Before the
Administrative Hearing Commission
State of Missouri

, in the interest of,	)	
Petitioner,	)	
vs.	)	No. 16-3786
ST. LOUIS CITY SCHOOL DISTRICT,	)	
Respondent.	)	

DECISION

(Parents) filed a due process complaint against the St. Louis School District (District), alleging that the District failed to provide their son (Student) with a free and appropriate public education (FAPE) pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq. We find that the District did not deny Student FAPE.

Procedure

On November 18, 2016, Parents filed their due process complaint against the District. On November 28, 2016, the District filed a response to the complaint. On December 9, 2016, the District filed a motion to dismiss. On January 10, 2017, Parents filed a response to the motion to dismiss. On January 11, 2017, the District filed a reply memorandum in support of its motion to dismiss. On January 23, 2017, we denied the District's motion to dismiss. On April 3, 2017, the District filed a second motion to dismiss and motion in limine. On April 4, 2017, Parents filed a

response to the District's second motion to dismiss and motion in limine. On April 4, 2017, we held a conference call in which we orally denied the District's second motion to dismiss and granted in part the District's motion in limine. On April 5 and 6, 2017, we held a hearing. Attorney Thomas Kennedy appeared on behalf of Parents, and Parent appeared in person.[1] Attorney Thomas Brink represented the District. This case became ready for decision on April 26, 2017, when the last brief was filed.

Findings of Fact

1. Student is a -year-old boy who resides in the District, with an educational diagnosis of other health impairment (OHI), and medical diagnoses of autism spectrum disorder (autism), attention deficit-hyperactivity disorder (ADHD), and post-traumatic stress disorder (PTSD).[2]

Early Childhood

2. The Missouri Department of Social Services, Children's Division, obtained legal custody of Student when he was five years old. Student lived in eight different foster homes over the next two years. In 2013, Student began living with Parents through a foster placement. In 2015, Parents adopted him.

3. In January 2012, Our Little Haven completed a full psychological assessment on Student and diagnosed him with autistic disorder and neglect of child (sensory processing disorder – auditory and tactile). His foster parents at the time observed that Student engaged in negative behaviors (oppositional behaviors) when he did not get his way. In addition, Student had significant toileting issues[3], hit children, preferred to be alone, spent significant time focused on

[1] Student's other parent could not attend the hearing due to an injury.

[2] Dr. John Constantino testified the Student's history spans the gap between DSM-IV and DSM-V, and the DSM-V has a "sort of novel condition . . . called disruptive mood regulation disorder." Tr. 283. Some of Student's symptoms fall within this diagnosis. *Id*. There is no evidence the District was aware of this conclusion when it completed Student's November 7, 2016 IEP.

[3] Student was abused in a previous foster home for toileting accidents.

one activity, and had difficulty leaving a preferred activity. The evaluation noted, "[Student's] severe [ADHD] and his oppositional defiant symptoms and anger problems would actually appear to be rather typical of children with Hig Functioning Autism." The District had a copy of this assessment. Ex. Q, pp. 190 and 193.

Kindergarten - Epworth

4. While in kindergarten, Student attended Epworth City School (Epworth), which was a private separate school placement within the District for students with special education behavioral problems.

5. At this time, Student's educational diagnosis was emotional disturbance (ED), and his medical diagnosis was ADHD.

6. According to Student's April 23, 2013 Individual Education Plan (IEP), which evaluated his time in kindergarten[4]:

a. Student was imaginative, playful and caring.

b. Student's disability affected his involvement in the general education curriculum in the areas of social/emotional behavior, anger management, being flexible to changes, social skills, and displaying oppositional defiant behaviors.[5]

c. Student required a small and structured setting with a therapeutic component, and benefited from materials being broken down into small steps, frequent breaks, positive reinforcement, clear and defined rules with consistent consequences, social skills training, trust building, self-regulation program, planned ignoring,

[4] The following parties participated in the IEP meeting: a), Parent/Guardian; b) Debra Bell, LEA Representative; c) Jill Lockwood, Individual Interpreting Instructional Implications of Evaluation Results; and Alice Kinsella School Clinical Therapist. In addition, all of Student's IEPs contained a note that the District and Parents had a right to invite any other participants they feel have knowledge or special expertise of the child, and the determination of such expertise shall be made by the party who invited the individual.

[5] All of Student's IEPs contained similar language.

and sensory support during times of escalation such as a calm down bottle, squeeze ball and pillow (fidgets were a distraction).[6]

d. Student displayed negative behavior when he did not get what he wanted, including loud piercing screams, knocking over chairs, emotional outbursts, lying on the floor, hitting himself, running his head into a wall, verbal threats of hurting himself, crying, and defecating in his pants.

e. Student's goals for first grade focused on improving his social and emotional behavior.

f. In first grade, Student was to receive weekly 1,740 minutes of social skills training and 60 minutes of psychological counseling during the regular school year. During the extended school year (ESY) student was to receive the same amount of services.

g. The District performed a functional behavior assessment (FBA) and prepared a behavior intervention plan (BIP) that targeted Student's refusal to do work by pushing it away, screaming, knocking over chairs, or sleeping.

First Grade – Epworth

7. In first grade, Student continued to attend Epworth.

8. During January 7-14, 2014, at the age of , Student was hospitalized in a psychiatric hospital, CenterPoint, for suicidal and homicidal ideations because:[7]

a. Student hit a Parent in the stomach and reported having "pictures in his head of throwing a knife at [foster mom's] neck and setting her on fire" and he "wished he could make [the images] stop." He reported hearing voices at night telling him "to kill myself" and "they are going to kill me." Ex. 13, p. 894. At the time, adjustments to Student's medication, Risperdal, was occurring, as well as the termination of his biological parents' parental rights.

9. A medical record from Student's January 2014 hospitalization indicated:

[6] A sensory diet was defined by one of the Parents as a:

> . . . schedule you set up for a child so that first thing in the morning, you have them do certain sensory activities. And then throughout the day at regular intervals, you identify the places that they're having trouble. You might have them do fine motor activities, squeezing Play-Doh right before a writing activity or have them do a whole bunch of jumping jacks right before a sitting still activity to keep their body feeling calm before they start to have an issue.

[7] There is no indication that the District had copies of these records or was aware of the reasons for Student's hospitalization.

a. Student's medical diagnoses, Axis I-V, was: a) mood disorder not otherwise specified; b) learning disability; c) fetal alcohol syndrome, sensory integration disorder, constipation, and auditory processing disorder; and d) abandonment issues, poor social skills, and issues with being in foster care. There were reported concerns that Student suffered from physical and sexual abuse in early childhood.

b. Student was inattentive, restless, avoided work he disliked or that required sustained mental effort. He had an average range of intellectual abilities, but his psychiatric issues interfered "with his ability to demonstrate this intelligence." Ex. 13.

10. On March 13, 2014, the District performed a psychological-educational assessment on Student at Parents' request. Parents wanted Student re-evaluated for an educational diagnosis of autism. The assessment was comprehensive, including the administration of seven standardized assessments, a review of past medical reports (including Out Little Haven report), classroom observations, school records, speech and language evaluations, and input from Parents and school staff. The evaluation concluded the following:

a. Student's negative behaviors were consistent with prior reports. The school therapist noticed that Student had difficulty with emotional regulation when he did not get what he wanted.

b. Student needed continuous sensory support (seat cushions, chew bands, music, deep pressure vest, weighed lap pad) throughout the day.

c. Student's IQ was 93, and his overall receptive and expressive language skills were within expectation for same-age peers. Student's informal language assessment showed his language was appropriate as to form, content and use. Student had a definite dysfunction with the ability to process sensory input and had a "low tone," which affected his motor accuracy and endurance to complete tasks.

d. Student met the criteria for OHI, but not autism. Student's Gilliam Autism Rating Scale autism index score was 66 and fell within the unlikely range for autism. Student's teacher had not observed any behaviors indicative of autism.

11. According to Student's April 10, 2014 IEP that evaluated his progress in first grade[8]:

a. Student remained imaginative, playful, caring, and loved to learn.

b. Student's educational diagnosis was changed to OHI, and his medical diagnoses were identified as autism, ADHD, PTSD, concerns of fetal alcohol syndrome, and diagnoses affecting his toileting issues.

c. The IEP referenced, but did not discuss, Student's hospitalization in January 2014.

d. Student continued to display negative behaviors throughout the school day when he did not want to work, when asked to stop doing a preferred activity, and during transitions. At times, Student looked at the person who asked him to stop, and smiled while continuing with the behavior. Student lacked problem-solving skills, shut down when work got hard, and his negative behaviors interfered with his academic progress. Changes in his personal life and home placement helped his progress.

e. A therapeutic environment benefited Student.

f. Student directed his aggression at both himself and staff.

g. Sensory processing was important throughout the day, such as chair cushion, hot dog blanket he could wrap up in and wiggle, tent to cover him, music, oral stimulation for mouth, fidget toys, trampoline, pressure vest, noise-reducing headphones.

h. Student's IEP goals for second grade continued to focus on improving his emotional and social behaviors.

i. Student's weekly therapy remained the same. His social skills training decreased 30 minutes per week. Occupational Therapy (OT) was added, which included 30 minutes per week with an additional 15 minutes per week of the OT therapist consulting with Student's teacher (OT consult). Student was to receive these same services during ESY.

j. Student's school modifications/accommodations remained consistent with the addition of more sensory support, giving oral clues, and providing structured time for organization of material. The accommodation of lower difficulty level/shortened assignments was removed.

[8] The following parties participated in the IEP meeting: a), Parent/Guardian; b) Amanda Johnson, Parent/Guardian; c) Debra Bell, LEA Representative; d) Angie O'Brien, Regular Classroom Teacher; e) Jill Lockwood, Individual Interpreting Instructional Implications of Evaluation Results; f) Angela Prada, SLPS Occupational Therapist; g) Trish Tadducci, Educational Advocate; and h) Kristie Tyson, School Therapist.

k. An FBA was completed and a BIP prepared to address Student's behavior of becoming upset and frustrated when he was unable to express his feelings, not ceasing his negative behaviors when asked, and not listening to directions. Student's interventions/reinforcements remained the same regarding the use of positive reinforcement, social skills training, and the use of a daily point sheet with motivators.

12. Between May 18, 2014 and June 5, 2014, Student was hospitalized, in partw because he threatened to jump from a banister at home to kill himself; he engaged in violent episodes; and he attacked his pregnant teacher.

13. On April 21, 2014, Parents had Student evaluated by Mercy Children's Hospital's Autism Center for a second opinion concerning Student's lack of an educational diagnosis of autism. The District received a copy of this report, which confirmed a medical diagnosis of autism.

14. On June 10, 2014, the District amended Student's IEP, with the consent of Parents, to change his placement to a regular classroom environment with non-disabled peers 100% of the time with a para-educator to assist with toileting.[9] Parents supported the change because they were concerned he was becoming non-verbal when overstimulated and was having difficulty understanding how his behavior affected others. They wanted to see the amount of sensory input increased.

15. Student's June 10, 2014 IEP noted his hospitalization from May 19 – June 5, 2014 due to anxiety and depression with medication changes. It also added to Student's BIP the use of social stories, direct instruction, and a sensory diet as already defined in the IEP.

16. Parents worked a lot with Student during the summer after his first grade year to enable him to read. By the end of the summer, he was reading basic books.

[9] While the IEP does not state this, the parties agreed that Student would primarily attend Mullanphy Elementary School in second grade in a self-contained classroom for students with autism.

Second Grade – Mullanphy in Cross-Categorical Classroom

17. Student attended second grade at Mullanphy Elementary School (Mullanphy) within the District, primarily within a self-contained classroom for students with autism.

18. On January 29, 2015, Student's IEP team met at Parents' request to review all existing evaluation information (RED meeting), and to discuss if additional data was necessary to evaluate Student's need for special education and related services.[10] A report was generated documenting the meeting, and it stated:

a. Parents stated that Student is easily frustrated, has tantrums when he is upset, screams, yells, hits himself, threatens to hurt other or "kill" his parents. The parties did not address Student's prior hospitalizations. Ex.Y, p. 354.

b. Student's teacher noted that Student utilizes a sensory diet daily, especially before writing activities.

c. Student struggled with social/emotional/behavioral skills, including "loud screaming, head banging, emotional outbursts, lying on the floor, hitting self, verbal threats to hurt self, verbal abuse to staff, crying, soiling pants, and making noises." "He has displayed these behaviors due to not getting what he wants, when something is taken away from him, transitions, non-preferred work/tasks, and when he is tired." Such outbursts have gone from 5-7 per week to 2-3 per week since the beginning of the school year. Student is exhausted by his behavior, and requires "continuous sensory support (fidgets, deep pressure, pressure vest, chew things for mouth) throughout the day to keep him regulated." The sensory items can become "very distracting for him and once taken away many times the cycle will start over again." Ex. Y, p. 353.

d. Student's educational diagnosis remained OHI because the District did not find Student had a required language deficit.

19. On February 4, 2015, Student was provided a speech and language evaluation, and it was determined that his overall receptive and expressive language skills fell within expectations for

[10] The following individuals attended the RED meeting: a) and, Parents; b) Megan Hetz, LEA Representative and Classroom Teacher; c) Diana Taylor, Special Education Teacher; d) Pamela Zacher, School Psychologist; e) Mary Skowra, Occupational Therapist; f) Ashley Hinds-Dunn, Speech Language Pathologist; g) Kelsey Wright, Children and Family Ministries; h) Colleen Reichert, Autism Specialist; and i) Kathleen McHugh, Speech Language Pathology Student.

same-age peers. Language therapy was not recommended for Student, and his educational diagnosis of OHI was confirmed.

20. According to Student's April 16, 2015 IEP that evaluated his second grade year[11]:

a. Student was a great reader, learned to follow classroom procedures, was social and motivated by science, handled responsibility, and was good with younger students.

b. Student continued to engage in similar negative behaviors, but he was now threatening peers as well as staff, and recently started displaying some automatic self-stimming behaviors that affected him throughout the day and hindered him academically.[12]

c. Student's three psychiatric hospitalization during the previous school year were not referenced.

d. Student made some progress academically and on goals such as sitting and performing a task for 30 minutes with minimal prompts especially with a preferred activity, responding to boundaries, independently expressing his feelings appropriately 67% of the time, and independently responding to teachers 60% of the time.

e. Student's OT assessment noted that he demonstrated "definite dysfunction" regarding overall ability to process sensory input throughout the day.

f. Student did not qualify for speech and language services.

g. Student's academic and social/behavioral goals for third grade became more defined and challenging, which were:

- Goal One - Comprehension – retelling a story identifying the events in order, stating the main characters, giving cause/effect relationships in details, reading independently, understanding inferences.

- Goal Two – writing goal – produce a sample with a given topic, create a story using details, use a graphic organizer, be able to edit his work, publish his work.

- Goal Three – in social situations, Student will increase his socialization skills by maintaining his own personal space, and refraining from physically

[11] The following individuals attended the IEP meeting: a), Parents; b) L. Small Hetz, LEA representative; c) D. Taylor, Special Education Teacher and Individual Interpreting Instructional Evaluations; and d) E. Garrison, General Education Teacher.

[12] The behaviors were, "look[s] like his hands get sweaty, he fixates them in a closed position like he is holding an object, then shakes them and may pull them close to his mouth." Ex. Z, p. 375.

intruding on other people's space unless asked or invited for 8 out of 10 observed opportunities.

- Goal Four – increase math skills by computing 3-digit addition and/or subtraction, and 1-2-digit multiplication problems with 80% accuracy.

- Goal Five – improve social skills by utilizing coping skills to assist him to be able to deviate from his schedule/routine without notice with minimal verbal excuses/arguments or oppositions for 8 out of 10 observed opportunities.

- Goal Six – When provided a visual, Student will use a checklist to complete complex tasks independently with fading prompts 75% of the time.

- Goal Seven – OT – Student will begin a non-preferred task such as morning writing with less than verbal cues within a reasonable period with and without OT present using sensory supports as needed on three of four data collection days.

- Goal Eight – Student will increase his completion of daily assignments to 60% on three of five data days.

- Goal Nine – Student will begin daily work tasks within 5 minutes after completing sensory work plan for 5-10 minutes at least 2 times per day on three of four data collection days.

h. An FBA was completed and a BIP prepared that continued to focus on Student's negative behavior, but added his threats to other students. Student's three primary negative behaviors throughout the school day were: 1) not completing work on time; 2) not keeping hands and feet and objects to himself (especially when other students are doing something fun); and 3) threatening students and staff, in particular, with the threats to staff focused on the distant future such as "I'm going to kill you when I get older, I hate you." The listed interventions moved away from a point system to use of visuals regarding the rules, active ignoring, peer and adult modeling, schedule of reinforcements, physical activity, and debriefing of incident. Positive reinforcement continued to include rewards.

i. Student's weekly social skills training decreased from 1,710 to 150 minutes, and his OT decreased from 30 minutes to 15. His OT consult remained the same. His specialized academic instruction increased. During EST, he was to receive weekly, academic instructions, 300 minutes of social skills training, and no OT services.

j. Special modifications/accommodations

    - <u>Same as 2014 IEP</u> - some sensory supports, preferential and alternative seating, give oral cues/prompts, provide structured time for organization of materials, send incomplete work home, use positive/concrete

reinforcers, repeated review and drills, frequent reminders of rules, check often for understanding/review, allow frequent breaks.[13]

- Added in 2015 IEP - use of multiplication table, adapted or simplified text/material, extended time for completion, multiple sessions, answers may be given verbally, alter physical room for comfort, extended time for completion, homework is practice.

- Removed from IEP – read test to student, directions given in a variety of ways, reduced pencil/paper tasks, avoid penalizing penmanship and spelling error. Removed for the BIP was the phrase "sensory diet".

21. By the end of second grade, Student entertained himself by reading books.

22. Student attended Children's School of Science in Woods Hole, Massachusetts, during the summer between second and third grade. He performed well with no accommodations. Student has consistently enjoyed and engaged in learning about marine life.

Third Grade – Cross-Categorical Classroom at Mullanphy

23. Student attended third grade at Mullanphy in a cross-categorical classroom with ten children, one teacher, and one aide.[14] The students had varying educational disabilities, but they were all high functioning. The work became more challenging.

24. Student' negative behaviors continued such as:

- In August 2015, Student "touched another student's (female) butt at recess" and made an inappropriate comment to another student in the restroom. Ex. DD, p. 512.

- In October 2015, while at school, Student made three comments about killing himself and wishing he was dead and that he wanted to kill another student.

- Student rode the school bus to and from school, and had difficulty with the noise and crowded environment.

25. Between November 5 -10, 2015, Student was hospitalized at CenterPointe due to suicidal ideation, aggression, and irrational fears of sand storms or home invasions. Student's teacher was aware of this hospitalization.

[13] Some of these moved from daily to weekly.
[14] Student's IEP does not clarify his placement in the cross-categorical class.

26. In January 2016, Student was again hospitalized at CenterPoint for increased aggression directed at himself and others. One of his Parents lost her hearing in one ear for several days after Student repeatedly screamed directly into her ear. He was also banging his head, hitting, and yelling, and had more episodes of soiling himself (night and day). Student focused on worst-case scenarios.

27. In February 2016, Student kicked another student in the private area, and had more toileting accidents at school and moved back into pull-ups.

28. Parents observed more difficulty with Student at home, and he did not want to go to school.

29. In March 2016, Student threatened to kill another student when it was unprovoked and the student was doing her best to ignore him.

30. During the 2015-2016 school year, Student went to the school nurse on the following dates: a) February 24, 2016 - was in a fight with peer on recess; b) March 10, 2016 - pushed teacher's chair and teacher fell out and landed on Student's foot; c) April 20, 2016 – was hit in the jaw by a peer; d) May 17, 2016 - was kicked in head in cafeteria while arguing over a bottle of juice, and e) June 16, 2016 – was hit in the eye by a peer.

31. On April 22, 2016, Student was hospitalized a third time during the school year for one and a half weeks at CenterPoint due to decomprensation, including low mood, increased outbursts, greater cognitive rigidity, and self-injurious behaviors, including self-hitting and suicidal statements.

32. Parents informed Student's teacher that he would be returning to school after Student's hospitalization, and he would start an outpatient program. Parents asked the teacher to let them know if Student displayed aggression, self-injury, threats, or suicidal statements. They wanted this information to "get his meds dialed in right." Ex. E, p. 86.

33. According to Student's May 24, 2016 IEP, that addressed his third grade year, Student regressed in his social interactions, and the report stated[15]:

a. Student's love of reading continued, he was capable of following classroom procedures, science motivated him, he handled responsibility well, and was imaginative.

b. Parents reported concerns were, "[Student's] parents are concerned with him moving into the general education environment. She also expressed concerns"[16]

c. Student's negative behaviors continued as well as his difficulty completing timely work. He required multiple redirections and physical cues, and it could take up to 30 minutes to begin a daily routine. He used sensory supports inconsistently and at times showed no consistent triggers for his behaviors. He continued with his self-stimming behaviors and he no longer questioned why he had to do certain tasks, but just refused to do them. However, his verbal distracting behaviors (making noises, kicking the seats of student's chairs) decreased to 5-7 times per week compared to 3-5 times per day from last year. He requires verbal prompts, and a quiet area in order to regroup before returning to work.

d. No mention was made of Student's psychiatric hospitalizations.

e. Student's goals did not materially change.

f. His social skills training remained the same, and his OT increased from 15 to 30 minutes and the OT consult with teacher remained generally the same. His academic specialized instruction remained the same. His ESY weekly services included academic instruction, 300 minutes of social skills training, and no OT services.

g. Special modifications indicated Student was regressing. Many modifications were the same as the ones included in Student's November 2015 IEP. However, several were added that had been in previous IEPs, but removed in the April 2014 IEP. In addition, several of the modifications moved back from weekly to daily. In addition, the interventions were similar to the ones in his November 2015 IEP.

h. An FBA was completed and a BIP prepared that targeted the same behaviors as stated before, and noted that Student made negative comments to peers 3-4 times per day when he did not get what he wanted, was upset, or disliked what someone was doing, or a peer instigated him, and this occurred during transitions, cafeteria,

[15] The following individuals were present at the IEP meeting: a), Parents; b) Dr. L. Small, LEA Representative; c) A Fontenot, Special Education Teacher and Individual Interpreting Instructional Implications of Evaluation Results; d) R. Jones, Regular Classroom Teacher; e) C Varner, Occupational Therapist; and f) L. Johnson, Occupational Therapist.

[16] The documented sentence is incomplete in the record. Both parents were present at the IEP meeting.

recess, gym, music, art and science. In addition, the interventions were similar to the ones in his 2015 IEP.

34. On July 12, 2016, Student was hospitalized a fourth time during the school year at St. Louis Children's Hospital for three days and then DePaul Hospital for another three days.[17] A medical record noted that Parents took Student on a cruise for autistic children in mid-June, and Student became angry while in the pool, choking other kids with pool noodles, hitting and kicking staff, and refusing to leave the pool. Redirection was not successful. Student stated he wanted a sword to chop off his head, and he would kill himself by banging his head against the wall. There were several triggers in his life that included end of school, cruise for autistic children, retirement of his therapist, and being unable to see his biological mother and siblings.

35. At the end of third grade, Parents explored several private school placements for Student, but they were unable to place him. They started Student at Mullanphy in fourth grade, as they had no other option.

Fourth Grade – Cross-Categorical Placement at Mullanphy and Great Circle

36. Student began the 2016-2017 school year at Mullanphy, and attended Kyle Hagan's classroom for seven days.

37. The classroom was a cross-categorical special education setting for grades three through five. It had nine students with a range of disabilities from specific learning disability, intellectual disability, language impairment and autism. There was one teacher and one aide.

38. Parents took Student to school after the school buses discharged students to avoid the noisy transition and likewise picked him up from school early. The school did not object.

39. During the last three days of school, Student's therapist accompanied Student. Student ate lunch with his therapist away from the cafeteria to avoid the noise, which was beneficial.

[17] Parent stated Children's Hospital does not have a psychiatric ward and staff wanted him to be officially discharged from a psychiatric unit, so Student was transferred to DePaul.

40. Student's negative behaviors included:

- On August 24, 2016, when it was time to move on to another activity, Student "became mad and [threw] stuff around the room and at kids . . . [h]e proceeded to yell that he was going to kill [Hagan] 8 different times and was attempting to get at the other kids." Ex. 1. p. 1.

- On August 25, 2016, Student was humming and stomping his feet and some of his peers asked him to stop. Student yelled "NO Stupid." When a teacher tried to redirect Student, he kicked and hit the teacher. The teacher then assisted Student to a "safe spot" and Student grabbed his hand and bit the teacher. Student also tried to run away out of the school yard several times, and kicked and bit staff who tried to keep him safe. Ex. 1, p. 2.

- On August 26, 2016, Student attempted to run out of the building three different times, and threatened to kill other students and staff. When the teacher prevented him from leaving the building, Student kicked and hit his teacher and "threatened to kill his entire school." Ex. 1, p. 3.

- On August 30, 2016, Student approached a student in a "fight demeanor" and a teacher blocked him. Student then kicked and screamed at the teacher in an attempt to get to the other student. The teacher physically escorted Student to another room, and Student intentionally kicked, punched, pinched, and head-butted the teacher. The teacher had welts from Student's conduct and a headache that lasted several hours. Student also hit is own head against the door. Ex. DD, p. 650.

- On August 31, 2016, Student's behavior was escalating without any specific triggers and he had recently bitten a teacher twice. When a staff member called Student's Parent, the response she got was, "Why would you call me to come get him if your staff can't calm him down? I can't either. Call 911." The staff informed the Parent that Student "hits his head on any surface he can find, floor, shelves, doors, repeatedly." Parent stated this was typical behavior as well as issuing threats to kill others. Ex. DD, p. 651.

- By September 2016, Student had bitten four staff members.

41. Student had access to a sensory room and sensory aides within the classroom, such as pedals of a bicycle, bean bags, fidgets, play-Doh, and music, but did not use them except for two times. He otherwise refused them when offered to him.

42. Student's teacher did not observe Student benefiting from a sensory diet, but did observe Student engaging in some stimming behavior, such as rocking back and forth.

43. Due to Student's behavior, the District scheduled an IEP meeting for September 14, 2016, but Parents canceled the meeting because they placed Student at Great Circle.

44. Parents informed Hagan that Student would enter a residential placement. The IEP meeting was canceled until Student was released from the autism residential treatment program.

Great Circle

45. Student began attending Great Circle on September 5, 2016.

46. Upon entering Great Circle, the District removed Student from its enrollment without Parents' knowledge.

47. Student first began attending the day program for autistic children, and then after eight days also entered him in the autism residential treatment program when a residential bed became open.

48. The residential program was medically necessary. In addition, Student was on a complicated combination of medications, and Parents and Dr. Constantino were trying to make changes to it. Dr. Constantino recommended the medication changes occur while Student attended the residential treatment facility.

49. Student made some progress at Great Circle, but continued to have difficulties such as refusing to complete work, biting himself and staff members, kicking the wall, throwing his shoes, and banging his head against the wall.

50. Parent informed Great Circle that personnel should ignore Student when he banged his head. Student's teacher, Gina Noble, did this and Student's head banging stopped at school.

51. Student attended Noble's class from September 6, 2016 through November 11, 2016. The students in the class predominantly had a diagnosis of autism, and more than one child was nonverbal, and at least one other was high functioning.[18] There were four adults and two aids

[18] Great Circle had an autism class with high functioning students, but Student did not attend. It is unclear why he did not attend such a class.

(one adult worked exclusively with one child). There were ten students in the class and their ages were eight to thirteen.

52. Student had access to a sensory diet, including headphones, a weighted vest and blanket, a lap pad, fidget toys, sensory room, and a calming room. Student took advantage of the sensory diet for the first two weeks, and then stopped using them and refused them when asked.

53. While at Great Circle, Student's negative behaviors escalated when asked to stop engaging in a preferred activity. He screamed, whined, and kicked over chairs and desks, and when escorted to the calming room, he hit his head on the walls and floor while looking directly at staff to gauge their reaction.

54. These episodes usually occurred in the morning and ceased once he realized he would not get his way through such behaviors.

55. Student did engage in stemming whereby he moved his fingers in front of his face when using the iPad.

56. Noble did not believe her class was the best placement for Student, as he was higher functioning. She felt Student would be better in an ED classroom that addressed attention-seeking behaviors.

57. Noble never worked in an ED classroom, and she had little experience with training on sensory diets for children with autism. She had a provisional special education certification.

58. Student responded well to a reward system she implemented.

59. Noble noted changes in Student's behavior after a change in his medication, such as more ticks, licking bottom lip until it was chapped, making more animal noises, yelling out, and trouble sitting still.

60. When Student stopped the medication Risperdal, he suffered from ataxia, a condition that caused his skin to itch. He began to pick at his skin. Student did not have this condition before.

61. Student's occupational therapist assistant at Great Circle was Adam Busby. Busby is a certified occupational therapist assistant at the national and state level. He has an associate's degree in applied science, with an emphasis in occupational therapy.[19]

62. Busby provided OT services to Student, both individually and as a group in the classroom. The therapy generally involved fine and gross motor skills and sensory input, such as taking deep breaths, counting to ten, asking for a drink of water, taking a break or a walk, a pressure vest, fidgets, stress ball, and a white room (low sensory room where everything is white).

63. Busby did not observe Student needing sensory input and believed Student communicated effectively.

64. Busby created records of his services with Student, but the District did not ask for them. He did share his observations about Student with the District during the November 7, 2016, IEP meeting.

65. Student's primary therapist at Great Circle was Crystal Keentus. She is a licensed professional counselor with a master's degree in art therapy and counseling. She worked with Student 30-45 minutes per week in the residential treatment facility.

66. Keentus observed Student being very active at times, but other times he shut down or crawled under a table and cowered when another student acted out or behaved in an unsafe manner. She did not believe Student's behavior was autism based, but instead due to "an

[19] Busby defined the term "sensory" as, "[Y]ou have multiple sensory systems in your body . . . [such as] proprioceptive, which is being able to feel where your joints are in space and register pressure in your joints … [a]nd vestibular, it can also be called your balance sense." Proprioceptive input includes heavy work and deep pressure. Autistic children can crave hugs, rolling around on the ground, jumping, and swinging. Vestibule input is movement based such as swinging or spinning, which can help calm a child by exciting their nervous system. Tr. 176-177.

attachment basic component." Tr. 194. She did observe some autism characteristics such as some sensory needs, like rocking and struggling with transitions.

67. Keentus did not believe Noble's class was the best fit for Student because he was higher functioning than the other children in the class.

68. The District did not request information from Keentus, and she did not attend Student's November 7, 2016 IEP meeting.

69. On October 5, 2016, Parents requested the District schedule an IEP meeting at Great Circle before Student was discharged in order to "capture the interventions [Great Circle had] been using and figure out how to keep [Student] on this upward trajectory." Ex. DD, p. 666.

70. On October 5, 2016, Mullanphy School Principal did not believe the school had space or staff for Student.

71. The District informed Parents that Student was not enrolled with the District and would need to be enrolled before an IEP meeting could occur.

72. On November 1, 2016, Great Circle informed Parents that Student's behaviors were "attention maintained, and . . . [h]e seems to do so much better when with higher functioning peers that are not also seeking additional attention from preferred adults." Great Circle recommended Student be discharged. Ex. 2, p. 77.

73. On November 3, 2016, Parent provided the District a letter stating in part:

> [Student] has progressively had more and more difficulty at Mullanphy; he has struggled in his interactions with other students, with being bullied, with the level of sensory stimulation at the school, and with managing his frustration appropriately … [Student] has experienced an increase in anxiety and depression during the 2015-16 school year; he was admitted four times to inpatient psychiatric programs and twice to outpatient programs due to depression and suicidal ideation.
>
> [Student] only attended seven days of school at Mullanphy this school year; on all seven days we brought him to school after breakfast and picked him up before dismissal so that he could avoid the most hectic parts of the school day. On four of those days he was aggressive towards teachers or other students, and three of those days the school

requested that he be picked up even earlier, it was only the last three days that he was not aggressive when his therapist came to the school and pulled him out of lunch and PE … his psychiatrist recommended that he be admitted to the autism residential program at Great Circle for treatment and medication adjustment…

According to Dr. Constantino, the components of an education program that will be successful for [Student] are:

- A proactive sensory diet with breaks, deep pressure, and fine motor activity throughout the day implemented before sensory issues arise, and the option for [Student] to withdraw to less stimulating areas as often as needed.

- A program that addressed both the ADHD and the Autism components of [Student's] OHI educational diagnosis, not a program geared towards children with ED and behavioral disorders.

- Individual and group OT, LT and social skills training.

- Full time Occupational Therapists and Language Therapists on staff to consult on issues as they arise.

- ABA in the classroom, including regular assessment and consultation with a BCBA, data taken daily in the classroom, and all staff trained in ABA and data collection.

- Positive behavioral supports including positive specific praise, directions phrased as positive requests, and all classroom staff trained in positive language.

- A program that responds to problematic behavior with sensory supports and ABA strategies rather than discipline and negative consequences.

- Accommodations that allow [Student] to avoid extremely loud and crowded places, such as the gym or cafeteria, if he wishes.

- Functional Communication Training to address [Student's] low frustration tolerance and difficulty following directions.

- ADHS executive skills training, calendar assistance, and support learning time management.

- An environment with sufficient staff to control bullying and prevent physical harm to student.

Based on [Student's] needs, and his difficulty with transitions, Dr. Constantino has recommended that [Student] continue to attend school in the Autism program at Great Circle after discharge from residential treatment. We look forward to discussing strategies to meet [Student's] needs at the IEP meeting next week.

74. Parents believed that placing Student in a program geared to children with ED and behavioral disorders was inappropriate because: a) Student models negative behaviors; b) a teacher can only individualize a classroom so much, and a classroom of children who need consequences as opposed to sensory input can be difficult to implement; and c) Student should not be punished for things he cannot control.

75. Parents believe Student needs OT because he has repeatedly been assessed as having a deficit in sensory processing.

76. On November 4, 2016, Great Circle discharged Student. Parents did not understand that Great Circle no longer thought it was an appropriate placement for Student.

77. The discharge noted that Student displayed some ability to self-regulate, but continued to need to control situations around him.

78. The District re-enrolled Student on November 7, 2016, and held Student's last IEP meeting that same day. During the meeting:

- The IEP team discussed a possible placement at Great Circle in an ED classroom but the team voted against this. Parents would have agreed to placement at Great Circle in an ED classroom.

- The Great Circle staff who attended the IEP meeting agreed that Great Circle was not an appropriate placement for Student, he was not using the sensory diet, and his problems were behavioral and not due to autism. Great Circle was too restrictive for Student.[20]

- Parents expressed concern that Student would run away from school and harm himself.

- The IEP Team, including Parents, agreed that Student's IEP goals should remain the same, as he had made little progress. However, the District determined Student's OT goals should be eliminated as not being appropriate and should instead be on a consulting basis.

[20] The following Great Circle employees participated in the meeting: Gina Nobel, Adam Busby, Maureen Gieseler (Associate Director) and Sarah Howard-Wilmies (Process Coordinator). Also in attendance was both Parents, and for the District - LEA Representative, Hagan, Ms. Collins (Regular Classroom Teacher); Ms. Johnson (OT), Ms. Jones (Process coordinator); Ms. Ohorton (DD Resources Service Advocate) and Ms. Davidson (Easter Seals).

- The District determined that a public separate school placement was appropriate for Student, with services to be provided at Educational Therapeutic Support at Madison (Madison).

- The vote on Student's placement at Madison occurred around two and half hours after the meeting began. As soon as a vote was taken, Parents stated they had to leave the meeting. One Parent had to pick up Student. The IEP team did not discuss with Parents the other aspects of Student's placement at Madison such as the content of the BIP.

- Before Parents left, they provided the District a letter that reiterated their November 3, 2016 information, including Dr. Constantino's recommendations. The letter also stated that, "Since we do not feel that the IEP team has been able to offer [an] acceptable alternative during this meeting we do not agree to the proposed plan. We therefore intend to make a private placement at public expense." Ex. J., p. 108. Parents did not state they wanted to continue the meeting because they had to leave.[21]

79. On November 10, 2016, Parents asked the District for a copy of Student's final IEP from the November 7, 2016 IEP meeting because they had an appointment with Dr. Constantino the next day to discuss current goals and placement of Student, and Parents planned to visit Madison to observe the program the next day.

80. On November 11, 2016, Parents did not want Student to attend Madison and were working on getting him placed at Giant Steps.

81. On November 16, 2016, Parents visited Madison and its Principal, Marvin Echols.

82. The District charged Hagan with drafting the November 2016 IEP.

83. Hagan requested data from Great Circle and Parents, but did not receive anything.

84. Hagan expressed to Student's OT specialist that he was unhappy having to write Student's IEP because he had not seen Student in a month, and had no data from Great Circle.

85. Hagen relied, in part, on information supplied by Great Circle at the November 7 IEP meeting.

[21] There is no evidence that the parties discussed at the meeting Dr. Constantino's recommendations as provided in the Parents' November 3, 2016 letter.

86. On November 17, 2016, Hagen completed the November 2016 IEP that he believed was appropriate for Student.

87. According to Student's November 7, 2016 IEP:

- The description of Student's behavior was almost word for word from Student's April 2014 IEP.

- It acknowledged Student's medical diagnosis of Autism, ADHD, and concerns with toileting issues.

- Dr. Constantino's recommendations and Student's hospitalizations were not mentioned. Hagan knew Student had been hospitalized multiple times, but did not believe it was important because it was "not impacting his education from that period of time, school was not in session then" and he had no documentation of such hospitalizations.

- Student's task completion during the seven days he was in Hagan's class was 40% of the preferred tasks and less than 10% of the non-preferred tasks.

- Student's IEP goals remained substantially the same, and in a few cases regressed.

- Student's social skill minutes per week increased to 968 from 150. His OT was eliminated, except for OT consult with teacher that remained the same. His academic specialized instruction decreased. The stated reason why Student's individual OT services were eliminated was that Student "does not require as much assistance to address his sensory needs . . ." The stated reasons for Student's change in placement to Madison was for Student "to continue to make progress on his IEP goals and weaknesses." The reasons stated why he would not continue in his current placement was the same reason. The basis of this reasoning was "teacher observations, behavioral data, and IEP Team observations." Ex. BB, p. 493. His ESY service included academic instruction and 968 minutes of weekly social skills training.

- Student's modification also decreased. The following modifications were removed: multiple sessions, exams of reduced length, record student responses, answers may be presented orally, alter physical room arrangement, study carrel for independent work, reduce paper/pencil tasks, allow student to record or type assignments, provide structured time for organization materials, allow dictation or typing of assignments, extended time for oral responses, extended time for written responses. A modification for modify test format was added.

- Student's August 31, 2016 FBA was used and a BIP developed that identified that Student responded aggressively to adults and peers when redirected or does not get what he wants, and this occurs every 10-15 minute in and outside of class, during transitions, lunch, recess, arrival, dismissal, and ancillary classes. The

> intervention to be used was noted as positive reinforcement through use of jobs, tangibles, free time, shout outs, school wide PBIS program, pointing out Student's strengths, positive notes/calls home, private conversations, and frequent breaks. Student will be taught through calming breaths to accept redirection without the use of verbal and/or physical aggression toward adults and/or peers.

88. On November 21, 2016, Noble sent the District a copy of Student's IEP goal sheets that she updated from his prior District IEP. Nobel noted that Student had been in her class a short time, and "We spent a lot of our day trying to get classroom routines down and some target behaviors as well." Ex. L, p. 131. The updated IEP noted Student was making some progress on his IEP goals, but not on the goal to improve his social skills.

89. Parents discussed Student's hospitalizations with the District, but did not provide any medical records regarding his treatment, and the IEPs do not mention them in the sections addressing Parents' concerns.

Giant Steps

90. On November 14, 2016, Parents supplied Giant Steps with an application and Student's vaccination records.

91. Giant Steps believed Student would be a good fit, as Student had attended a summer program in the past.

92. Student had a three-day trial visit. The first day, Student did a walk through of the facility. The second day, he attended two classes, and the third day he attended two classes and lunch. The three visits were free of charge.

93. The purpose of the visits was to determine how Student adjusted to the school.

94. On November 17, 2016, Parents asked Giant Steps how Student's visit went, and recommended Student begin Giant Steps on December 5, 2016 for a half day and then start full days on December 6, 2016. Giant Steps agreed.[22]

[22] Parents and Student went on a cruise and returned from it December 4, 2016.

95. On November 18, 2016, Parents filed their due process complaint.

96. On December 5, 2016, Parents signed a payment authorization with Giant Steps.

97. Student began attending Giant Steps on December 5, 2016.

98. Student likes Giant Steps, and Parents have noticed improved behavior at home since he began attending.

99. Giant Steps observed a "honeymoon period" for two and a half weeks in which Student behaved well. Thereafter, Student began to engage in negative behaviors, some "severe", and had difficulty with transitions, particularly when he was engaged in a preferred activity. Tr. 406.

100. Student has good and bad weeks at Giant Steps, and some of his meltdowns have lasted 30 minutes.

101. Academically, Student has done well. Giant Steps is using the District's IEP for Student and has a yearly schedule planned out.

102. Student's science teacher requires Student go to a sensory room for a ten-minute workout where he does "heavy work" like jumping jacks or carrying weighted balls, and she has found it beneficial for Student. Tr. 354.

103. Student receives 100 minutes of OT per week, and Giant Steps feels it is important because Student holds his body very tight and has a hard time relaxing. When his body is not calm, he has difficultly learning.

104. Giant Step's records, Ex. 10, document that Student has engaged in the following negative behaviors:

a. On December 13, 2016, he had trouble transitioning from one exhibit to another at the science center, and he began hitting/biting himself, crying, and verbally refusing to move. Eventually he transitioned, but after time and space was provided.

b. December 14, 2016, when asked to clean up after having received a five-minute warning, he refused to follow directions, staff began to help him, and he began to bite and hit himself.

c. On January 4, 2017, he refused to participate in art and began yelling and vocalizing loudly. He took a break in the library to calm down. In addition, he had difficulty transitioning between morning free time and class. He was unable to regulate his body, as he fell out of his chair and waved his arms. He began to bite his arm and hit himself in the head. He cried and continued to refuse /ignore directives. Staff gave him deep pressure that he gradually responded to and was able to focus on work.

d. On January 5, 2017, he refused to go to science class and became increasingly disruptive. He yelled, whined, and was unable to verbalize why he did not want to go. He was taken to the sensory room to calm down and he banged his head on the door continuously and kicked the wall, hurting his foot. He eventually calmed down once the needs for this foot were met.

e. On January 6, 2017, he refused to share a bicycle with peers after several promptings and hit himself and other things. He was taken to the sensory room and he bit staff. Once in the room, he was able to calm down and was ready for class.

f. On January 17, 2017, during a transition after recess, he refused to clean up, threw himself on the ground, and hit his head.

g. On January 20, 2017, he refused to participate in class and engaged in unsafe behavior such as rocking back and forth in his chair, almost falling, sitting on top of his desk, and throwing his body on the ground. When a movie was turned off, he began yelling, whining, screaming, and hitting himself. He has difficulty calming down and preparing to go home.

h. On January 24, 2017, he misplaced his book at lunch and refused to sit and eat. He actively disrupted the entire cafeteria. He was taken to the sensory room and he continued to kick and bang on the walls and throw chairs. After twenty minutes, he calmed down and ate his lunch. He was later denied an activity because of his behavior, and he tried to push his way out the front door and repeatedly pushed and hit staff. He was transported to the sensory room.

i. He engaged in similar behavior on February 10, 14, 21, 23, and 28, 2017.

105. Parents have paid Giant Steps the following for services to Student: a) December - 2016 - $2,677.50; b) January 2017 - $4,845.00; c) February 2017 - $4,590.00 and d) March 2017 - $5,610.00.

Educational Therapeutic Support at Madison (Madison)

106. Marvin Echols, Jr., is the program director (Principal) of Madison. He has a master's degree in both psychology and social work. He was a behavior specialist for the District prior to

his position at Madison. He worked at Hawthorn Children's Psychiatric Hospital for seven years and worked for Caring Communities.

107. The District established Madison two years ago. It has many students who have behavior concerns. Madison uses a lot of behavior modification to address the social and emotional needs of the students.

108. Students have a mix of educational disabilities, such as emotional disturbance and learning disability. At the time of the hearing, three autistic students with behavior concerns attended Madison, and it did not have a sensory room. At the time Parents toured Madison, no autistic students attended and no sensory room was present. Madison did have a room that contained desks where students could go to calm down and be away from others (recovery room).

109. The school has no students with toileting issues, but staff could assist with such issues if necessary.

110. Madison has two classes with the following grade groups: K-2, 3-4, 5-6, 7-8, and one class for students suspended from their regular school for a weapon or violence infraction. They serve approximately 70 students.

111. Madison caps class size at 10 children, with one teacher and one aide.

112. Many of the students are not used to having parameters set on them or expectations. The school stresses the same expectations at home as in school, and conducts home visits and works with parents of every student. Echols is committed to working with the needs of each individual student.

113. Echols is not very familiar with autism, but works with the students' negative behaviors. A student who has no control over his behaviors would not benefit from instruction at Madison.

114. All Madison's teachers are certified in special education.

115. Madison reviews each student each quarter. It wants to stabilize student behavior and get the student back into a regular school setting. The goal is for students to attend Madison for 6-8 weeks and then return to a non-separate school. Students can, and do, stay longer.

116. Some students have entered the school, throwing chairs and desks, fighting teachers, hitting, scratching, and punching, and Madison has been successful with them. The staff work with the students and parents.

117. Students enter the building through a metal detector that makes a loud beeping noise, and the school has two safety officers trained to do restraints.

118. Madison's lunch and gym are noisy.

119. Madison uses a program called Accelus so students can do work at their own pace.

120. The school teaches consequences for one's actions and strives to build relationships with the students. A student may have lunch period, recess, or gym class taken away for bad behavior. The school asks parents to remove privileges at home as well. Students have autonomy to choose when the consequence stops, and the school uses this to develop relationships with students.

121. A student may be required to go to the recovery room for misbehaving, fighting, lying, etc. For severe infractions, a student may stay in the recovery room for several days. Other consequences include after-school detention, calls to parents, and asking parents to take away television or video games at home. On the reverse side, if a child is having a bad day or not ready to work because he is upset or tired, the school may allow him to go to the quiet room to get himself together.

122. Madison praises children when they do well, and works hard at relationship building and providing a safe environment for them, especially children who have experienced trauma.

123. Madison has two full-time master level social workers (not LCSWs) who provide individual and group counseling, and a language therapist who attends school 2-3 times per week.

124. Parents and Katee Thornton, LCSW, Senior Services Advocate with St. Louis Office for Developmental Disability Recourses, toured Madison with Echols. Parents and Thornton concluded that Madison was not a proper placement for Student.

125. Parents did not enroll Student at Madison because they did not feel it was appropriate for him because it was not prepared to handle his autism issues. Parents were concerned that the school was solely focused on behavioral issues, it used the recovery room as a consequence, and children were denied recess, lunch, or physical education as a consequence. Parents felts Student would not receive the sensory regulation he needed, and taking away recess would make everything worse. In addition, they did not think Student would be safe due to the student population mixture.

Dr. Constantino – Background Information

126. Dr. John Constantino is a physician and professor of psychiatry in pediatrics at Washington University. He is the director of the Division of Child Psychiatry at St. Louis Children's Hospital.

127. Constantino is an accomplished and well-respected physician in his field. He has published numerous peer-reviewed manuscripts and received research grants on topics related to diagnosis and treatment of autism in children.

128. Constantino has worked with children with autism since 1990. In that time, he has treated over a thousand children with autism.

129. Constantino directs the Synchrony Project, a program within the Division of Child Psychiatry that seeks to provide unmet mental health needs of young children in foster care.

130. In 2012, through the Synchrony Project, Constantino met Student for the first time. Since then, he met with Student on approximately 25 occasions. The total time Constantino spent with Student totals approximately ten hours.

131. Constantino diagnosed Student with autism, PTSD, and ADHD. Student also manifests symptoms of disruptive mood regulation disorder. He considers Student "one of the most damaged, affected children I have ever seen." Tr. 315.

Constantino's Treatment and Observation of Student

132. Autism is largely genetically determined. Constantino observed autistic traits in Student's sibling.

133. Constantino observed that Student engages in repetitive skin picking, a self-injurious act consistent with the repetitive behaviors seen in children with autism and PTSD.

134. Constantino currently prescribes Student an antidepressant (Fluvoxamine), a stimulant (Vivanse), two different mood stabilizing medications (an antiseizure medication, Lamotrigine, and an atypical psychotic, Quetiapine), an impulse control medication (Guanfacine), and a small dose of a sedating antidepressant (Mirtazapine) at bedtime.

135. Student has experienced dyskinesia – a syndrome of repetitive, spontaneous wave-like muscle movements that may occur as a result of changes in medication. Dyskinesia is a disfiguring and potentially stigmatizing condition. As such, a child with dyskinesia may require protection from bullying.

136. Constantino opined that Student:

- Has deficits in his capacity to use language for social communication. He misinterprets information and has difficulty managing verbal prompts and expressing himself appropriately.

- Student presents "monumental" disturbance in his capacity to relate appropriately to people, events, and objects. Tr. 305.

•Although Student is capable of engaging in reasoned social deviation to achieve some ends, the extent and spontaneity of his deviation is not voluntary from a clinical standpoint.

•Despite his problems, Student is not intellectually disabled, but does have social cognitive deficits and executive function deficits.

•Student "has a lot of insight and … preserved intelligence" and he can display negative behaviors that are manipulative, but many other times his responses are not voluntary or thought through because they are too deviant, inappropriate, and spontaneous. Tr. 339-40.

•The cause of Student's hospitalizations is complicated. He described being bullied and had a perception of disorganization and chaos and being afraid which "accompanied some of his episodes of deterioration over time … there certainly has been an association between how his school going and how is [Student's] life going. Tr. 306-07.

137. Constantino has observed characteristic features to Student's misbehavior. For instance, Student becomes mentally disorganized, more juvenile and regressive, significantly more disruptive and aggressive, prone to agitation, and prone to shutting down and withdrawing.

138. Constantino's understanding of what motivates or does not motivate Student in the school comes primarily from Parents' reports. He has not personally observed Student in a classroom setting.

139. Constantino considered Student's admission to Great Circle medically necessary because his behavior had become especially unmanageable, disorganized, aggressive, regressive, and inappropriate. He required essentially constant "man-to-man defense" to respond to his negative behaviors and a consistent therapeutic intervention plan "around the clock." Tr. 307-08.

Constantino's Communication with and Recommendations to the District

140. Constantino does not share medical records with the District. Instead, he shares them with the Parents who may share them with the District. He directly discussed Student's education plans with the District on two occasions, but cannot recall specifically when he did so.

141. On those two occasions, Constantino advised the District in two areas. First, Constantino advocated a higher level of structure with more individualized, one-on-one support for Student, which he felt was necessary for Student to learn and remain stable. Second, he

advocated tailoring a specific plan to optimize Student's ability to learn given his autism symptomology and considerable intelligence.[23]

142. Constantino was not invited to Student's IEP meetings, but his diagnoses were acknowledged in all of the IEPs. Constantino did not participate in Student's re-evaluation report, dated March 26, 2015, however the report acknowledged receiving documentation of diagnosis of ADHD from Constantino and Student's autism diagnosis.

143. There is no record of when Constantino participated in an IEP or directly communicated with the District.

144. Constantino's recommendations contained in the letter included as indicated in paragraph 73.

145. At hearing, Constantino acknowledged his recommendations provided to the District by Parents.

146. Constantino recommends:

- A proactive sensory diet for Student to counteract his autism of overstimulation that leads to disruptive behavior. A proactive sensory diet is implemented by an occupational therapist and it allows a child to stop what they are doing to receive a focused sensory input. The result of a proactive sensory diet for a child with autism is to prevent disruptive behaviors before they start.

- To effectuate a proactive sensory diet, an occupational therapist must continuously update and revise the sensory diet because strategies which initially motivate the student may become less motivating as time goes on.

- Social skills training would help Student cultivate and obtain support from peer interactions.

147. Different stimuli motivate children with autism as compared to other children. As such, one of the most important elements to educating autistic students is to accommodate their motivational structure.

[23] It is unclear what advice Dr. Constantino provided to the District regarding what type of sensory diet Student required.

148. Constantino disapproves of Student's placement in a program geared towards children with emotional disorders. He believes that children who are misdiagnosed or not understood as having autism as a primary driver of their disruption and motivation, are not generally afforded appropriate support.

149. Constantino believes placing Student in an academic setting in which all students have emotional disturbances would be inappropriate on multiple levels. Although Constantino believes Student is emotionally disturbed, he has concerns that a classroom not equipped to protect Student from agitated or disruptive behavior will exacerbate Student's PTSD.

150. Constantino predicts that Student will not be successful in school without OT, social skills training, and language therapy.

151. Constantino believes, based on seeing Student in his practice, that Student has been successful at Giant Steps.

Conclusions of Law

This Commission has jurisdiction over matters relating to the identification, evaluation, placement or the provision of FAPE to students with disabilities. Section 162.961.[24] The burden of proof in an administrative hearing is on the party seeking relief, which in this case is Parents. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). 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). Our findings of fact reflect our credibility determinations.

Jurisdiction

The District argues that we lack jurisdiction to hear Parents' due process complaint because Student was not enrolled with the District as a student at the time the due process

[24] Statutory references are to RSMo Supp. 2016 unless otherwise indicated.

complaint was filed. This issue is more fully explored in the parties' pleadings and our order of January 23, 2017.

However, courts have "continued to hold that parents who unilaterally enroll their child in private school before filing a due process complaint 'cannot [later] attempt to exhaust their administrative remedies,' regardless of whether the claim is for reimbursement, compensatory education, or both." *D'Aavis v. Independence School District*, 466 S.W.3d 17, 26 (Mo. App. W.D. 2015) (internal citations omitted).

The term "enroll" is not defined in the IDEA or in applicable federal regulations. The use of the word "enroll" or "enrollment" as used in Chapter 161, RSMo., that is applicable to the Missouri Department of Education and Secondary Education, generally uses the terms to express that a student is attending the school or has been included in the list of students enrolled in the school.[25]

The evidence does not establish that Student was enrolled with Giant Steps before Parents filed their due process complaint on November 18, 2016. Parents were certainly making a concerted effort to enroll Student at Giant Steps before November 18, 2016, and had established an informal agreement with Giant Steps that Student would begin attending the school on December 5, 2016. However, Parents and the school finalized enrollment when Parents signed the payment agreement on December 5, 2016.

Evidentiary Issues

District's Motion in Limine

The District filed a motion in limine, which we took with the case. The District argues that information not available at the November 7, 2016 IEP team should be excluded. In particular, the motion cites four exhibits created after the IEP was proposed.

[25]For example, see §§ 160.400.1(5), 160.405.1(5), 160.410.1(4), 160.415.1, 160.522.2.

Exhibit 5 contains an evaluation from St. Louis Children's Hospital from December 16, 2016. Exhibit 7 contains an affidavit from Michelle McCammond, dated February 7, 2017. Attached to the affidavit is a letter that describes Student's behavior and experiences prior to November 7, 2016. Exhibit 28 is a Washington University Department of Psychology Neurological Assessment of Student that was performed on March 7, 2017; while it contains some historical information, it primarily assesses Student's current situation.

As its primary support, the District cites *Gill v. Columbia Sch. Dist*, 1999 WL 33486649 (W.D. Mo. 1999) [hereinafter *Gill I*]. That decision was affirmed in *Gill v. Columbia Sch. Dist*, 217 F.3d 1027 (8th Cir. 2000) [hereinafter *Gill II*]. Gill II summarized the pertinent finding of *Gill I* as "[the IEP] could not be judged in hindsight]," but made no substantive finding regarding the appropriateness of admitting evidence gathered after a challenged IEP. In *Gill I*, the Court of Appeals refused to admit evidence of a student's progress in a home-based instruction after the parents rejected the student's IEP and sought compensation for the in-home education. The court determined that the issue in the case was whether the IEP was appropriate as of the date the IEP occurred. Accordingly, "[a]bsent some indication that the evidence was presented to defendants in an effort to get a revised IEP," only evidence from before the IEP meeting should be admitted. *Id*. at 20.

The District takes this holding to mean that information not provided to the IEP Team should be excluded, but that interpretation is too broad. In this case, Parents have, prior to this complaint, sought autism related services from the District and an educational diagnosis of autism. *Gill I* does not preclude them from subsequently seeking evidence of those issues to bolster their due process complaint. However, in admitting these exhibits, we understand that the issue in this case is whether the program developed is reasonable based on "the best information available to them at the time the IEP [was] developed. *Gill I*, at 2. We admit exhibits 5, 7, 28, and 29 subject to their weight as evidence.

Hearing Objections Taken with the Case

During the hearing, both parties made objections that we took with the case. We overrule all such objections.

IDEA Overview

Under the IDEA, all children with disabilities are entitled to FAPE designed to meet their unique needs. 20 U.S.C. §1400(d)(1)(A) and 34 C.F.R. §300.1(a). Missouri's State Plan for Special Education (2016) (State Plan) generally defines FAPE as regular and specialized special education and related services provided at public expense, under public supervision and direction without charge to the parents that meet the educational standards of the state educational agency and are provided in conformity with the Student's IEP. *State Plan*, Regulation I, §, page 3.[26] The IDEA does not prescribe any substantive standard regarding the level of education a disabled child should be accorded. *Board of Education of Hendrick Hudson Central School District, Westchester County, et al. v. Rowley*, 458 U.S. 176 (1982). It does require the school district to "provide a disabled child with such special education and related services 'in conformity with the [child's] individual education program." *Endrew v. Douglas County School District RE-1*, 137 S.Ct. 988, 994 (2017).

Accordingly, it is well established that "The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Id., quoting Honig v. Doe*, 484 U.S. 305, 311 (1988). An IEP is a specialized course of instruction developed for each disabled student, taking into account the "unique needs" of a particular child. *Id, citing Rowley*, 458 U.S. at 181. The IEP is not required to maximize the educational benefit to the child, but must be "reasonable" and "not ideal." *Rowley*, 458 U.S. at 199 and *Endrew*, 137 S.Ct. at 999.

[26] See also, 20 U.S.C. § 1401(9).

Children not fully integrated into a regular classroom, such as Student, must have an IEP that provides an educational program "appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom." *Endrew*, 137 S.Ct. at 1000. "To meet its substantive obligations under the IDEA" an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew*, 137 S.C. at 999.[27] This is not a bright line rule and it "requires a prospective judgment by school officials" that is a "fact-intensive exercise" incorporating information from both school officials and input from the child's parents. *Id*., citing *Rowley*, 458 U.S. at 207.

However, an absence of the court providing a "bright-line rule" is not "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review" and such deference is "based on the application of expertise and the exercise of judgment by school authorities" and "[a] reviewing court my fairly expect those authorities to be able to offer a cogent and responsive explanation for their decision that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Endrew*, 137 U.S. at 1001-1002, citing, in part, *Rowley*, 458 U.S., at 206. Nevertheless, this does not negate a hearing officer's duty to weigh the credibility of the witnesses and consider the impact of the testimony of expert witnesses. *Bd. of Educ. of Montgomery County v. S.G.*, 2006 WL 544529 (D.Md. Mar. 6, 2006).

[27] At the time of the November 7, 2016 IEP, the standard in the Eight Circuit was "that a student who 'enjoyed more than what [the court] would consider 'slight' or 'de minimis' academic progress" was not denied an educational benefit. *Paris School District v. A.H. by and through Harter*, 2017 WL 1234151, *5, citing *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 803 (8th Cir. 2011). See also, *Gill v. Columbia 93 School District*, 217 F.3d 1027, 1036 (Mo. App. W.D. 2000)(The standard in Missouri was whether student's "individualized program was sufficient to provide him with some educational benefit."). In *Paris*, the court noted that *Endrew* rejected this standard and proceeded to "apply the standard articulated in *Endrew*, using existing Eight Circuit case law where it is still relevant. *Paris*, at *5.

Educational authorities must identify and evaluate disabled children, develop an IEP for each one, and review every IEP at least once a year. §§1414(a)-(c), (d)(2) and (4). They must also re-evaluate a student every three years. 20 U.S.C. §1414(a)(2)(B)(ii); 34 C.F.R. §300.303(b)(2). Each IEP must include an assessment of the child's current educational performance, articulate measurable educational goals, and specify the nature of the special services that the school will provide. §1414(d)(1)(A).

Issues in the Case

Parents presented the following three claims in their due process complaint:

a) Did the District deny Student FAPE by failing to provide Student the educational diagnosis of Autism instead of Other Health Impairment in Student's November 7, 2016 IEP?

b) Did the District deny Student FAPE when it failed to provide Student with OT services in Student's November 7, 2016 IEP?[28]

c) Did the District deny FAPE when it placed Student in a public separate school program where many of his classmates have an educational diagnosis of Serious Emotional Disturbances rather than an autism-specific program?

We independently address each issue below.

Autism Diagnosis

Parents allege that the District denied Student FAPE because his November 7, 2016 IEP did not provide for an educational diagnosis of autism. As argued by the District, courts have held that, when considering the adequacy of an IEP, it is the student's individual needs that are more important than whether the identified diagnosis is correct. In *Fort Osage R-1 Sch. Dist. v. Sims*, 641 F.3d 996, 1004 (8th Cir. 2011), the court stated:

> … we believe that 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 … instead, as with any other purported procedural defect, the party challenging the IEP must show that the failure to include a proper disability diagnosis

[28] Parents originally pled in their due process complaint that Student was also denied FAPE because he did not receive speech and language and Applied Behavioral Analysis (ABA) services. Parents waived these allegations in their post-trial brief.

'compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.'[29]

An education diagnosis of autism is different from a medical diagnosis. According to the State Plan, the definition of autism for purposes of an educational diagnosis is:

> "Autism" means a developmental disability significantly affecting verbal or nonverbal communication and social interaction, generally evident before age three (3) that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.
>
> The term does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disability as defined in this document.
>
> ****
>
> Criteria for Initial Determination of Eligibility
>
> A child displays autism when:
>
> A. Through evaluation that includes a review of medical records, observation of the child's behavior across multiple environments, and an in-depth social history, the following behaviors are documented:
>
> 1) Disturbances of speech, language-cognitive, and nonverbal communication: The child displays abnormalities that extend beyond speech to many aspects of the communication process. Communicative language may be absent or, if present, language may lack communicative intent. Characteristics may involve both deviance and delay. There is a deficit in the capacity to use language for social communication, both receptively and expressively.
>
> ****

The District concluded that Student did not have an educational diagnosis of autism because his speech and communication skills did not fit the required definition. The District consistently acknowledged Student's medical diagnosis of autism and addressed his autistic needs in its IEPs. In addition, the District re-examined Student's educational diagnosis over the years through re-evaluations, IEPs, and observations. Student's assessment and the direct

[29] The court was citing *Lathrop R-II School Dist. v. Gray*, 611 F.3d. 419, 424 (8th Cir. 2010).

observations from school personnel support the District's conclusions that Student's speech and language deficits do not rise to the level required by the State Plan's definition of autism.

Parents argue that there is unrebutted evidence that District personnel – Shinita Jones – stated in the November 7, 2016 IEP meeting that the District could not place Student at Great Circle or Giant Steps because he lacked an educational diagnosis of autism. We did not find that Jones made the statement as understood by t Parents. It is not consistent with the District's placement of Student in an autistic classroom in second grade. More importantly, the statement alone is not dispositive that the District would have placed Student at either location if he did have an educational diagnosis of autism. Moreover, this does not address whether Student meets the State Plan definition or whether the District addressed Student's autistic needs despite a lack of an educational diagnosis of autism.

Parents also argue that the District did not consider: 1) that during each hospitalization Student underwent in 2015 and 2016, his diagnosis of autism was confirmed; 2) when Student attended an autism-specific class at Mullanphy, he enjoyed school, made "remarkable progress," his negative behaviors decreased, and he was never hospitalized; and 3) when Student was removed from the autism-specific classroom, he regressed.

These arguments are more fully addressed below as they are similar to the arguments presented by Parents regarding their claim that Student was denied FAPE when his November 7, 2016 IEP placed him at Madison. These arguments do not account for the District's decision to deny such an educational diagnosis due to the State Plan's definition. They are more relevant to the issue of whether the District properly provided services to Student to address his autistic needs.

Dr. Constantino testified that Student was deficient in both speech and language per his observations in a clinical setting. However, the State Plan requires the District to consider more

than a medical opinion. The District's records over time have consistently stated Student does not qualify for an autism educational diagnosis because he is not sufficiently deficient in his speech and language skills as compared to his peers, and language therapy was never recommended. Student's OT and speech and language therapist at Great Circle – Adam Busby – agreed with the District's conclusion. In addition, the District has been providing services directed at Student's needs regardless of his educational diagnosis.

Parents have not demonstrated by a preponderance of the evidence that Student was denied FAPE because the District did not provide him with an educational diagnosis of autism as defined in the State Plan.

Occupational Therapy Services

Parents contend that Student was denied FAPE in his November 7, 2016 IEP when his sensory diet supervised by an occupational therapist was eliminated. Parents argue that Dr. Constantino testified that "a proactive sensory diet" helps prevent Student from experiencing "dysregulated episodes," and an occupational therapist is required to constantly revise the diet to ensure it continues to motivate Student. Parents' Brief, p. 23, citing tr. 296-297. In addition, they argue that Student has benefited from a sensory diet at Giant Steps, as testified to by his science teacher. However, as argued by the District, this is not the best example of Student benefiting from a sensory diet because science is reported to be one of his preferred activities.

Parents also argue that the District's witnesses were not credible when they testified that Student did not benefit from a sensory diet or OT services, and we address this argument more fully below. The record supports that the District provided Student with OT services overall and determined that he was not benefiting from it.

In the November 7, 2016 IEP, Student continues to receive OT services, but it is in the nature of an OT therapist providing consulting services to Student's teacher in order to meet

Student's sensory needs. Great Circle staff also supported this finding. The weight of the evidence does not support Parents' claim that Student was denied FAPE when his direct OT services were eliminated in the November 7, 2016 IEP.

Public Separate School Program Placement – Madison

Parents argue that Dr. Constantino supports their claim that Student's November 7, 2016 IEP denies him FAPE by placing him at Madison. Dr. Constantino opined:

- Student's autism is the "primary driver of [his] disruption and motivation." Tr. 299.
- The behavioral supports needed for children with ED are not the same for children with autism, and Student needs to be served in a setting without children with "intractably disruptive behavior" as this was associated with his deteriorating behavior and failing to learn. Tr. 291.
- If Student is placed in a school environment geared for students with emotional disturbances, then Student is predicted to not be successful at school. Tr. 302.

Parents also argue that: a) Giant Steps has benefited Student; b) Dr. Constantino unequivocally supports Student's placement at Giant Steps; c) Giant Steps performed a functional analysis on Student and has a "plan" to address Student's difficult behaviors; d) the District never conducted a functional analysis on Student's behaviors to investigate the causes of them; e) the District's witnesses did not contradict Dr. Constantino's medical analysis and clinical observations of Student; and f) the evidence does not support a finding that Student can possibly succeed at Madison and he will likely have additional hospitalizations. Parents argue that Madison is designed to be short term, which is not what Student needs, and it did not serve students with developmental disabilities or autism at the time Parents toured it.

For Parents to receive reimbursement from the District for tuition paid to Giant Steps, they are "required to show that the school district had not provided [Student] a FAPE in a timely manner prior to his enrollment at the private school." *Endrew*, 137 S.Ct. at 997, *citing*

§1412(a)(10)(C)(ii). Further, Parents were required to inform the District at the November 7, 2016 IEP meeting that they were rejecting the placement at Madison and intended to remove Student from public school and enroll him in a private school at public expense. 20 U.S.C. §1412(a)(10)(C)(iii).

Parents adhered to this notice requirement. Therefore, the issue is whether the District denied FAPE through its November 7, 2016 IEP, and whether Giant Steps is a proper placement under IDEA. *T.B. v. St. Joseph School Dist*., 677 F.3d 844, 847 (8th Cir. 2012), *citing Florence Cnty. Sch. Dist. Four v. Carter by & Through Carter*, 510 U.S. 7, 15 (1993). A private school placement is considered "'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits.' " *Florence*, 510 U.S. at 11, *citing Carter v. Florence County School District Four,* 950 F.2d 156, 163 (4th Cir. 1991), *quoting Rowley,* 458 U.S at 207. The alternative placement does not have to meet state education standards, but must be specifically designed to meet the student's unique needs and be supported by such services as are necessary to permit the student to benefit from the instructions. *T.B.*, 677 F.3d at 848, *citing Rowley*, 458 U.S. at 188-89.

The District argues that it is too speculative to conclude that Student will fail at Madison, not receive FAPE, and likely have additional hospitalizations. The District also argues that Parents have not established that the District denied FAPE, or that Giant Steps is an appropriate placement. The District maintains that it did not deny Student FAPE, and that Madison can implement Student's November 7, 2016 IEP. It argues that Madison is geared to students who have behavior issues, and its program addresses students' behaviors within the context of their individual needs. It uses positive behavioral supports and a recovery room. Its program goal is to return a student to a general education setting, but it is not short-term focused. The District

argues that Parents have not established that Madison cannot effectively implement Student's IEP.

The District also argues that the November 7, 2016 IEP encompasses all areas of Student's needs and addresses proper motivation factors, required interventions, goals, and contains a BIP to further address Student's unique needs. The District also argues that Parents failed to show that Giant Steps is an appropriate placement for Student since he participates in limited academics at Giant Steps, and has not fared any better there than at any other setting in which he has attended.

The record consistently states that Student's negative behaviors occur when he is directed to do a non-preferred activity. This has remained unchanged since his early childhood. Some of Student's assessments have attributed this to Student's high functioning autism. Dr. Constantino testified that Student engages in manipulative behavior, but at other times, his negative behaviors are not voluntary because they are too deviant, inappropriate, and spontaneous. The difficult questions are what is the proper educational setting and program for Student that will enable him to make progress appropriate in light of his circumstances and whether Student's November 7, 2016, IEP is reasonably calculated to achieve this. *Endrew*, 137 S.Ct. at 999.

Student attended Epworth in kindergarten and first grade in classrooms with ED children. In second grade, he was moved into an autism classroom. During both years at Epworth, Student engaged in similar negative behaviors, such as screaming, knocking over chairs, hitting himself, running his head into the wall, and threatening to hurt himself. He received sensory input both years. We found no indication in the record that his negative behaviors increased due to the student make-up in the classrooms, as opposed to external factors or the instability of his condition.

Student was first hospitalized for a week for suicidal and homicidal ideations in first grade, and hospitalized a second time for 19 days at the end of first grade for threatening suicide, violent episodes, and attacking his teacher. However, the legal record is lacking regarding the underlying causes for this hospitalization.

Parents argue that Student's regression in a cross-categorical classroom in third and fourth grade, and his increased hospitalizations, support the conclusion that he needs a school environment geared to autistic children. They stress that Student was successful in second grade while attending an autism classroom as demonstrated by him learning to read, enjoying school, and not being hospitalized.

While Student experienced some success in second grade, it was also noted that sensory items were a distraction and once taken away, the cycle started over again. In addition, it is unclear if Student learned to read in second grade due to Parents' efforts over the summer, because of his placement in an autism classroom, or because reading is one of Student's preferred activities. The record also reflects that in second grade, Student began directing his aggression toward his peers, while maintaining aggressive behaviors toward himself and adults. He also began displaying self-stemming behaviors. In addition, the record contradicts itself regarding the behavioral success Student experienced in second grade. His January 2015 RED report noted that Student's outbursts have gone from 5-7 per week to 2-3 per week since the beginning of the school years. However, his May 24, 2016 IEP (in third grade) stated that he had decreased his distracting behaviors from 5-7 times per week compared to 3-5 time per day last year.

With regard to Student's hospitalization, it is concerning the number of times he was admitted and missed school. We would have liked to have more information regarding the underlying causes of these hospitalizations before making a finding that Student's placement

outside an autism classroom contributed to the hospitalizations. The evidence identifies suicidal ideations, aggression, irrational fears, and self-injurious behaviors as the reason Student was admitted, but the record provides little else regarding the causes of such behaviors. The medical records from CenterPoint are limited, and do not address the impact of Student's educational experience on his hospitalizations. Dr. Constantino's records likewise have limited information regarding Student's school environment and its impact on his conditions.

Dr. Constantino testified that the cause of Student's hospitalizations is "complicated" and there is "an association" between how school is going for him and how his life is going. Tr. 307. However, this testimony lacked details. In addition, while the record establishes that the District was aware of Student's hospitalizations as referenced in the records and Student's IEPs, the record does not indicate how much the parties discussed the hospitalizations, including whether the Parents considered Student's hospitalizations to be causally connected to his school structure. Student had been evaluated within the three-year period as required by 20 U.S.C. §1414(a)(2)(B)(ii) and 34 C.F.R. §300.303(b)(2), and it is unclear how the parties viewed the hospitalizations as they related to the method by which the District was educating Student and addressing his unique needs.

Further, the records do not show that Parents advocated for a change in Student's IEPs because Student's educational experience was causing or contributing to his hospitalizations. Dr. Constantino's recommendations in t Parents' November 3 and 7, 2016 letters do not associate Student's hospitalizations with his school environment. The record does reflect that Student's medication adjustments and personal life events played a part in his required hospitalizations.

Accordingly, Parents' examples of how Student benefited from his second grade autism classroom do not rise to the level of establishing that Student received a more appropriate education to fit his unique needs in second grade as opposed to other settings within the District.

With regard to Student's sensory needs, he consistently received sensory input while attending District schools. It is unclear what sensory supports he received in second grade as opposed to later years. In third and fourth grade, he had access to a sensory room and sensory objects, such as visual aids, frequent breaks, repeated review of skills, small group discussion, and positive reinforcement. However, in third and fourth grade, he used his sensory diet inconsistently.

Student experienced an autism-focused program at both Great Circle and Giant Steps. He received a sensory and structured diet to address his autistic needs. In both locations, Student did well for the first two weeks. Thereafter, his negative behaviors continued, some severe. Student only attended Great Circle for a short period, and Great Circle staff had varying levels of education and experience educating autistic children. However, the staff's overall observations of Student were consistent with the District's conclusions that he was not benefiting from a sensory diet. Both the District and Great Circle's OT consultants who provided direct services to Student reached this same conclusion.

Student has attended Giant Steps for approximately five months. Student has been successful at Giant Steps in some aspects of his education. This is similar to the successes Student experienced at various times while attending District schools. However, his negative behaviors continue, and they are sometimes severe and last up to 30 minutes. He continues to have trouble with transitions and leaving a preferred activity. Further, it is unclear what additional sensory input he is receiving at Giant Steps than he received at the District. Parents argue that Giant Steps has performed an FBA on Student while the District did not. However, the District consistently documented the use of an FBA in Student's IEPs.

Dr. Constantino recommended that Student receive a sensory diet. However, the record does not provide us information to analyze why Student's sensory diet in the past has not been

effective at reducing or controlling his negative behaviors. There is a discrepancy between what is medically recommended for Student and the practical application of such recommendations. Further, much of Dr. Constantino's testimony was not information the District had access to when it offered the November 7, 2016 IEP.

Student's November 7, 2016 IEP for Madison does not contain the sensory diet Parents may want, but it does continue many of the same interventions that have been found effective for Student in the past, such as an increase in social skills training (from 150 minutes per week to 968); OT consulting services; positive reinforcement through the use of jobs, tangibles, free time, shout outs, school wide PBIS program, emphasizing Student's strengths, frequent breaks and positive notes/calls to home. Madison has a recovery room for quiet time that has benefited Student in the past, and currently has a sensory room. Student will be taught redirection and taking deep breaths as Adam Busby worked with him on at Great Circle.

With regard to Student being placed in a classroom with ED students, Parents are concerned for his safety, as they fear he will become more aggressive if his classmates act out. The record does not provide much information about how the make-up of the students in the cross-categorical classroom affected Student's negative behaviors. Student's IEPs, medical records, and the recorded correspondence between the District and Parents do not focus on aggression from other peers. Instead, they focus on Student's aggression toward others, how noisy environments affected him, and Parents' request for additional sensory support. The record indicates that Student has been hit or had an object thrown at him by a peer, but it does not state if Student's behavior precipitated the action.

Dr. Constantino testified that placing Student in a classroom with ED children would exacerbate Student's PTSD. However, Student's PTSD was not a focus in the record by either the Parents or the District, and was not an issue at the November 7, 2016 IEP meeting.

With regard to the noisy environment at Madison, such as the gym or cafeteria, it is unclear if Madison is somehow unique as compared to such areas in other schools. In addition, the Parents left the IEP meeting before such issues could be addressed in Student's BIP, and it would seem reasonable that further discussions would be helpful between the parties.

This Commission respects Dr. Constantino's testimony. We likewise respect the District's attempts to implement a sensory and structured diet from a practical standpoint for Student. District staff were hit, bitten, kicked, and managed Student's difficult behaviors on a daily basis. Great Circle did not find success with Student, and Giant Steps continues to experience Student's outbursts. The District did perform FBAs when it considered Student's sensory needs. Student's situation is not an easy one. Parents' dedication and love for their son is well established in the record. They want the best for him, as any parent would for their child.

Unfortunately, the law does not allow us to find that the District denied Student FAPE. We must give deference to the District as to what educational setting is appropriate for Student. There are arguments both for and against Madison and Giant Steps. However, we do not find that the preponderance of the evidence supports a conclusion that the November 7, 2016 IEP is not appropriately ambitious in light of Student's circumstances to reasonably enable Student to make progress appropriate in light of his unique disablities. The information contained in the record and the best information the District had at its disposal at the time the IEP was proposed supports a denial of Parents' due process complaint.

Summary

We deny Parents' due process complaint because the District did not deny Student FAPE.

SO ORDERED on May 9, 2017.

_____

RENEE T. SLUSHER
Commissioner

Appeal Procedure

Please take notice that this is a final decision of the Administrative Hearing Commission and you have a right to request review of this decision. Per § 162.962, when a review of this decision is sought, either party may appeal as follows:

(1) The court shall hear the case without a jury and shall:

(a) Receive the records of the administrative proceedings;

(b) Hear additional evidence at the request of a party; and

(c) Grant the relief that the court determines to be appropriate, basing its decision on the preponderance of the evidence.

(2) Appeals may be taken from the judgment of the court as in other civil cases.

(3) Judicial review of the administrative hearing commission's decision may be instituted by filing a petition in a state or federal court of competent jurisdiction. Appeals to state court shall be filed within forty-five days after the receipt of the notice of the agency's final decision.

(4) Except when provided otherwise within this chapter or Part 300 of Title 34 of the Code of Federal Regulations, the provisions of chapter 536 are applicable to special education due process hearings and appeal of same.

(5) When a commissioner renders a final decision, such decision shall not be amended or modified by the commissioner or administrative hearing commission.

The right to appeal is also addressed in 34 C.F.R. § 300.516.