 1000, 1021-22; Resp. Ex. GG at 333-37; Resp. Ex. HH at 338-41*.

Parents seeking reimbursement for the cost of private education can only succeed if a court concludes both that (1) the public placement violated the IDEA before the parents chose to remove the student, either by declining to offer the student special education services and an IEP or otherwise failing to provide FAPE, and (2) the private school placement was proper under the IDEA. *See, e.g., Gill*, 217 F.3d at 1037 (8th Cir. 2000); *Reese ex rel. Reese v. Bd. of Educ. of Bismarck R-V Sch. Dist.*, 225 F. Supp. 2d 1149, 1159 (E.D. Mo. 2002); *T.B. ex rel. W.B. v. St. Joseph Sch. Dist.*, 677 F.3d 844, 847 (8th Cir. 2012 (Emphasis added).

The Petitioners seek relief, including transportation and tuition reimbursement, beginning with the 2012 -13 school year. But when Father first contacted the District in July 2012, Parents had already decided to send to Horizon during that school year. They had come to that decision independently, *not* because the District had not offered FAPE to . had never been enrolled in the District. Petitioners cannot satisfy the first prong of the test because they cannot prove the public placement violated the IDEA before they enrolled at Horizon. “The IDEA was not intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations.” *Park Hill Sch. Dist. v. Dass*, 655 F.3d at 767.

Petitioners attempted to bolster their claim for tuition reimbursement for the previous school year by alleging at the hearing, for the first time, that Respondent had violated the Child Find provisions set forth under federal and state law. Under the IDEA and the Missouri State Plan for Special Education, all children with disabilities residing in the state, regardless of the severity of their disability, and who are in need of special education services, must be identified, located, and evaluated. This process is called “Child Find.” *See generally* 20 U.S.C. § 1414; Missouri State Plan for Special Education, Part B 2013 (Regulation III, p. 17). This issue was not contained in Petitioners’ complaint or their pre-hearing conference statement, so it is not properly before us. 20 U.S.C. § 1415(f)(3)(B); 34 CFR 300.511(d).

Even if it were, we would not find that the District violated the Child Find requirements of the IDEA. At the hearing, Father testified that he and Mother wrote a letter in December 2009 informing District officials that they would be moving to the District in January 2010 and that they had two school-age children whom they were homeschooling. *Tr.* 656. Dr. Brown testified she had no knowledge of such a letter. Petitioners attempted to introduce the letter into evidence at the hearing. Respondent objected and it was excluded.

Nevertheless, in Petitioners' brief, they argue:

The school district's obligation to provide services to . arose in January 2010 when Petitioners moved into the school district . . . The evidence that the Petitioners wrote the letter is undisputed . . . this conclusion is bolstered by the fact that the Petitioners are not seeking any sort of compensation or vindication for any failure to provide services prior to July 2012 and by the fact that [Father] was a credible witness . . . From January 2010 until April 2013, the school district did not provide services to despite its legal obligation to do so. The School district's failure to *timely* provide services from July 2012 until April 2013 was a violation of its responsibilities not only under **Child Find** but also under the line of cases cited herein particularly *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009).

Resp. written argument, excerpted from "case-specific conclusions of law" ¶¶ 41-46, pp. 103-04.

Assuming that the letter was sent to District officials in December 2009, it would not prove they violated their Child Find obligations. The State Plan, Regulation III, p. 18, requires local school districts to engage in Child Find by publishing a notice on their website, airing notice on local radio and television stations, putting up posters in their administrative offices, and distributing information to the parents and guardians of enrolled students. There is no suggestion the District failed to fulfill these responsibilities. Per Regulation VIII, p. 115, districts must also "locate, identify, and evaluate all private school children with disabilities, who are enrolled by their parents in private, including religious, elementary schools and secondary schools **located in the school district served by the LEA.**" (Emphasis added.) Horizon is located in Kansas, not the District. Finally, we note that the letter did not mention that the Sullivan children were disabled or in need of special education services. *Tr. 770.*

Finally, we note that while there is no question that the process of evaluating and developing an IEP for was lengthy, the District violated no IDEA timelines during the process. Father admitted he was not aware of any such violations. *Tr. 746.*

The 60-day timeline to complete 's evaluation began on January 10, 2013, when Petitioners provided the executed Notice and Consent to Evaluate . *State Plan, Regulation III, Section 3; Tr. 337*. Prior to that time, delays in the process had been due to Parents' concerns about District testing, their hiring an advocate, wanting to locate the most appropriate evaluators for , and scheduling those evaluations. We have previously noted that Father claims that Dr. Brown told him to delay sending parents' executed consent until after the Christmas holiday, and that Dr. Brown denies this. At the hearing, we found both parties to be credible witnesses. We note that the parties engaged in considerable discussion, telephone calls and e-mails regarding 's evaluation process from August 2012 to January 2013. We see no evidence of dereliction or delay on the District's part. It seems entirely possible that Dr. Brown could have mentioned the Christmas holiday to Father in December 2012, and that he mistakenly interpreted the information as a request to delay. We decline to find evidence of bad faith, lying, or intentional delay on the part of either party.

We find that the lengthy process engaged in to evaluate and develop an IEP for did not violate Petitioners' rights, and that Petitioners have not established the first requisite element required for private school tuition reimbursement. Therefore, we do not consider whether Petitioners have shown that the placement at Horizon was both proper under the IDEA and necessary in order for to receive an appropriate education.

Petitioners' Issue #4 and Proposed Resolution

Thus far in the process, an attorney has not yet entered an appearance on behalf of the Petitioners. Additionally, I do not know whether or not the Administrative Hearing Commission has the authority to award attorney's fees. However, once an attorney enters (or attorneys enter) an appearance on behalf of the Petitioners, and if the Administrative Hearing Commission has the authority to award legal fees, then Petitioners respectfully request an order be entered awarding attorneys' fees and related expenses associated with pursuing this Due Process request.

The IDEA states that the court, in its discretion, may award reasonable attorneys' fees to the prevailing party. 20 U.S.C. § 1415 (i)(3)(B)(i). At the hearing, Petitioners were represented

by an attorney, and no doubt incurred substantial legal fees. Because of our decision on the other issues in this case, however, we address this point no further.

Conclusion

This is a case in which well-meaning people attempted to develop an IEP for a student but were unable to come to an agreement because of their differing expectations. District personnel approached the task by drafting an IEP that would provide with “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Rowley*, 458 U.S. at 203; *Clynes*, 119 F.3d at 612. Petitioners had different expectations. As Father explained, he believed the District understood that “what we were looking for was a program that was substantively similar to that which existed at Horizon where he was doing really well, and that the School would be able to either create a program like it or find a place that’s like it to send him or send him there.” *Tr.* 729. Whether or not the District personnel that participated in ’s IEP process were aware that this was Petitioners’ desire, they were not obligated to fulfill it.

An IEP is not required to maximize the educational benefit to the child, or to provide each and every service and accommodation that could conceivably be of some educational benefit. *Rowley*, 458 U.S. at 199; *Clynes*, 119 F.3d at 612. Although an educational benefit must be more than de minimis to be appropriate, *Doe v. Bd. of Educ. of Tullahoma City Schls.*, 9 F.3d 455, 459 (6th Cir. 1993), an appropriate educational program is one that is “reasonably calculated to enable the child to receive educational benefits.” *Rowley*, 458 U.S. at 207. See also *Clynes*, 119 F.3d at 611. The IEP created for meets this standard.

Case law under the IDEA is replete with examples of parents who have placed their children in private schools and been denied tuition reimbursement for reasons similar to the ones in this case. *See, e.g., Gill* (no reimbursement for home-based program using specialized method to teach student with autism); *Park Hill v. Dass* (no tuition reimbursement where Parents

enrolled autistic twins in private school using specialized teaching methods); *Fort Osage v. Sims* (no tuition reimbursement for private school placement where student's IEP did not fully identify student's disabilities). "Parents are not entitled to reimbursement for the cost of providing a private education to a disabled student unless the school district has not offered a free appropriate public education and the private placement is appropriate. Parents who unilaterally decide to spend money on private education do so at the risk that they will not receive reimbursement for the cost." *Gill*, 217 F.3d at 1037. This is the law even if a court finds that the student might have benefited more from the private school education than the public school. *Clynes*, 119 F.3d at 613.

In summary, the IDEA required Respondent to offer FAPE to by creating a unique educational program that will provide him with some educational benefit. The educational program created by 's IEP team did not meet all of Petitioners' desires and expectations, but it satisfied the requirements placed upon Respondent by the IDEA.

Summary

We deny Petitioners' claims for placement of at Horizon and transportation to Horizon at District expense. We deny Petitioners' claim for tuition and transportation cost reimbursement beginning with the 2012-13 school year.

Appeal Procedure

Please take notice that this is a final decision of the Administrative Hearing Commission in this matter and you have a right to request review of this decision. Specifically, you may request review as follows:

1. Proceedings for review may be instituted by filing a petition in the circuit court of the county of proper venue within forty-five days after the mailing or delivery of the notice of the agency's final decision.

2. The venue of such cases shall, at the option of the plaintiff, be in the circuit court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence.

Please take notice that you also have a right to file a civil action in federal or state court pursuant to the IDEA. See 34 C.F.R. Section 300.512.

SO ORDERED on January 22, 2014.

KAREN A. WINN
Commissioner