

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF EDUCATION**

In the Matter of [Student],

Student,

**FINDINGS OF FACT,
CONCLUSIONS
AND ORDER**

v.

St. Paul Public Schools,

District.

The Parent made a request to the Minnesota Department of Education (MDE) for a due process hearing via a letter dated April 9, 2012. On April 10, 2012, Administrative Law Judge (ALJ) Richard C. Luis was appointed as the hearing officer. This matter came on for hearing before Judge Luis on June 19-22 and July 20, 23, and 30 at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, MN.

The record closed with filing of the District's Corrected Brief on September 4, 2012.

Margaret O'Sullivan Kane, Kane Education Law, LLC, appeared on behalf of the Student.

Laura Tubbs Booth, Booth & Lavorato LLC, appeared on behalf of the School District.

STATEMENT OF ISSUES

1. Were the Student's needs properly and timely identified by the District?
2. Were outside evaluations considered and appropriate programming offered?
3. Did the District employ an unlawful use of an administrative transfer after multiple suspensions of the Student from Linwood School?¹

¹ Hereinafter, citations to the Transcript will be "T. (page number)(line(s) number)". Citations to the Exhibits will be "Ex. (number) at (page(s))".

4. Did procedural errors occur that resulted in a denial of services to the Student?

Based on the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Background and Relevant Period of Time

1. The Student was born on [...].²

2. The Student is currently [...] years old and will be in [...] grade in the 2012-2013 school year. He lives with his Mother (Parent) and younger brother in St. Paul, Minnesota.³

3. The relevant time period for this case is April 9, 2010 to April 9, 2012 because the request for hearing was made on April 9, 2012, and the Individuals with Disabilities Education Act (IDEA) contains a two year statute of limitations.⁴

II. Educational History

Early Childhood Special Education – 2005 to 2008

4. Student was first evaluated by St. Paul Public Schools Early Childhood Intervention Services when he was 27 months old on [...]. He qualified for special education services under the entrance or eligibility criteria of “Developmental Delay” and “Speech/Language Impairment”.⁵

5. Student immediately began receiving special education services from St. Paul Public Schools including “home based parent infant services” from November, 2005 to the summer of 2006.⁶

6. An Individual Education Program (IEP) was developed for him, and he made adequate progress on 17 of 18 goals.⁷

7. In the fall of 2006, Student enrolled in the Crossroads Early Childhood Special Education program and continued there through the end of the 2007-2008 school year.⁸

² Ex. 1, 13.

³ Complaint at p.3 ¶1.

⁴ 20 U.S.C. § 1415(f)(3)(C).

⁵ Ex. 1 at 1-5.

⁶ Ex. 5 at 613.

⁷ Ex. 1 at 10-18.

⁸ Ex. 5 at 613.

8. The School District staff noted that the Student does “best and has fewer behavioral difficulties when he attends school on a regular basis.”⁹

9. During the 2006-2007 school year, the Student missed 67 days of school.¹⁰ The School District accommodated the Parent’s preference that the Student attend only 3 days of school per week instead of four and that he attend in the afternoons instead of mornings.¹¹

10. During the 2007-2008 school year, the Student missed 36 school days as of April 08, 2008.¹² The issue of his “chronic attendance problem” was something that school staff worked with county agencies and the Parent to try to resolve.¹³

11. A second evaluation was performed by the St. Paul Public Schools on April 08, 2008, three years after the first, as required by Minn. R. § 3525.2710, subp. 2.¹⁴

12. In this second evaluation, the District considered two outside evaluations provided by the Parent. The first was by a social worker at LifeTrack, and the second was by a psychologist at Alexander Center, Park Nicollet.¹⁵ The latter diagnosed him with pervasive developmental disorder, not otherwise specified (PDD-NOS).¹⁶

13. The Alexander Center report stated: “Typically, PDD-NOS is a less symptomatic form of autism. Children with PDD-NOS have a [sic] similar behaviors and difficulties, but do not meet the full diagnostic criteria for autistic disorder or Asperger’s Disorder.”¹⁷

14. The LifeTrack report stated that Student “... shows many symptoms of Autism Spectrum Disorder or Disorders of Relating and Communicating.”¹⁸ The LifeTrack social worker also diagnosed the Student with PDD-NOS.¹⁹ The assessment found that Student “struggles with interacting with his world.”²⁰ He “can be quick to have a negative emotional response”, “may be over or under stimulated in his environment” and demonstrates “symptoms of Autism Spectrum Disorder or Obsessive Compulsive Disorder”.²¹

⁹ Ex. 5 at 618.

¹⁰ Ex. 5 at 618.

¹¹ Ex. 5 at 618.

¹² Ex. 5 at 618.

¹³ Ex. 5 at 618.

¹⁴ Ex. 5 at 613.

¹⁵ Ex. 13; The Alexander Center/Park Nicollet documents at Exhibits 178 and 179 reflect in error that the Student was seven when the evaluation took place . He was actually 3 years old in 2006 when evaluated at Park Nicollet. (Exs. 178, 179)]

¹⁶ *Id.*; Exs. 178, 179.

¹⁷ Ex. 3 and 179, p. 2 of 5.

¹⁸ Ex. 2, at p. 4.

¹⁹ *Id.*

²⁰ Ex. 2 at 4.

²¹ *Id.*

15. The IEP team, including the Parent, reviewed the Minnesota special education criteria for Autism Spectrum Disorder (ASD).²² The results of the Autism Diagnostic Observation Schedule (ADOS), however, indicated that “the Student did not show social or communication skills that are similar to other children with Autism Spectrum Disorder. He has clearly delayed language and difficulty with communication. His social interaction skills were more age appropriate. He did not demonstrate significant stereotyped behaviors or restricted interests.”²³

16. The IEP team did not find Student qualified under the ASD criteria.²⁴ This evaluation found that the Student qualified for Special Education Services under the entrance criteria for “Developmental Delay” and “Articulation Disorder”.²⁵ The team found the Student continued to be eligible to receive services under those labels.²⁶

Como Park Elementary – Special Education Kindergarten –[...]

17. Student attended a Special Education Kindergarten class at Como Park Elementary during the [...] school year.²⁷ He was in a separate class for students with disabilities.²⁸

18. The Student’s IEP dated April 14, 2009 reflected that he had made “a good deal of progress in his academic learning skills since the beginning of his experience this school year”.²⁹

19. The Student was able to correctly name all upper and lower case letters by February 2009.³⁰ He was unable to write the alphabet without visual aids, but he was able to write the letters if they were dictated to him.³¹ He demonstrated improvement in his fine motor skills although his writing and drawing skills were somewhat immature for his age.³²

20. The Student could identify numerals 0-10 and could write independently numerals 1-9.³³ He required constant adult support to get started on a task and to stay with it.³⁴ He made gains in vocabulary and expressive language moving from identifying

²² Ex. 13, at pp. 7-9.

²³ Ex. 5 at 620.

²⁴ *Id.*

²⁵ Ex. 5 at 621-22.

²⁶ Exs. 13, 17.

²⁷ Ex. 13 at 528.

²⁸ Ex. 7 at 626. Federal Setting 41: Separate Class.

²⁹ Ex. 7 at 629.

³⁰ *Id.* at 629.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

20 basic concepts to being able to identify 36 out of 50.³⁵ He could follow a two step direction but had great difficulty with a three step direction.³⁶

21. The Student displayed improvement in his ability to follow classroom routines and make transition between activities. He initially had emotional outbursts, refusals, and non-compliant behaviors when directed by an adult. These behaviors, however, “greatly diminished”.³⁷ He was much more able to regain his composure and move on in the room.³⁸

22. Due to poor attendance while in Kindergarten, his IEP team decided to have the Student repeat Kindergarten in a regular education classroom.³⁹

Bruce F. Vento Elementary – Second Year of Kindergarten – [...]

23. For the [...] school year, Student attended Kindergarten at Bruce F. Vento Elementary (“Vento”).⁴⁰

24. During this, his second year of Kindergarten, a third evaluation was performed because Student would be turning seven and could no longer be eligible for special education services under the “Developmental Delay (DD)” entrance criteria or “label”.⁴¹

25. The third evaluation dated April 27, 2010 found Student to be eligible for special education services under the entrance criteria for “Emotional/Behavioral Disorders” (EBD) and “Speech/Language Impaired”.⁴²

26. The Parent was a part of the IEP team that determined the Student met the entrance criteria under each label.⁴³ She agreed with the results.⁴⁴

27. The outside diagnoses of LifeTrack Resources and the Alexander Center were again given due consideration.⁴⁵ Student, however, “did not indicate a significant or Definite Dysfunction in any of the sensory or behavioral areas” and ultimately, the “team concluded that [Student] did not display a pattern of behavior consistent with children who have autism.”⁴⁶

³⁵ Ex. 7 at 630.

³⁶ *Id.*

³⁷ Ex. 7 at 631.

³⁸ *Id.*

³⁹ Ex. 13 at 528.

⁴⁰ Ex. 13 at 528.

⁴¹ Ex. 13 at 528; Ex. 11 at 664; see *also* Minn. R. 3525.1351 (allowing eligibility for services under the DD criteria until age six.)

⁴² Ex. 13 at 547.

⁴³ *Id.*

⁴⁴ Ex. 11 at 661.

⁴⁵ Ex. 13 at 528-529; T. 868, L.25.

⁴⁶ Ex. 13 at 535 and 542.

28. Student did, however, “display a pattern of behavior that is significantly different from peers as characterized by: withdrawal or anxiety, depression, mood problems, low self-worth and aggression, hyperactivity or impulsivity that are developmentally inappropriate” consistent with an eligibility criteria finding of “Emotional/Behavioral Disorder” EBD and “Speech/Language Impaired”.⁴⁷

29. The above Findings were based on data from “clinically significant scores on a standardized normed behavior rating scale, BASC-2”, an “individually administered, standardized, nationally normed test of intellectual ability and academic achievement, three systematic observations in the classroom or other learning environment, school record review, interviews with parent, student, and teacher, health history review, mental health screening, and functional behavior assessment.”⁴⁸

30. Therefore, Student was found eligible for Special Education Services under the EBD label and met all necessary criteria for that label, as indicated on the Emotional or Behavioral Disorders Eligibility Verification Checklist.⁴⁹

31. Following the Evaluation, the Student’s IEP was updated detailing his educational goals, interventions, strengths, weaknesses and Behavior Intervention Plan.⁵⁰

32. During the 2009-2010 school year, the Student missed 30 days of school.⁵¹ 22 of those days were excused because of “various viral illnesses” and 8 of those days were unexcused.⁵²

33. Numerous meetings were held with “administration, social worker, and attendance liaison regarding his attendance” including a meeting between the Parent and Ramsey County.⁵³

Linwood-Monroe Elementary – [...]

A. Enrollment at Linwood

34. The Parent enrolled the Student at Linwood for the [...] school year.

35. The Parent told Linwood’s Principal, Steve Unowksy, that she dis-enrolled the Student from his previous school because she was displeased with it, she alleged physical harassment of the Student, and stated that he did feel not safe at Vento.⁵⁴

⁴⁷ Ex. 13 at 546-47.

⁴⁸ *Id.*

⁴⁹ Ex. 15 at 549-552.

⁵⁰ Ex. 18 at 684-96.

⁵¹ Ex. 13 at 536.

⁵² Ex. 13 at 536.

⁵³ Ex. 13 at 529.

⁵⁴ T. 556, L. 8-12.

36. The Parent also stated to Mr. Unowsky that two staff people at Vento were abusive to the Student.⁵⁵ She told the principal that one of the paraprofessionals had choked the Student.⁵⁶

37. The Parent asserted that the Student was denied enrollment at Linwood because of his special education label “EBD”.⁵⁷ Mr. Brant Thomsen, the school social worker, noted that was the Parent’s perception and that she sometimes misperceived situations.⁵⁸ Mr. Unowsky notes the Parent was sometimes an unreliable reporter.⁵⁹

38. The Student was enrolled at Linwood for the 2010-2011 school year.⁶⁰ All special education students have access to any school but the District must ensure that each student’s needs can be met with the resources available at the particular school and that the student is safe at the particular location.⁶¹

39. Steve Unowsky was a principal for Linwood - Monroe Arts Plus for 3 years and the principal at Linwood Elementary for 3 years.⁶²

40. Mr. Unowsky explained to the Parent when she enrolled her child that Linwood has excellent instruction within the arts and that is their expertise.⁶³

41. When the Parent informed Mr. Unowsky of her preference to have an environment with fewer stimuli for her children, Mr. Unowsky told her that because of the arts focus, the school was an extremely stimulus-filled environment.⁶⁴

42. Mr. Unowsky also informed the Parent that the social worker was only at the school 2½ days a week and the learning disability teacher was only half time. However, the school did have speech services, and they also had services for developmentally cognitively delayed students.⁶⁵

43. Mr. Unowsky informed the Parent of the school’s No Child Left Behind/ Annual Yearly Progress (AYP) status.⁶⁶ He told her that like Vento, Linwood – Monroe was also not achieving AYP status.⁶⁷ He tells parents these types of things on their first visit to the school to avoid having unmet expectations if they were to learn later that the school had no science specialists, for example.⁶⁸

⁵⁵ T. 556, L. 24-25.

⁵⁶ T. 556, L. 8.

⁵⁷ T. 183, L. 19.

⁵⁸ T. 183, L. 2-4; T. 203, L. 25.

⁵⁹ T. 466, L. 21; T. 551 L. 10-16.

⁶⁰ T. 283, L. 23; T. 161, L. 2.

⁶¹ T. 114, L. 24 *see also* T. 56, L. 6-9.

⁶² T. 251, L. 9-11.

⁶³ T. 547, L. 1-25; T. 548, L. 1.

⁶⁴ T. 548, L. 12-24.

⁶⁵ T. 549, L. 2-5.

⁶⁶ T. 549, L 6-17.

⁶⁷ T. 534, L. 2.

⁶⁸ T. 547-551.

44. Linwood had other students who qualified for special educational services in each of the recognized categories including EBD.⁶⁹

45. Mr. Unowsky did not discourage the Parent from enrolling her children at Linwood.⁷⁰

46. When the Parent informed Mr. Unowsky that the Student was special education eligible under the EBD category, Mr. Unowsky asked Mr. Brant Thomsen school social worker to welcome her to the building, examine the information and discuss the School's services with the Parent.⁷¹ Mr. Thomsen and Mr. Unowsky then met with the Student and his family.

B. Linwood uses the Responsive Classroom Strategy for All Students

47. Responsive Classroom is a positive behavior strategy that is used for the entire student body at Linwood. It is recognized across the State and is a nationwide positive behavior intervention training strategy.⁷² It begins with the assumption that children do not necessarily know what social skills they need to succeed in school and life, so the school staff's job is to specifically teach and model those things.⁷³

48. The District's staff has had extensive training in responsive classroom strategy techniques. The techniques of a responsive classroom model involve building a community within the classroom, teaching students about the school's expectations, and using interventions and supports that are non-shaming and non-blaming to help support students to stay in the classroom as much as possible.⁷⁴

49. "Take A Break" is used as part of this model when students are having trouble or need some time to compose themselves. Breaks are taken in a location within the classroom where the student can still see and hear the instruction and participate in the instruction but the student is physically separated from the other students.⁷⁵ This might be a desk nearer the teacher or at the back of the room or a space in the room to sit.⁷⁶

50. The Buddy Room is another intervention used under the responsive classroom model where students would go to another classroom at the same grade level so they would still receive instruction, but they would change their environment.

⁶⁹ T. 553, L.12.

⁷⁰ T. 552, L. 16. Parent notes that a recorded voicemail from a Linwood official establishes that Mr. Unowsky stated he did not want the Parent's children at Linwood. The recorded voicemail (Ex. 300) fails to establish that allegation.

⁷¹ T. 551, L. 5-16.

⁷² T. 538, L. 18-25; T. 539, L. 1-16.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ T. 539, L. 16-22.

⁷⁶ T. 540, L. 13-21.

The teacher would then go back and process those situations with the student with the main goal of teaching and reinforcing, in a positive way, the expectations the school has of the student.⁷⁷

C. Services and Facility at Linwood

51. Linwood-Monroe is a “dual campus.”⁷⁸ Linwood was formerly an elementary school and Monroe was formerly a high school.⁷⁹ The two campuses were merged.⁸⁰ The two campuses merged are called Linwood – Monroe Arts Plus.⁸¹

52. Monroe was one of the worst performing schools under No Child Left Behind’s requirement of Adequate Yearly Progress (AYP).⁸²

53. Under No Child Left Behind, there are five steps that occur when schools are not meeting AYP before the school is changed/restructured and staff and principal changes are made.⁸³ Linwood was two steps “down the road”. Both schools were on one of the five steps under AYP status before the merger.⁸⁴ Generally, when schools merge, the AYP status is reset and the AYP “clock” gets reset.⁸⁵

54. When the Parent was enrolling at Linwood, Mr. Unowsky thought the “clock would be reset” but they had not yet received approval from the Department of Education. Linwood-Monroe is currently not making AYP.⁸⁶

55. In the part of the building where the Student’s classes were located at Linwood, there was not space available to make a sensory break room.⁸⁷

56. Linwood did not have a physical education or science teacher.⁸⁸

57. Linwood had a half time learning disabilities teacher, a half time social worker (Mr. Thomsen) and a speech clinician.⁸⁹

58. Linwood did not have a licensed EBD teacher.⁹⁰ Because Linwood did not have an EBD teacher, a licensed EBD teacher would be made available for IEP meetings and for consult.⁹¹

⁷⁷ T. 539, L.23-25; T. 540, L. 1-6.

⁷⁸ T. 531, L. 12.

⁷⁹ T. 531, L. 16-20.

⁸⁰ T. 531, L. 22.

⁸¹ T. 533, L. 10-18.

⁸² T. 532, L. 6-7.

⁸³ T. 532, L. 8-11.

⁸⁴ T. 533, L. 19-21.

⁸⁵ T. 532, L. 18-22.

⁸⁶ T. 534, L. 4.

⁸⁷ T. 978, L. 19; T. 569 L. 16-22.

⁸⁸ T. 547, L. 8.

⁸⁹ T. 535, L. 17-24.

⁹⁰ T. 141, L. 2

59. Linwood did not have an ASD teacher⁹² or an ASD classroom.⁹³ Nor does Linwood have an ASD specialist.⁹⁴ It had no teacher with training in ASD.⁹⁵

60. Linwood had very limited paraprofessional support.⁹⁶

61. The amount of paraprofessional support the Student needed in the regular education environment was not available at Linwood.⁹⁷

62. The District does not hire additional paraprofessionals when that support is available at other buildings within the District.⁹⁸

63. The District does not have the same level of resources at every school in the District.⁹⁹

64. Mr. Thomsen is licensed by the Minnesota Department of Education (MDE, State Department) as a school social worker.¹⁰⁰ Mr. Thomsen was the case manager for the Student at Linwood and he provided direct services as a social worker.¹⁰¹

65. Mr. Thomsen taught the Student initially in a small group using the Social Thinking Curriculum.¹⁰² Mr. Thomsen eventually had to discontinue working with the Student in group, however, because twice the Student became so angry that after 5-10 minutes of trying to calm him, the Student was continuing to say loudly that he wanted to hurt another child in his group.¹⁰³ Mr. Thomsen continued to provide social skill instruction to the Student one to one.¹⁰⁴ The Student maintained his ability in social skills throughout his time at Linwood.¹⁰⁵

66. Mr. Thomsen had 45 students on his case load and was only at Linwood 2.5 days per week.¹⁰⁶

⁹¹ T. 172, L. 17-20; T. 558, L. 25; T. 559, L. 1-10.

⁹² T. 141, L. 6.

⁹³ T. 91, L. 11-13.

⁹⁴ T. 91, L. 14-17.

⁹⁵ T. 1041, L. 15-16.

⁹⁶ T. 141, L. 9-10.

⁹⁷ T. 77, L. 19-21.

⁹⁸ T. 83, L. 5-6.

⁹⁹ T. 142, L. 14-15; T. 543 L. 18.

¹⁰⁰ T. 1014, L. 17.

¹⁰¹ T. 181, L. 6-7.

¹⁰² T. 1017, L. 9-15.

¹⁰³ T. 1018, L. 8-14.

¹⁰⁴ T. 1015, L. 9.

¹⁰⁵ T. 1018, L. 20-21.

¹⁰⁶ T. 1029, L. 8.

67. Mr. Thomsen spent 20 to 25 percent of his time in 2010/2011 with the Student and Parent.¹⁰⁷

68. The disproportionate amount of time spent with the Student and Parent occurred because there were many behavioral incidents with the Student and significant time was needed to communicate with the Parent.¹⁰⁸ Her voicemails were sometimes 5 minutes long and, on 15 occasions over the course of the school year, she filled Mr. Thomsen's voicemail on the weekend.¹⁰⁹

69. Because of the level of service to Student's family, Mr. Thomsen had difficulty providing services to the other students on his case load.¹¹⁰

70. Mr. Thomsen contributed to the behavior plan developed in December of 2010.¹¹¹ It listed the positive behavior interventions that were being employed with the Student.¹¹²

71. The December 2010 plan outlines the types of things that Mr. Thomsen worked on with the Student.¹¹³ They included role-playing or coaching the Student through a specific social interaction based on intent of the person with whom Student was sharing a verbal exchange. Role playing scenarios were done individually or in a group.¹¹⁴

72. The Student did not succeed for two reasons. First, because he had so many absences. Second, because he needed individual instruction. If the Student was given instruction in a group with his peers, his behaviors would worsen and safety issues arose.¹¹⁵

73. It was "very, very difficult" to do instruction of the Student on social skills in the general classroom because he would escalate in his behaviors.¹¹⁶ When he was calm it was also difficult because he would refuse to participate.¹¹⁷

74. Mr. Thomsen trained the other staff on the Student's behavior plan and gave them the plan.¹¹⁸ This included the specialist teachers (or "specials": dance, music, drama, art), the classroom teacher, teaching assistants, Kathy Sekorski, Mary Morgan, Steve Unowsky and all special education instructors.¹¹⁹

¹⁰⁷ T. 1029 L. 14.

¹⁰⁸ T. 1030, L. 2.

¹⁰⁹ T. 1030, L. 4-13.

¹¹⁰ T. 1030, L. 16.

¹¹¹ Ex. 30.

¹¹² T. 1001, L. 16-22.

¹¹³ T. 1002, L. 6.

¹¹⁴ T. 1002, L. 9-14.

¹¹⁵ T. 1003 L. 24-25; T. 1004 L. 1-7.

¹¹⁶ T. 1004, L. 10-11.

¹¹⁷ T. 1004, L. 8-14.

¹¹⁸ T. 1037, L. 20-22.

¹¹⁹ *Id.*, T. 1038, L. 6-8.

75. The Student was in Mary Morgan's first grade general education class.¹²⁰ Ms. Morgan was a veteran teacher. Mr. Unowksy hired her, supervised and formally observed her for seven years.¹²¹

76. Mr. Unowsky rated Ms. Morgan as an exceptional teacher. Her classroom was a model for the District which others visited to observe her stellar teaching.¹²²

77. Ms. Morgan was a nurturing, astute and highly effective teacher. The parents of children in her classroom were very satisfied.¹²³

78. Ms. Morgan was generally aware of all that was going on in the classroom. She teamed well with the teaching assistants. When she had one to one time with the Student she was listening to him and was very clear.¹²⁴

79. Ms. Morgan also had a student with ASD in the classroom.¹²⁵ He made significant progress throughout the year.¹²⁶

80. Ms. Morgan's classroom consisted of at least 27 students, several of whom were gifted and talented and several with special needs.¹²⁷

81. The classroom had one paraprofessional, Kathy Sekorski.¹²⁸ She was not always in the room because she had to accompany other students to classes like music or art.¹²⁹

82. The Parent complained that Ms. Morgan bullied her child and that she punished him through the school's behavior strategy: "Take a Break".¹³⁰

83. The Parent did not understand that Take a Break and going to the Buddy Room were part of the building-wide discipline program and not directed specifically at the Student.¹³¹

84. The Parent asked to have her child removed from Ms. Morgan's room.¹³² The request was refused because it would disrupt both classrooms.¹³³

¹²⁰ T. 577, L. 6.

¹²¹ T. 577, L. 9-17.

¹²² T. 578, L. 1-7.

¹²³ T. 578, L. 8-14.

¹²⁴ T. 1019, L. 10-14.

¹²⁵ T. 1019, L. 17.

¹²⁶ T. 109, L. 22-23.

¹²⁷ T. 579, L. 1-17.

¹²⁸ T. 579, L. 21.

¹²⁹ T. 580, L. 1-6.

¹³⁰ T. 581, L. 11-16.

¹³¹ T. 1608, L. 1-2.

¹³² T. 581, L. 11-16.

¹³³ T. 982, L. 19.

85. The Parent accused Ms. Morgan of calling the Student a “bad boy” and ripping up his paper.

86. Mr. Unowsky never heard Ms. Morgan say anything like that and would be shocked to hear that she destroyed student work because that would be “completely out of character.”¹³⁴

87. The Parent only observed Ms. Morgan work with the Student once.¹³⁵

88. Kathy Sekorski was also a veteran employee.¹³⁶ Mr. Unowsky supervised her for three years and formally observed her working with students.¹³⁷ He believes that Ms. Sekorski is a very effective teaching assistant.¹³⁸

89. Mr. Thomsen observed that Ms. Sekorski was very deliberate in her implementation of the Student’s behavior plan and that she was very calm.¹³⁹

90. The Parent complained that Ms. Sekorski bullied her child and that she punished him through “Take a Break”.¹⁴⁰

91. Mr. Unowsky has never had a complaint about Ms. Sekorski other than from this Parent.¹⁴¹

D. Federal Settings v. Location of Services for Students with Special Education Needs

92. A Federal Setting I on an IEP would allow that the student be in a special education classroom for up to 21% of the student’s day.¹⁴²

93. A Federal Setting II would signify that a student could be in special education for up to 21-61% of the student’s day.¹⁴³

94. A Federal Setting III on an IEP would be for up to 62-100% of the student’s day.¹⁴⁴

95. Federal Setting IV is all day special education, a separate program.¹⁴⁵

¹³⁴ T. 583, L. 1-9.

¹³⁵ T. 584, L. 7.

¹³⁶ T. 580, L. 13.

¹³⁷ T. 580, L. 19.

¹³⁸ T. 480, L. 22.

¹³⁹ T. 1037, L. 6-10.

¹⁴⁰ T. 581, L. 11-16.

¹⁴¹ T. 581, L. 2-4.

¹⁴² T. 168, L. 19-25; T. 169, L. 21-22.

¹⁴³ T. 168, L. 21.

¹⁴⁴ T. 168, L. 22-23.

96. The Federal Setting is an IEP team decision.¹⁴⁶

97. Students with a Setting I IEP can go to Linwood but generally a Setting II student would attend another St. Paul Public School because the other schools have the needed additional levels of support.¹⁴⁷ A child with EBD and a Federal Setting I can be served at any school throughout the district. However, not every school can serve a child with Federal Setting II.¹⁴⁸

98. "Location" is wherever the given level of service (the Federal Setting determined by the IEP team) might be provided across the 80 schools within the district.¹⁴⁹

99. The Student's Federal Setting stayed the same when he was transferred from Linwood to Museum Magnet, in the spring of 2011.¹⁵⁰ His special education placement (Federal Setting) did not change. Instead, the "location" of services changed.¹⁵¹

100. Ms. Pat Anderson, the PACER representative who worked with the Parent, noted that a change from one school to another is only a change in location, not in the special education services.¹⁵²

101. The administrative transfer of the Student to another school building was a change in location but not a change in the special education program.¹⁵³ The Student's Federal Setting was I at Linwood and remained at Federal Setting I after he was administratively transferred to Museum Magnet late in the 2010-2011 school year.¹⁵⁴ The level of services did not change when he went to Museum Magnet and his IEP did not change.¹⁵⁵

E. Parent Requests for Re-Evaluation

¹⁴⁵ T. 168, L. 24-25.

¹⁴⁶ T. 169, L. 15.

¹⁴⁷ T. 56, L. 10-25.

¹⁴⁸ T. 743, L. 14.

¹⁴⁹ T. 169, L. 16-19.

¹⁵⁰ Testimony of Mary Kelly.

¹⁵¹ T. 169, L. 20-15.

¹⁵² T. 358, L. 22.

¹⁵³ T. 895, L.15, 17, 21. Testimony of Mary Garrison.

¹⁵⁴ T. 170, L. 1-6.

¹⁵⁵ T. 170, L. 7-10.

102. The Parent asked early in the 2010-2011 school year for re-evaluation. Mr. Thomsen and the Parent had very specific discussions about evaluation.¹⁵⁶ They had discussions about her concerns.¹⁵⁷

103. On October 5, 2010, just a month into the school year, the IEP team considered doing a functional behavioral assessment (FBA).¹⁵⁸

104. The District did not do another comprehensive evaluation because one was just done at the end of the prior school year.¹⁵⁹

105. The Parent asked for a re-evaluation, autism spectrum disorder (ASD) testing and a functional behavioral assessment (FBA) in writing on November 30, 2010¹⁶⁰ and on December 2, 2010.¹⁶¹

106. Mary Garrison, a special education supervisor, received the request for re-evaluation on December 2nd.¹⁶² She did not respond because the Student was under a mental health evaluation at the time that involved observations at school.¹⁶³

107. Annette Duerschler is a community support provider with Washburn Child Guidance and she was conducting the Student's mental health assessment.¹⁶⁴ Ms. Duerschler's assessment was conducted in December, 2010 and January, 2011.¹⁶⁵ This evaluation included obtaining information from the school staff and Parent, observations of the Student at school and discussions with the Student at home.¹⁶⁶

108. Ms. Duerschler told Mr. Thomsen during the assessment that she did not think the services available at Linwood were appropriate for the Student.¹⁶⁷

109. Ms. Duerschler was terminated by the Parent. Dr. Lessin's office record, dated March 25, 2011, states that outside therapy with Washburn was stopped because "mom felt that [Annette Duerschler] was taking the school's side."¹⁶⁸

110. A re-evaluation was offered in November 2010 to include an EBD consultant but no agreement was reached at that time.¹⁶⁹ The Parent wanted to remove the Vento evaluation done in April of 2010 from the Student's educational record.¹⁷⁰

¹⁵⁶ T. 188, L. 23-25, T. 218 L. 25 – T. 219 L. 1-7.

¹⁵⁷ T. 190, L. 11-12.

¹⁵⁸ Ex. 22; T. 1599, L.13-16.

¹⁵⁹ T. 218, L. 21-25.

¹⁶⁰ Ex. 25.

¹⁶¹ Ex. 26.

¹⁶² T. 749, L. 3.

¹⁶³ T. 752, L. 9.

¹⁶⁴ T. 1056, L. 7-16.

¹⁶⁵ T. 1605, L.6-9, 17-18, T. 1056, L. 23-25.

¹⁶⁶ T. 1606, L. 3-16, T. 996, L. 23-24.

¹⁶⁷ T. 998, L. 2.

¹⁶⁸ Ex. 240, T. 1058, L. 20-25; T. 1059, L. 1-7.

¹⁶⁹ T. 1604, L. 5.

111. There was difficulty understanding what the Parent wanted so Ms. Garrison referred the Parent to PACER for assistance.¹⁷¹ The Parent obtained PACER representation from Pat Anderson, who knew that the Parent had asked for an FBA or reevaluation in order to correct the “label”.¹⁷²

112. On December 3, 2011, a meeting was held regarding the FBA for the Student. Ms. Jill O’Gorman from PACER was present with the Parent. After a two to three hour meeting, the team drafted a new IEP.¹⁷³

113. At that meeting, the team discussed behavioral interventions. The discussion included identifying the behavior of concern, what positive interventions had been done, what new positive interventions could be introduced, what to do to prevent inappropriate behavior, and what to do when inappropriate behavior occurs.¹⁷⁴

114. The new IEP included a revised behavior plan.¹⁷⁵ However, the Parent did not agree to the new IEP.¹⁷⁶

115. There was a follow up IEP meeting later in December.¹⁷⁷ The IEP team met on December 6, 2010 to review the manifestation of behaviors which occurred on November 24, 2010 and to discuss increasing services. The IEP team discussed increasing services to a Federal Setting II.¹⁷⁸

116. The District proposed a Federal Setting II IEP in writing on December 6, 2010.¹⁷⁹

117. When the IEP team met in December of 2010, they had four months of information about the Student. One purpose of the meeting was to discuss how to keep the Student safe and to provide appropriate services during a reevaluation.¹⁸⁰

¹⁷⁰ T. 881, L. 13-15.

¹⁷¹ T. 882, L. 5-7; T. 881, L. 13.

¹⁷² T.1602, L. 20; T. 1603, L. 1.

¹⁷³ T. 1000, L. 11-12.

¹⁷⁴ T. 1001, L. 6-14.

¹⁷⁵ *Id.*, Ex. 30.

¹⁷⁶ Ex. 30 at p. 558.

¹⁷⁷ T. 1000, L. 14-15.

¹⁷⁸ Ex. 28.

¹⁷⁹ Ex. 29.

¹⁸⁰ T. 220, L. 12-20.

F. Mediations

118. On January 6, 2011, following a request by the Parent, the parties agreed to mediation with the MDE's Minnesota Special Education Mediation Service (MNSEMS).¹⁸¹

119. The parties, including the Parent and the District Supervisor, Mary Garrison,¹⁸² reached a mediated agreement on February 4, 2011.¹⁸³

120. The District agreed to an Independent Educational Evaluation (IEE), and the District agreed to investigate providing educational services after 10 days of suspension (discussed below). The Parent agreed to visit Frost Lake and Rondo Elementary Schools.¹⁸⁴

121. Ms. Garrison asked for mediation again in April, 2011 because of communication difficulties between the parties that made completing the IEE difficult.¹⁸⁵

122. The Parent agreed to the second mediation "reluctantly" because she did not agree with "the grounds" or purpose for the second round of mediation.¹⁸⁶

G. Independent Education Evaluation (IEE)

123. The parties agreed to an IEE in mediation.¹⁸⁷ It was not concluded more quickly because of a variety of issues regarding locating and contracting with providers.¹⁸⁸

124. One group cancelled after it had committed to do the work.¹⁸⁹ The Parent cancelled appointments because she did not like the scheduling clerk.¹⁹⁰ It was sometimes difficult to reach the Parent and there were scheduling difficulties with her.¹⁹¹

125. The Parent objected, on two occasions, to the proposed evaluators.¹⁹² The Parent initially agreed in mediation to have the school nurse do the health

¹⁸¹ Ex. 31.

¹⁸² T. 215 L. 1.

¹⁸³ Ex. 39.

¹⁸⁴ *Id.*

¹⁸⁵ T. 801, L. 21-25.

¹⁸⁶ T. 1547, L. 17-21; T. 1548 L. 18.

¹⁸⁷ Ex. 39.

¹⁸⁸ T. 790, L. 23.

¹⁸⁹ T. 796, L. 13.

¹⁹⁰ T. 802, L. 8.

¹⁹¹ T. 817, L. 18.

¹⁹² T. 1157, L. 1-8, Ex. 68.

review,¹⁹³ then later changed her mind and the District had to locate an independent person to do this review.¹⁹⁴

126. The Museum IEP Team and the Parent met in December of 2011 to discuss the findings of the FBA that was done by Jan Ostrom of Brih Design as part of the IEE.¹⁹⁵

127. Ms. Ostrom is a board certified behavior analyst.¹⁹⁶ She completed a report of the FBA findings that was reviewed by the IEP team, including the Parent, in December 2011.¹⁹⁷

128. The Parent objected to some of Ms. Ostrom's factual recitations.¹⁹⁸ Ms. Ostrom invited her to provide authorization for the individuals to whom she might speak for more information.¹⁹⁹ Those authorizations were never received.²⁰⁰

129. Ms. Ostrom did not finalize the report until April, 2012 because she was waiting for the Parent's information.²⁰¹

130. Ms. Ostrom observed the Student on two occasions in class at Museum. She had the sense that the Student liked the sensory breaks, but she questioned whether he had direct sensory needs.²⁰² She concluded he did not have sensory needs but that his behavior was part of his impulsiveness and his inattention.²⁰³

131. Ms. Ostrom observed that the Student really needed a smaller environment, that 25-30 children was too large a group for him, and she stated that because he is inattentive and impulsive, he needs a lot of structure and a lot of direct support from the teacher.²⁰⁴

132. Ms. Ostrom noted that Student's general education teacher expressed some strong concern for his ability to be managed in the 4th grade next school year.²⁰⁵ She reported that the teacher had to have a lot of support in her classroom and ensure that things were in place for the Student or he would have a behavioral incident and could go from "0 to 60" rapidly.²⁰⁶

¹⁹³ Ex. 39.

¹⁹⁴ T. 1528, L. 13-25.

¹⁹⁵ T.1657, L. 25.

¹⁹⁶ T. 1653, L. 15-16, Ex. 96.

¹⁹⁷ T. 1656, L. 22-24, Ex. 93.

¹⁹⁸ T.806, L. 25; T. 1658, L.8.

¹⁹⁹ T. 1661, L. 1-5.

²⁰⁰ T. 1661, L. 6-7.

²⁰¹ T. 806, L. 25, T. 889 L.2, 20.

²⁰² T. 1671, L. 1-17.

²⁰³ T. 1669, L. 1-25; T. 1670, L. 1-23.

²⁰⁴ T. 1672, L. 2-18.

²⁰⁵ T. 1673, L. 12-13.

²⁰⁶ T. 1673, L. 20-22.

133. Once the Student escalates his behavior, there is a concern about the safety of others around him.²⁰⁷

134. The recommendations of the IEE were consistent with the District's information.²⁰⁸

135. The Student's current teacher, Karen Fantauzza, agreed with the Brih Design report and found it very well done.²⁰⁹

H. Eligibility

136. The Student was diagnosed with PDD-NOS, a mild form of autism, in early childhood. The School Team in 2010 ruled out an Autism Spectrum Disorder label.²¹⁰

137. A student who is diagnosed by medical professionals as having ASD might not qualify under the MDE criteria for special education.²¹¹

138. A student who is diagnosed medically as having PDD-NOS can be eligible for special education services in school under the entrance criteria for Other Health Disabilities (OHD), ASD and EBD criteria.²¹²

139. The IEP teams examined the eligibility criteria and choose that which most specifically indentifies what is interfering with the child's education.²¹³

140. Ms. Ostrom concludes that the Student's behavioral profile is "complex."²¹⁴ "His support needs do not fit into either category neatly or successfully."²¹⁵ She believes he will not fit "into a particular educational category neatly. He's complex."²¹⁶

141. Ms. Garrison concludes that there is evidence to support both labels and evidence that does not support both.²¹⁷ She stated the Student has characteristics of PDD-NOS and behaviors that are also presented by students who are labeled EBD. "He is a complicated student. He has needs. I think no matter how we label him, we need to serve those needs."²¹⁸

²⁰⁷ T. 1674, L. 1-6.

²⁰⁸ T. 890, L. 24; T. 891, L. 3.

²⁰⁹ T. 1163, L. 23.

²¹⁰ T. 934, L. 10.

²¹¹ T. 912, L. 6 & 14; Testimony of Mary Garrison. T. 1719, L. 17-22; T. 1720, L. 1; Testimony of Jan Ostrom.

²¹² T. 165, L. 2-11.

²¹³ T. 165, L. 17.

²¹⁴ T. 1724, L. 7.

²¹⁵ T. 1724, L. 8-9.

²¹⁶ T. 1724, L. 14-15.

²¹⁷ T. 915, L. 17-21.

²¹⁸ T. 916, L. 5-10.

142. The medical professionals are not all in agreement as to the Student's diagnosis. For example, the therapist at LifeTrack suggested PPD-NOS or obsessive compulsive disorder or communication disorder.²¹⁹

143. The most recent medical evaluation provided by the Parent indicates that Student does not medically qualify for PDD-NOS.²²⁰

144. The Student's current teacher was not aware that the Parent wanted the Student's special education label to be changed.²²¹

145. Ms. Fantauzza has a great deal of experience with students who are eligible under the EBD label,²²² and she has no reason to believe that label is incorrect for the Student.²²³

146. Mr. Thomsen never concluded that the eligibility label should be changed from EBD to ASD.²²⁴

147. The Student's special education programming would not change because his label changed.²²⁵

148. Ms. Anderson noted that the programming for students with ASD and EBD labels could be similar because each child is an individual and requires individualized services.²²⁶

149. Ms. Kelly noted that an incorrect label would not lead to the wrong services to be delivered because the IEP is based on the individual student's needs as opposed to the label.²²⁷

I. Behavioral Incidents

150. On November 24, 2011, the Student became angry in class after the teacher had given him a direction. He was told to "take a break" and kicked over a chair, then picked up another chair and threw it at the classroom paraprofessional. He then ran from the room and ended up climbing a wall rail on the third floor. Principal Unowsky physically removed Student from the wall, and the Student assaulted him and

²¹⁹ Ex.2, at 4.

²²⁰ Ex. 257; T. 963, L. 13.

²²¹ T. 1165, L. 2.

²²² T. 1160, L. 5

²²³ T. 1194, L. 24.

²²⁴ T. 1023, L. 19-21.

²²⁵ (T. 1214, L. 21)(Testimony of Karen Fantauzza), (T. 163, L. 22,) (Testimony of Mary Kelly) (T. 163, L. 20-23; T. 121, L. 23-25 – T. 122, L. 1-3) (Testimony of Mary Garrison.)

²²⁶ T. 296, L. 24.

²²⁷ T. 121, L. 12-13, 18; T. 122, L. 6-13; T. 121, L. 18; T. 122, L. 5; T. 163, L. 20-23.

two other students. After he was brought to the office, the Student wrote on a board “I want to kill myself”.²²⁸

151. The Student was suspended for the November 24, 2010, incident through December 10, 2010.²²⁹

152. The Student had previous instances of “explosive” behavior on September 30 and October 1, 2010. After the October 1 incident, which caused Mr. Thomsen to spend three hours to calm him down, the Student was dismissed for the balance of the day.²³⁰

153. On January 10, 2011, the Student was directed by his classroom paraprofessional, Ms. Sekorski, to clean up his materials. He refused and after several requests attempted to stab her with a scissor. A meeting was held with Parent to discuss this incident,²³¹ for which he was suspended for two days.²³²

154. On January 28, 2011, the Student threw a garbage can, chair, and water at Mr. Thomsen after the social worker began to give him individual instruction.²³³

155. On February 17, 2011, there was an incident when (the Parent alleges) the Student was asked by the dance teacher to take a time out under the flag in the room.²³⁴ The Student was allegedly fidgeting and tapping on the radiator.²³⁵

156. The Parent alleged that the paraprofessional, Ms. Sekorski, threatened during this February 2011 incident to take recess away from the Student and then, when the Student began to cry, she dragged him out of the room and down the hall by his ribs, leaving marks on him.²³⁶

157. The Parent reported the alleged assault to the police, but no charges resulted.²³⁷ The Parent alleges that the assault was reported to MDE and they did not take any action.²³⁸

158. The Parent and two St. Paul police officers took photos of the Student’s torso area the evening of February 17, 2011.²³⁹ The photos show a few superficial scratch marks on the torso, and light bruising on the left side rib area.

²²⁸ Ex. 242.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Ex. 32.

²³² Ex. 242.

²³³ T. pp. 594-596.

²³⁴ T. 1265, L. 3-4.

²³⁵ T. 1265, L. 5-8.

²³⁶ T. 1265, L. 9-18.

²³⁷ T. 1265, L. 21-22; T. 1579.

²³⁸ T. 1579, L. 25.

²³⁹ Ex. 247.

159. At the hearing, the Student alleged first that the incident happened in music class, until he was corrected to remind him it was dance class.²⁴⁰ He could not recall if it happened in the winter or spring.²⁴¹

160. The Student alleged that Ms. Sekorski dragged him down the hallway and he was asking her to stop because it hurt.²⁴²

161. Julie Sutmar is a paraprofessional at Linwood School.²⁴³ She was present on the day of this incident and heard the Student yelling and screaming.²⁴⁴

162. The Student denied seeing Julie Sutmar as he was allegedly being dragged by Ms. Serowski.²⁴⁵

163. Ms. Sutmar heard loud noises and went to the dance room where the Student was. Sutmar passed Kathy Sekorski in the hallway as Sekorski went to the office.²⁴⁶ Ms. Sekorski had been punched on her legs and in her face by the Student during the incident. After being struck in the face, Ms. Sekorski left the dance room.²⁴⁷

164. Ms. Sutmar observed the Student sitting on the floor in the classroom about ten feet from the door.²⁴⁸ She asked him to come with her and put her hand out. He took her hand, smiled and walked to the office with her.²⁴⁹

165. The Student did not say he was hurt.²⁵⁰

166. Mr. Thomsen spoke with Ms. Sutmar either that day or the next about the incident.²⁵¹

167. The Student stated that Ms. Sutmar was not telling the truth that she walked him to the office from dance class.²⁵²

168. He then alleged that he recalled Ms. Sutmar leading him out of dance class in February of his 1st grade year and that Ms. Sekorski asked Ms. Sutmar to help her drag him.²⁵³

²⁴⁰ T. 1633, L. 24.

²⁴¹ T. 1634, L. 12.

²⁴² T. 1636, L. 22-25; T. 1637, L. 1-5.

²⁴³ T. 1622, L. 1-11.

²⁴⁴ T. 1622, L. 18-25; T.1623, L. 2.

²⁴⁵ T. 1637, L. 1.

²⁴⁶ T. 1623, L. 7-12.

²⁴⁷ Testimony of Sekorski.

²⁴⁸ T. 1623, L. 17-18.

²⁴⁹ T. 1623, L. 19-23.

²⁵⁰ T. 1624, L. 19.

²⁵¹ T. 1626, L. 18-24.

²⁵² T. 1637, L. 25.

²⁵³ T. 1638, L. 8-19.

169. The Student alleged that Ms. Sutmar refused and Ms. Sekorski said “Well, you better.”²⁵⁴

170. Ms. Sutmar was called to rebut the Student’s testimony. She denied that Ms. Sekorski dragged the Student or that she asked Ms. Sutmar to help.²⁵⁵

171. Ms. Sutmar recalled that she walked into the dance classroom and the Student took her hand and walked to the office.²⁵⁶

172. The Student’s testimony regarding the February 17, 2011, incident is outweighed by the more credible testimony of the paraprofessionals, to the effect that he assaulted Ms. Sekorski. Ms. Sekorski did not harm him, and he walked from the dance room to the office under his own power.

173. The Student’s allegation that he was dragged from the dance room to the office by Ms. Sekorski, who held her hands on his sides, is not credible.

J. Administrative Transfer

174. An administrative transfer was requested by Linwood Elementary on February 17, 2011, following the suspension of the Student for punching Ms. Serkoski in the face.²⁵⁷

175. The Student was suspended until February 28, 2011 and homebound services were set up to take place at the Monroe campus.²⁵⁸

176. On February 23, 2011 Sharon Freeman, Assistant Superintendent, wrote to the Parent offering placement at either Frost Lake or Rondo Elementary. Those schools were sites that the Parent had agreed to visit in mediation.

177. On March 1, 2011, Ms. Freeman repeated the offer and again stated to the Parent that the Student would otherwise be administratively transferred.²⁵⁹

178. The Parent asked for a neutral party to decide on the transfer. Assistant Superintendent Andrew Collins met with her on March 15, 2011 for that purpose.²⁶⁰

179. On March 8, 2011, the Parent filed a restraining order petition against Kathy Sekorski but that petition was denied.²⁶¹

²⁵⁴ *Id.*

²⁵⁵ T. 1644, L. 10.

²⁵⁶ T. 1644, L. 10-18.

²⁵⁷ Ex. 44.

²⁵⁸ Ex. 44.

²⁵⁹ Ex. 52.

²⁶⁰ Ex. 53, 55.

²⁶¹ Ex. 54, T. 1572, L. 10.

180. On March 9, 2011, Principal Steve Unowsky sent a letter to the Parent giving notice that her presence at Linwood would be considered trespassing.²⁶²

181. At the meeting prior to the incident which instigated the trespass letter being sent, Brant Thomsen observed that the Parent was taking pictures, agitated, and speaking with a loud voice very rapidly. A security officer had been called because the possibility of Parent's escalation had been predicted.²⁶³ Parent's agitation was significant enough that Mr. Thomsen felt "scared" throughout the meeting.²⁶⁴

182. On March 22, 2011, Mary Kelly, interim director of special education, wrote to the Parent advising that she had cancelled three meetings with Mr. Collins, failed to respond to a request for a phone conference with him and that the Student had been transferred to Battle Creek Elementary.²⁶⁵

183. Ms. Kelly advised that if the Student did not attend Battle Creek Elementary, the District would consider him truant.²⁶⁶

K. The Student 's Progress at Benjamin Mays/Museum Magnet

184. The Student has been successful in a Federal Setting I program at Museum.²⁶⁷ He is making progress academically, socially and emotionally in school.²⁶⁸

185. The Parent acknowledges that the Student is doing well at Museum with her support.²⁶⁹ The Museum Magnet IEP appropriately identified his needs.²⁷⁰

186. The current IEP team, including Ms. Fantauzza, have discussed with the Parent a possible need for an increase in service from a Federal Setting I to a Federal Setting II in the future.²⁷¹

187. Ms. Ostrom believes that the interventions being used at Museum were appropriate although she thought the classroom size was too large.²⁷²

188. At the Hearing, Counsel for the District offered Exhibit 97. The ALJ deferred his decision to admit or take notice of certain parts of the Exhibit. The District

²⁶² Ex. 56.

²⁶³ T. 1048, L. 25--T. 1049, L. 1-18.

²⁶⁴ T. 1049, L. 21.

²⁶⁵ Ex. 57.

²⁶⁶ *Id.*

²⁶⁷ T. 909, L. 15.

²⁶⁸ T. 1195, L. 24.

²⁶⁹ T. 1591, L. 8.

²⁷⁰ (T.1024, L. 3-8; T. 1025, L. 11) (Testimony of Brant Thomsen) (T. 1240, L. 16)(Testimony of Katherine Scanlan);(T. 1195, L. 5, 7)(Testimony of Karen Fantauzza)

²⁷¹ T. 1209, L. 19.

²⁷² T. 1721, L. 22-23; T. 1732, L. 12-18.

policies, and the District's response to the St. Paul City Department of Human Rights are admitted to the record. Notice is taken of the case of *J.K. v. Minneapolis Public Schools* and MDE Complaint 10-041C.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Education have jurisdiction in this matter pursuant to Minn. Stat. § 125A.091, subd. 12.

2. The Notice of Hearing in this matter was proper in form and content, and the District has complied with the relevant substantive and procedural requirements of statute and rule concerning the due process hearing.

3. This decision was not rendered within 45 days from the date on which the Commissioner received the Student's request for a hearing under Minn. Stat. § 125A.091, subd. 20. Extensions were granted for good cause shown and with agreement of the parties.

4. The Administrative Law Judge does not have jurisdiction over complaints brought under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794. Those claims and other non-IDEA claims were dismissed by the Administrative Law Judge prior to hearing.

5. The Student has the burden of proof to show procedural and substantive violations of the IDEA.²⁷³

6. Each state must have in effect policies and procedures to ensure that all children with disabilities residing in the state regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located and evaluated.²⁷⁴

7. School districts are obligated to develop systems designed to identify pupils with disabilities who are of school age and are not attending any school.

8. The District timely evaluated the Student and identified him as a student in need of special education. The Student was first identified at age 27 months and has continuously received special education services since that time. He was re-evaluated as required prior to age 7. At that time he met the entrance criteria for EBD.

²⁷³ *M.M. ex. rel. L. R. v. Special Sch. Dist. No. 1*, 512 F.3d 455, 458-459 (8th Cir. 2008). Minn. Stat. § 125A.091, subd. 16.

²⁷⁴ 20 U.S.C. § 1412(a)(3).

9. EBD means an established pattern of one or more of the following emotional or behavioral responses: (A) withdrawal or anxiety, depression, problems with mood, or feelings of self-worth; (B) disordered thought processes with unusual behavior patterns and atypical communication styles; or (C) aggression, hyperactivity, or impulsivity. The established pattern of emotional or behavioral responses must adversely affect educational or developmental performance.²⁷⁵

10. A student is eligible and in need of special education and related services for an emotional or behavioral disorder when the student meets the criteria in items A to C.

(A) A pupil must demonstrate an established pattern of emotional or behavioral responses that is described in at least one of the following subitems and which represents a significant difference from peers: (1) withdrawn or anxious behaviors, pervasive unhappiness, depression, or severe problems with mood or feelings of self-worth defined by behaviors, for example: isolating self from peers; displaying intense fears or school refusal; overly perfectionist; failing to express emotion; displaying a pervasive sad disposition; developing physical symptoms related to worry or stress; or changes in eating or sleeping patterns; (2) disordered thought processes manifested by unusual behavior patterns, atypical communication styles, or distorted interpersonal relationships, for example: reality distortion beyond normal developmental fantasy and play or talk; inappropriate laughter, crying, sounds, or language; self-mutilation, developmentally inappropriate sexual acting out, or developmentally inappropriate self-stimulation; rigid, ritualistic patterning; perseveration or obsession with specific objects; overly affectionate behavior towards unfamiliar persons; or hallucinating or delusions of grandeur; or (3) aggressive, hyperactive, or impulsive behaviors that are developmentally inappropriate, for example: physically or verbally abusive behaviors; impulsive or violent, destructive, or intimidating behaviors; or behaviors that are threatening to others or excessively antagonistic. The pattern must not be the result of cultural factors, and must be based on evaluation data which may include a diagnosis of mental disorder by a licensed mental health professional.

(B) The pupil's pattern of emotional or behavioral responses adversely affects educational performance and results in: (1) an inability to demonstrate satisfactory social competence that is significantly different from appropriate age, cultural, or ethnic norms; or (2) a pattern of unsatisfactory educational progress that is not *primarily* a result of intellectual, sensory, physical health, cultural, or linguistic factors; illegal chemical use; *autism spectrum disorders under part 3525.1325*; or inconsistent educational programming.²⁷⁶

²⁷⁵ Minn. R. 3525.1329

²⁷⁶ Emphasis added.

(C) The combined results of prior documented interventions and the evaluation data for the pupil must establish significant impairments in one or more of the following areas: intrapersonal, academic, vocational, or social skills. The data must document that the impairment:

(1) severely interferes with the pupil's or other students' educational performance;

(2) is consistently exhibited by occurrences in at least three different settings: two educational settings, one of which is the classroom, and one other setting in either the home, child care, or community; or for children not yet enrolled in kindergarten, the emotional or behavioral responses must be consistently exhibited in at least one setting in the home, child care, or community; and

(3) has been occurring throughout a minimum of six months, or results from the well-documented, sudden onset of a serious mental health disorder diagnosed by a licensed mental health professional.²⁷⁷

The evaluation findings must be supported by current or existing data from: (1) clinically significant scores on standardized, nationally normed behavior rating scales; (2) individually administered, standardized, nationally normed tests of intellectual ability and academic achievement; (3) three systematic observations in the classroom or other learning environment; (4) record review; (5) interviews with parent, pupil, and teacher; (6) health history review procedures; (7) a mental health screening; and (8) functional behavioral assessment.²⁷⁸

11 The Student was eligible for special education under EBD criteria and his Parent has agreed with such evaluation results. She no longer agrees, but it is not unreasonable, based on the record, to conclude the Student's pattern of emotional or behavioral responses is not primarily a result of autism spectrum disorders.

12. Claims in this matter are limited to occurrences arising within two years of the request for hearing on April 9, 2012. See U.S.C. §1415 (f)(3)(A); 34 C.F.R. 300.511.

13. Compensatory educational services may be awarded to the Student if it is found the District has not offered or made available FAPE in the least restrictive environment, and the Student has suffered a loss of educational benefit.²⁷⁹

14. IEPs and services must be reviewed with a harmless error standard.²⁸⁰

15. The School District did not deny the Student a FAPE.

²⁷⁷ Minn. R. 3525.1329, subp. 2a

²⁷⁸ Minn. R. 3525.1329, subp. 3

²⁷⁹ Minn. Stat. § 125A.091, subd. 21.

²⁸⁰ *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556 (8th Cir 1996), Minn. Stat. 125A.091, subds. 21 & 28.

16. The School District did not unilaterally change the Student's special education placement. He was suspended for violations of school rules and provided with alternative instruction in the form of homework or homebound instruction and transportation to that instruction.

17. The District complied with state and federal requirements with respect to the IEE requested by the Parent. The private medical and mental health providers and the IEE evaluators had differing opinions about the appropriate medical diagnosis and the appropriate special education label.

18. Determination of the eligibility label is an IEP team decision.²⁸¹ In this case, the IEP team, including the Parent, selected the entrance criteria that most closely defined the Student's disability. The experts agreed that the Student has complex needs and that his needs do not fit neatly into any of the 13 eligibility criteria for special education services.

19. Any Conclusion of Law that might more appropriately be considered a Finding of Fact is adopted as such.

Based on the Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS ORDERED that the Student's Complaint, filed April 9, 2012, is **DISMISSED**.

Dated: September 24, 2012

/s/ Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

Reported: Kirby Kennedy and Associates
Angela Sauro and Susan Strom, Reporters
Transcript Prepared

²⁸¹ Minn. Stat. § 125A.08 (b)(3)(4).

NOTICE

Under Minn. Stat. § 125A.091, subd. 24, this decision may be appealed to the Minnesota Court of Appeals or to the United States District Court, consistent with federal law. A party must appeal to the Minnesota Court of Appeals within 60 days of receiving the hearing officer's decision, or to Federal District Court within 90 days.

MEMORANDUM

This case arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et. seq.* and the corollary Minnesota Statute, Minn. Stat. § 125A. At issue is whether the St. Paul Public Schools ("the District") provided the Student with an appropriate education. The Parent and the District agree that the Student's current educational program at Benjamin Mays/Museum Magnet ("Museum or Museum Magnet") has provided him with meaningful educational benefit.

Despite this agreement, the Parent argues that the Student's special education "label" is incorrect. She also complained that the "location" of the Student's education was improperly decided by the District. The preponderance of evidence supports that the District correctly identified the Student's educational needs and that he has made meaningful progress in his special education program. The District used its administrative transfer authority to move the Student to a location that had the resources to meet his needs and keep him safe. The Parent and the District agree that the District's chosen location of Museum Magnet has the resources to serve the Student and that he has made progress there.

The Parent asked for a re-evaluation, autism spectrum disorder (ASD) testing and a functional behavioral assessment early in the 2010-2011 school year. Her goal was to have the Student's eligibility label changed. It is apparent from the Parent's testimony that she thought the EBD label was causing her son's behaviors to be viewed by school staff as volitional as opposed to stemming from his disability. No witness testified that they found the Student's behavior to be volitional – instead, every witness testified that because of the Student's disability he was inattentive, impulsive, and had difficulty accepting directions or consequences that he did not like.

At no time did District deny a request for re-evaluation or an FBA or to delete the Vento evaluation. The record reflects that the District consistently worked with the Parent to try to understand her concerns and respond appropriately to her requests.

THE DISTRICT PROVIDED THE STUDENT WITH A FREE APPROPRIATE PUBLIC EDUCATION ("FAPE")

IDEA Generally

Congress enacted the IDEA "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education

and related services designed to meet their unique needs.”²⁸² The IDEA “provides federal money to state and local education agencies in order to assist them in educating handicapped children on the condition that the states and local agencies implement the substantive and procedural requirements of the Act.”²⁸³

The IDEA requires that a free appropriate public education (“FAPE”) must include special education and related services tailored to meet the unique needs of a particular child and must be “reasonably calculated to enable the child to receive educational benefits.”²⁸⁴ Because each child's needs and abilities are unique, however, the law does not mandate the acquisition of specific knowledge or “strict equality of opportunity or services.” “[T]he IDEA does not require that schools attempt to maximize a child's potential, or, as a matter of fact, guarantee that the student actually make any progress at all.”²⁸⁵

The Act also includes procedural safeguards that afford parents an opportunity for input into their child’s special education program. These safeguards are equally important in the Act’s scheme of rights.²⁸⁶

In summary, the IDEA's legal obligations are fulfilled when the school district (1) complies with the law's procedural safeguards in developing an IEP, and (2) the resulting IEP is “reasonably calculated to enable the child to receive educational benefits[.]”²⁸⁷ “An IEP should be set aside only if procedural inadequacies 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.”²⁸⁸

A parent who is dissatisfied with certain aspects of a child's special education may request an administrative due process hearing.²⁸⁹

Burden of Proof

At the administrative hearing, the party challenging the IEP bears the burden of demonstrating that the IEPs were not appropriate.²⁹⁰ In our case, the Parent requested the hearing and challenged the Student’s disability category or “label” and the District’s selection of the location of his school program. The Parent argued that she was not permitted to participate fully in the development of her child’s IEP and that as a result of these failings the Student did not receive a FAPE. The preponderance of the evidence

²⁸² 20 U.S.C. § 1400(d)(1).

²⁸³ *M.P. v. Indep. Sch. Dist. No. 721*, 326 F.3d 975, 979 (8th Cir.2003).

²⁸⁴ *Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982).

²⁸⁵ *CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630, 642 (8th Cir.2003); see also 34 C.F.R. § 300.350.

²⁸⁶ *Rowley*, 458 U.S. at 207.

²⁸⁷ *Id.*

²⁸⁸ *Indep. Sch. Dist. No. 283 v. S.D. by J.D.*, 88 F.3d 556, 562 (8th Cir.1996) (quotation omitted).

²⁸⁹ 20 U.S.C. § 1415(b)(6), (f) & (i)(2)(A).

²⁹⁰ *M.M., ex. rel. L.R. v. Spec. Sch. Dist. No. 1*, 512 F.3d 455 (8th Cir. 2008); *Schaffer v. Weast*, 546 U.S. 49, 56 (2005). Minn. Stat. § 125A.091, subd. 16.

establishes that the District properly identified the Student's needs, considered his Parent's input and provided him with a FAPE.

The District Correctly Identified the Student's Needs

The IDEA directs school districts to evaluate children suspected of having a disability "in all areas of suspected disability" and to individualize their educational programs to their specific needs.²⁹¹ The evaluation must be sufficiently comprehensive to identify all of the child's special education and related service needs, "whether or not commonly linked to the disability category in which the child has been classified."²⁹² The purpose of the evaluation is two-fold: to determine whether the child is a "child with a disability" as defined under 34 C.F.R. § 300.8 and to determine the content of the child's IEP.²⁹³ The statute further requires "that all children with disabilities have available to them special education and related services that are designed to meet their *unique needs*."²⁹⁴

A school district must evaluate a student within thirty school days of the parent's agreement to the evaluation and must evaluate the student every three years.²⁹⁵ In the case at bar, the only evidence presented was that the District timely evaluated the Student first in 2005, again in 2008 and in 2010.²⁹⁶ There is also no dispute that his mother was involved in the planning of each of those evaluations and that she agreed to the evaluation plans.²⁹⁷ There is also no dispute that the Parent agreed, at least initially, to the results of the last evaluation conducted at Vento in 2010 when the Student was turning age 7.²⁹⁸

The Parent asked for a re-evaluation in the fall of 2010. Her request was for a new FBA to be done and re-evaluation geared toward reconsideration of the eligibility label. She claims that the District then failed to provide a Prior Written Notice of its Refusal to re-evaluate the Student. A school district is required to provide a Prior Written Notice of its refusal to initiate or change the identification, evaluation, placement or the provision of FAPE to a student.²⁹⁹

However, there is no evidence that the District denied a request to re-evaluate the Student in the 2010-2011 school year. What the evidence clearly supports is that the Parent began the school year seeking to have her son labeled as autistic rather than

²⁹¹ 20 U.S.C. § 1414(b)(3)(B), (d); *see also Fort Osage R-1 Sch. Dist. v. Sims*, 641 F.3d 996, 1002 (2011).

²⁹² 34 C.F.R. § 300.304(c)(6).

²⁹³ 34 C.F.R. § 304 (b)(1)(i), (ii).

²⁹⁴ *Id.* at 1003, *citing* 20 U.S.C. § 1400(d)(1)(A) (emphasis in the original); *see also Blackmon v. Springfield R-XII School Dist.*, 198 F.3d 648 (8th Cir. 1999) ("A school district must tailor such education to meet the unique needs of each disabled child.").

²⁹⁵ Minn. R 3525.2710.

²⁹⁶ *See e.g.* Ex. 1, 5, 13.

²⁹⁷ *Id.*

²⁹⁸ Ex. 17.

²⁹⁹ 20 U.S.C. § 1415 (3)(b)(3).

emotionally behaviorally disordered. The evidence indicates that Mr. Thomsen, the Student's case manager, and the Parent discussed her concerns about the Student's eligibility label more than once. The evidence is also clear that Mr. Thomsen told the Parent that since it had been less than sixty school days since the last evaluation was done, it would make more sense to collect more information and allow the Student to acclimate to the new school before beginning another evaluation. A school district is not required to re-evaluate a student more than once per year.³⁰⁰ The regulation states:

(a) General. A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311—

(1) If the public agency determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(2) If the child's parent or teacher requests a reevaluation.

(b) Limitation. A reevaluation conducted under paragraph (a) of this section-

(1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and

*(2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.*³⁰¹

The Vento evaluation was completed with only about six weeks left of school in April of 2010 and less than a year had elapsed since the last evaluation. There was no agreement between the Parent and the District to conduct re-evaluation and as a result, the District was not required to do so.

Despite the lack of a legal obligation to re-evaluate, the District did not deny the Parent's request or ignore her concerns. On October 5, 2011, the IEP team met to discuss the IEP and a FBA. A FBA is a systematic way of observing a student's behaviors to determine what function those behaviors serve for the student in an effort to design interventions to prevent the negative behaviors and to teach the student positive behaviors to replace them.³⁰²

A FBA was part of the Vento evaluation completed at the close of the school year. The Parent and Mr. Thomsen testified that the team discussed the FBA but they agreed that it would be beneficial to learn more about the Student before doing another

³⁰⁰ 34 C.F.R. § 300.303(b)(1).

³⁰¹ 34 C.F.R. § 300.303 (b)(1),(2)(Emphasis added).

³⁰² T. 225,L.15-21.

one.³⁰³ The Parent and Mr. Thomsen testified that the Parent was reluctant but she did agree to this plan.³⁰⁴ School had been in session less than a month at this time.

The District was not denying a request for a re-evaluation or a FBA; it was suggesting that staff would have better information about the Student's school functioning with a bit more time. It is noted that when the FBA was re-done by a private behavioral analyst, Jan Ostrom, her assessment was similar to that done by the Vento staff in 2010. Ms. Ostrom found that the Student was complex, did not fit neatly into either the ASD or EBD category and that his needs were as identified by the District.³⁰⁵

The District Properly Evaluated the Student in 2010 and Considered the Private Evaluations

The evidence is likewise undisputed that the District considered the 2006 private evaluations from LifeTrack and Alexander Center/Park Nicollet provided to the school staff by the Parent.³⁰⁶ In the latest assessment in 2010, the District noted that the Student had a medical diagnosis of PDD-NOS and considered the Student's behaviors and needs in light of that diagnosis.³⁰⁷ The District considered the private evaluations and their recommendations; it simply did not agree that the Student met the **educational criteria** for ASD.

The ALJ agrees with the District's suggestion that there is little disagreement about the Student's educational needs. In the last evaluation conducted by the District in April of 2010, the Student's cognitive ability was in the average range including average verbal skills.³⁰⁸ The Student also performed in the average range in tests of reading, written language, math and academic knowledge.³⁰⁹ Inattentiveness was also noted as a presenting problem throughout the testing.³¹⁰ Speech and language testing was also in the low average range.³¹¹

The Parent's concerns were taken into account and the evaluation noted that the mother thought that the large class size and lack of sensory input was contributing to the Student's behavior at home.³¹² The Parent rated the Student's behavior as worse at

³⁰³ T.1020,L.1-10.

³⁰⁴ *Id.*

³⁰⁵ *See*, Ex. 93.

³⁰⁶ Exs. 5, 13 at 528-9. 2008 assessment considered autism diagnoses to determine whether the Student met the "Educational Disability criteria for Autism Spectrum Disorder".

³⁰⁷ Ex. 13 at 535.

³⁰⁸ *Id.* at 530.

³⁰⁹ *Id.* at 531.

³¹⁰ *Id.* at 532.

³¹¹ *Id.* at 533.

³¹² *Id.* at 536.

home than the school staff rated it at school.³¹³ Critical items of note at school were the Student's frequent reports that he wanted to die or wished he was dead.³¹⁴

A functional behavioral assessment was completed as part of the 2010 evaluation. It indicated that the Student exhibited off task behaviors in school every minute to once every three minutes, he failed to follow directions when he did not like them and he displayed serious self-harming behaviors.³¹⁵ He tended to display these behaviors when he was upset, or when he received consequences or redirection that he did not like.³¹⁶ Finally, the evidence is also undisputed that the District considered the Student's medical doctors' recommendations as provided by his mother.³¹⁷

In the area of sensory needs, the Student scored in the typical range for body awareness and planning and ideas.³¹⁸ "He did seem to be stressed by noise and" "frequently yells, screams or makes unusual noises to himself."³¹⁹ "He tolerates touch and willingly plays with peers in a variety of activities" although he could not resolve conflict with them without the teacher's support. The evaluation did not find that the Student had definite dysfunction in the sensory areas.³²⁰ As a result of these findings, the IEP team including the Parent, found that the Student met the entrance criteria for Emotional/Behavioral Disorder (EBD) and Speech/Language Impaired.³²¹ The Parent agreed with the results at the time^{322 323}.

On May 24, 2010, as the school year was ending, the IEP team including the Parent developed a new IEP that slightly increased the services for the following school year.³²⁴ It identified the Student's academic needs, speech and language needs and his need for increased ability to follow classroom routines and rules as well as accept redirection without engaging in self-harm or verbal/physical opposition.³²⁵ The IEP also included a behavior intervention plan outlining behavioral interventions and positive behavioral supports.³²⁶ One of those supports was a referral by the District to Wilder Child Guidance for additional support in school.³²⁷

³¹³ *Id.* at 540.

³¹⁴ *Id.*

³¹⁵ *Id.* at 542.

³¹⁶ *Id.*

³¹⁷ *Id.* at 538.

³¹⁸ *Id.*

³¹⁹ *Id.* at 534.

³²⁰ *Id.* at 534, 535.

³²¹ Ex. 13, 15.

³²² When the Parent enrolled the Student the next school year at Linwood, she disputed the results and asked for reevaluation.

³²³ Ex. 17. The Parent testified that she was forced to agree because it was late in the school year. Regardless, it is clear at the start of the 2011-2012 school year that she wanted her son labeled ASD.

³²⁴ Ex. 18.

³²⁵ *Id.* at 685-687.

³²⁶ *Id.* at 691-692.

³²⁷ *Id.* at 692, Ex. 13 at 538.

Despite her initial agreement, the Parent argued at hearing that the Student's behaviors at Linwood were due in part to the lack of attending to his sensory needs. She testified that the Student has autism and that one of its "cardinal" signs is an inability to tolerate touch or loud noises. She argued that the Student required a "sensory diet" and "sensory breaks" in school.

Jan Ostrom, a board certified behavioral analyst who observed the Student both at home and at school, did not find that he had definite sensory needs like most students with autism.³²⁸ Instead, she thought that the Student liked sensory breaks when he could go to a space outside of his classroom to play with items or swing on a chair because of his inattentiveness and impulsivity.³²⁹

What is in dispute is the "label" or under which eligibility criteria the Student should be found eligible for special education services. The Parent asserts that the Student should be found eligible under the Autism Spectrum Disorder (ASD) criteria instead of the EBD criteria. She has argued that the Student cannot be adequately served if the IEP incorrectly identifies the disability.

The District has asserted that the label is correct but more importantly, it is the needs that are identified in the evaluation (such as the need for a highly structured classroom, paraprofessional support, adapted math curriculum, etc.) that determine what services the Student will require. In essence, it argues the Parent's dispute about the educational label is legally less significant and moreover, creates a diversion that the District has continually addressed. The District argues that doing so made it difficult for the parties to consider the real issue – how to provide the necessary resources for the Student in school.

In a similar case, the Eighth Circuit Court of Appeals addressed similar issues.³³⁰ In *Fort Osage*, a student with Down Syndrome was assessed for special education prior to kindergarten.³³¹ At the time, there was no evidence that the child had autism.³³² However, when the student was evaluated sometime later by a private psychologist, she determined that the child had autism.³³³ As a result, the Fort Osage School District re-evaluated her to determine if she had met the educational criteria for ASD.³³⁴ The IEP team determined that the student met the criteria for Other Health Disabilities (OHD) based on her diagnosis of ADHD and the medical diagnosis of ASD (although the School District did harbor some concerns about the medical diagnosis of ASD).³³⁵

³²⁸ Ex. 93.

³²⁹ T. 1669-1670.

³³⁰ *Fort Osage R-1 Sch. Dist.*, 641 F.3d at 1002.

³³¹ *Id.* at 997.

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.* at 999.

³³⁵ *Id.*

The School District determined that the student did not meet the IDEA criteria for autism.³³⁶ The parents asserted that the student was misidentified and should have been labeled as autistic for school purposes.³³⁷

In *Fort Osage*, the Eighth Circuit held:

Given the IDEA's strong emphasis on identifying a disabled child's *specific needs and addressing them*, 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. Consequently, while the IDEA intends that IEPs contain accurate disability diagnoses, we will not automatically set aside an IEP for failing to include a specific disability diagnosis or containing an incorrect diagnosis.³³⁸ Instead, as with any other purported procedural defect, the party challenging the IEP must show that the failure to include a proper disability diagnosis "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."³³⁹

The Eighth Circuit noted that there was a mixed record as to whether the student actually had autism or instead displayed some autistic traits as a result of her other disabilities.³⁴⁰ The *Fort Osage* Court noted that, given the mixed record before it, it was difficult to discern how the IEP failed to identify adequately that student's disabilities.³⁴¹

The same is true here, where some of the Student's private providers suggested various medical conditions including a mild form of autism, PDD-NOS, communication disorder, ADHD, and obsessive compulsive disorder.³⁴²

Ms. Ostrom was the only expert who observed the Student in school and at home and she opined that he did not fit neatly into any educational category. She testified that the Student's educational program (the same goals and objectives that had been implemented at both Linwood and at Museum) was appropriate.

Ms. Garrison and Ms. Kelly, special education experts with more than twenty years' experience each, also testified that it was the needs of the Student as identified in the evaluation, not the eligibility label, that defined what was included in the Student's IEP.

³³⁶ *Id.*

³³⁷ *Id.* at 1003.

³³⁸ See generally, 20 U.S.C. § 1414(d) (stating the general requirements of an IEP). Footnote from *Fort Osage* opinion.

³³⁹ *Lathrop*, 611 F.3d at 424 (internal quotation marks omitted). *Fort Osage* at 1004.

³⁴⁰ In this case, the District does not dispute the medical diagnosis of ASD. It asserts that the EBD criteria more closely describe the Student's school behaviors and needs.

³⁴¹ *Fort Osage* at 1003-1004.

³⁴² See, Ex. 3, 178, 179, 257.

The record shows that when the Student was transferred to Museum with the same IEP that was used at Linwood, including the same eligibility label, he did well. It was not a change in label that afforded the Student success in the school environment. Instead, it was the availability of a lot of adult support from the classroom teacher, the increased paraprofessional availability and the support of a special education teacher with experience in EBD and ASD that made the difference. The Parent's support of the school and her work with her son also very likely contributed to his success.

An "IEP is a comprehensive written statement developed jointly between the child's parents and the school district, which outlines the child's special educational needs and the specially designed instruction and services to be provided by the school system in order to meet those needs."³⁴³ In this case, the Parent does not point to any substantial disagreement with IEP. It outlines the child's needs and the unique instruction and services that he requires. The fact that it does not label the Student as ASD is immaterial where the evaluation recognizes his medical diagnosis and his needs are correctly identified.

In another factually similar case, the IEP team considered the ADHD diagnosis and the autistic like behaviors of a student.³⁴⁴ The student had not been medically diagnosed as having autism.³⁴⁵ The student was found eligible under the OHD criteria.³⁴⁶ The student's behaviors escalated at school and he was eventually provided with homebound instruction.³⁴⁷ Unlike the case at bar, the IEP team in *Clark* changed the child's educational placement from a regular school to a separate day school.³⁴⁸ The parents requested a hearing to return their son to a regular school with special education supports.³⁴⁹ The parents did not dispute that the child had made progress but they disagreed with how his behavior problems were addressed.

The Court held that the IEP must be reviewed to determine if it was "responsive to the student's [JJ] specific disabilities, whether academic or behavioral."³⁵⁰ The Court found that the IEPs contained detailed behavioral interventions and enumerated academic and behavioral goals and the student made some progress under those IEP's.³⁵¹ The Court held that the student did receive a FAPE.

In this case, it may be possible the Student could have been found eligible under OHD criteria because of either his medical diagnosis of ADHD or his other medical diagnoses of PDD-NOS or communication disorder. Instead, his IEP team in 2010 believed that the primary factor impacting his education was his inattentiveness, failure

³⁴³ *M.P. ex rel. K. v. Indep. Sch. Dist. No. 721*, 326 F.3d 975, 977 n. 1 (8th Cir.2003) (citing 20 U.S.C. § 1414(d)).

³⁴⁴ *Clark v. Spec. Sch. Dist. of St. Louis*, 2012 WL 592423 (E.D.Mo. 2012).

³⁴⁵ *Id.* at *1.

³⁴⁶ *Id.*

³⁴⁷ *Id.* at #7.

³⁴⁸ *Id.* at *8.

³⁴⁹ *Id.*

³⁵⁰ *Id.* at*11. (citations omitted).

³⁵¹ *Id.*at*15.

to follow directions and verbal/physical reaction to adults redirecting him or providing a consequence that he did not like.

Even if the ALJ were to find that the Student's label could be ASD or even should be ASD, that fact would not change the Student's special education program. No witness, including the Student's mother, testified that changing the label would make a difference in his programming.

What did make a difference in the Student's education was the change in location of his services to a school within the District that had significantly more special education resources available.

As Minn. Stat. § 120A.36 states, "Attendance at a particular school is a privilege not a right for a pupil."

Minn. Stat. §123B.09, subd. 1 provides each school district with the authority to manage and control its schools. In addition, Minn. Stat. §120A.36 states that "attendance in a particular school is a privilege not a right". A school district has the right to use the administrative transfer process to change a general education student's school location.³⁵²

The Minnesota Department of Education (MDE) has opined that a school district's authority extends to manage and control the District's schools "through the use of administrative transfer as a consequence for disciplinary infractions, for both general and special education students..."³⁵³

In the Complaint referenced above, a St. Paul Public School student who received special education services argued that he was not subject to administrative transfer because to do so would change his special education placement. The MDE found that the term "educational placement" is not the location where the special education programming takes place, but instead, the "educational placement" is the point along the continuum of services that are required of the school district.³⁵⁴ MDE held that the District did have the right to transfer a special education student to another location as long as his "educational placement" – that is, his special education setting, did not change.³⁵⁵

As a result of that Complaint, the District codified its administrative transfer practice for students with special needs.³⁵⁶

The Student in this case was in a Federal Setting I placement at Linwood and he was transferred to a Federal Setting I placement at Museum following a suspension for

³⁵² *J.K. v. Minneapolis Public Schools*, 2011 WL 3438884 (D. Minn. 2011)(District policy allowing for administrative transfer did not violate student's rights in light of Minn. Stat. §120A.36).

³⁵³ MDE Complaint File No. #10-041C (May 11, 2010)(District Ex. 97).

³⁵⁴ *Id.* at 33.

³⁵⁵ *Id.*

³⁵⁶ Ex. 296.

hitting a paraprofessional. No change in his educational placement occurred, only a change in location of services.

The majority of Circuit Courts that have addressed placement outside of a student's home school have agreed with the MDE's conclusion.³⁵⁷ In *White*, the Fifth Circuit held that a special education student may be transferred to another school in the district as a result of disciplinary consequences without changing the student's special educational placement.

The Eighth Circuit has not addressed the situation where a disciplinary transfer results in a change in location. In *Hale ex rel. Hale v. Poplar Bluff*, 280 F.3d 831 (8th Cir. 2002), the Court held that a special education student whose parents had filed a request for due process hearing was entitled to remain in his "stay put" special education placement during the pendency of the action.³⁵⁸ In that case, the school district ended the student's home bound educational services and provided the same services at a school building.

The Court found that the district's unilateral change in the services from home to school *during the pendency of a due process hearing* violated the Act.³⁵⁹ The Court also held that because the student was receiving homebound services post-surgery, what may have been a change in location otherwise had prevented the child from receiving any education. The *White* Court and the court in *A.W. ex rel. Wilson v. Fairfax County Sch. Bd.*,³⁶⁰ distinguished the *Hale* decision, finding that a change in location does not violate the IDEA unless the student is unable to receive educational services such as occurred in *Hale* or would occur if the student was expelled from school altogether.

Federal administrative agency interpretations of the IDEA regulations reach the same result. The Office of Special Education Programs (OSEP), the Department of Education branch charged with monitoring and enforcing the IDEA and its implementing regulations, has explained: "[I]f a public agency ... has two or more equally appropriate locations that meet the child's special education and related service needs, the assignment of a particular school ... may be an administrative determination, provided that the determination is consistent with the placement team's decision."³⁶¹

³⁵⁷ See, *White ex rel. White v. Ascension Parish School Bd.*, 343 F.3d 373, 381 -382 (C.A.5 2003) (reviewing decisions of Circuits).

³⁵⁸ *Hale* at 833.

³⁵⁹ *Id.*

³⁶⁰ 372 F.3d 674 (4th Cir. 2004).

³⁶¹ *Letter from Office of Special Education Programs to Paul Veazey* (26 Nov. 2001). See also, e.g., *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994) (it is permissible for a student with a disability to be transferred to a school other than the school closest to home if the transfer school continues to be appropriate to meet the individual needs of the student); *Letter to Fisher*, 21 IDELR 992 (OSEP 1994) (citing policy letter indicating that assignment of a particular location is an administrative decision); see also *Letter to Trigg*, (OSEP 2007) ("Placement" is the point along the continuum of services required by 34 C.F.R. §115(b) and "location" is the physical place that the services are provided. If a school district has two appropriate locations "...school administrators should have the flexibility to assign the student..." to either one.)

In the present case, while the Student's escalating and potentially dangerous behaviors were a trigger to the administrative transfer, the District could have used its non-disciplinary transfer to change the Student's placement. The Parent seemed to agree that such a transfer would be legitimate. She only objected to the disciplinary nature of the transfer in this case. However, through the numerous IEP team meetings, discussion and correspondence with the District Ombudsperson, Dana Abrams, Mary Kelly, Mary Garrison and Sharon Freeman, it was obvious that the School District was concerned that the Student's misconduct, much of which was likely related to his disability, could not be managed in a school that only had part time special education staff.

THE DISTRICT AFFORDED THE PARENT AMPLE OPPORTUNITY TO PARTICIPATE

The Parent has alleged that the length of time it took to complete the IEE somehow violated her rights or impacted her son's education. The claim is easily dismissed however. The IEE consisted of a host of private providers whom the District identified, scheduled appointments with, provided records to, cabbed the Parent and Student to and paid for as required. The Parent seems to argue that there was a timeline for the completion of an IEE. The ALJ finds no authority that requires a school district to force the Parent's evaluators to complete their work under any specific time line.

The evidence in this case is clear that the Parent's conduct contributed to much of the delay. For example, she agreed in mediation that the school district nurse could perform the health review. After mediation, the Parent changed her mind. Certainly she has that right but it is disingenuous to lay the resulting delay on the District.

The evaluation was complicated. It included an assistive technology specialist, a speech clinician, the Student's treating psychologist, and Brih Design among others. There were a large number of evaluations and evaluators to coordinate. The District notes that, in its view, their reports did not provide any transformative information to the IEP team.

The District emphasizes that none of the IEE evaluations considered the change in location of services except that of Jan Ostrom of Brih Design. Ms. Ostrom opined that the Student's needs were properly identified and served in his new location at Museum Magnet. Although the Student's psychologist may have asserted again that the Student is ASD and should have his education programmed under that designation, that was not new information to the School District and it and the IEP team had earlier considered that recommendation.

The Parent argues that the lack of an IEP team meeting to consider all of the IEE reports caused some unidentified damage. First, there is no legal authority that requires a school district to convene an IEP meeting to consider IEE reports. Instead, the

District's obligation is to consider those reports.³⁶² The District did convene a resolution meeting with the Parent and it did discuss her position that the Student should be labeled as ASD.

THE STUDENT WAS NOT DENIED FAPE

A school district may suspend a student with special needs for up to ten school days for each violation of a school rule or policy.³⁶³ If the student's suspensions accumulate over the course of a school year such that they change his educational placement, the suspensions violate the Act. The Department of Education regulations provide that short suspensions that total more than ten days may constitute a unilateral change of placement.³⁶⁴ "Suspensions exceeding ten days can create a change in placement, but do not necessarily do so."³⁶⁵

In *M.M. v. Spec. Sch. Dist. No. 1*, the Eighth Circuit opined that when a student is suspended following a school district's appropriate offer of a higher level of services, the district cannot be faulted for suspending the student for misconduct.³⁶⁶ That is essentially the case here. The District initially cautioned the Parent that the resources to support the Student were not readily available at Linwood. When the Student's behavior escalated and created a serious threat to his safety, the District proposed increasing the Student's setting to a Federal Setting II and the Parent refused. The team agreed to revise the behavior plan and Mr. Thomsen began instructing the Student one on one.

The District next recommended that the parties agree to a transfer to a building that had the necessary resources and the Parent declined that offer. As a result, the Student was suspended for misconduct that disrupted his or other's education.

When he was eventually transferred to Museum and appropriate resources were more available, the Student was no longer suspended. The District cannot be faulted in this case for suspending a Student when his behavior warranted it. Moreover, the Student has made progress on his goals and objectives and his suspensions have been all but eliminated given the resources at his new school. His current teacher opined as did Ms. Ostrom that he required a great deal of adult support and that support was available at Museum.

The preponderance of the evidence supports that the District correctly identified the Student's needs and programmed appropriately for him, that he received a FAPE, and that he benefitted from his education in meaningful ways.

³⁶² See, 34 C.F.R. §330.502(b).

³⁶³ 20 U.S.C. § 1415(k).

³⁶⁴ See, 34 C.F.R. § 300.536.

³⁶⁵ *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 1495 (9th Cir.1994).

³⁶⁶ *M.M.*, 512 F.3d 455 (8th Cir. 2008).

THE PARENT'S ARGUMENTS

The record fails to establish by a preponderance of the evidence the following arguments and allegations made by the Student and his Parent:

The Parent alleges a failure of education services during the school year 2010/11, as a direct consequence of the misidentification of the Student as a child with EBD rather than the correct eligibility criteria of ASD. She notes that from the beginning of his education at Linwood Elementary until he was forcibly moved to another education program, the Student's education was marred by adverse and discriminatory assumptions about his functioning in the public school setting as a result of the EBD label. She argues that the District's position that the eligibility criteria for the Student is a negligible element of his education is belied by its refusal to change it to ASD despite two years of the Student's requests.

The ALJ is not persuaded by these arguments. He is persuaded that the District did not designate the Student as ASD eligible because of a reasoned determination that the data and findings presented failed to support such a designation.

Parent argues the case law cited by the District is distinguishable for three reasons: 1) the case law did not examine the responsibility of public schools to apply the correct state eligibility criteria; 2) the decisions found that despite the eligibility label, the student was properly served; and 3) the decisions did not address fundamental and significant procedural violations on the part of the school.

This argument fails because the District's designation of the Student as EBD eligible has not been proven incorrect or unreasonable, the record shows that the Student was served appropriately in 2010-2011 (consistent with available resources), and the District is not responsible for any procedural delays in 2010-2011.

In this case, Parent argues she has been requesting consideration of the ASD criteria for nearly two years and is asking the ALJ to apply the correct state eligibility criteria, that Student was not properly served as evidenced by the excessive suspensions and punitive exclusions, and the District (consistent with its disregard for Student's and Parent's rights), usurped the due process rights found in federal and state law.

This argument is overly broad and misplaced. It was reasonable for the District to conclude when it did that the Student is complex, and that designating him ASD-eligible is inconsistent with the Student's overall educational needs. The ALJ also is not persuaded that the suspensions imposed on the Student in 2010-2011 violated his due process rights.

The Parent notes that the only professionals asserting that Emotional Behavioral Disorder (EBD) is the Student's eligibility criteria are the educators in the Saint Paul Public Schools (District). In that regard, Parent repeatedly sought out and provided the

District what the child's life-long physicians and Parent were recommending. She argues that an objective examination of the record reflects that the Student met the ASD eligibility criteria. She also alleges support for that proposition from Mary Garrison, the District's Special Education Coordinator.

That argument fails because the Parent's evidence fails to show that an EBD designation for the Student was incorrect in 2010-2011. To accept the Parent's argument would amount to declaring the District's determinations of the Student's eligibility criteria wrong, and the record does not support such a result.

It is contended by Parent that the application of the EBD label resulted in substantial adverse action by Linwood administration including serial suspensions resulting in a unilateral change in placement, a physical assault of the Student, the usurpation of Parent's school choice of Linwood, discriminatory actions in the form of the administrative transfer, reprisals against the Parent via a baseless No Trespass Order, interruption in her other son's education, and a truancy action against the family for absences resulting from District initiated suspensions.

The record fails to support that any of the problems listed resulted from designating the Student eligible for special education because of EBD. In fact, the allegations that the Student was assaulted by District personnel, that he was transferred from Linwood due to discrimination, or that the No Trespass Order against the Parent and truancy actions were acts of reprisal, are not supported by the record.

Parent alleges that at the heart of the violations was an administrator, Steve Unowsky, who wielded a disturbing amount of consolidated power through administrative *fiat*.

The record fails to establish that Mr. Unowsky caused the problems alleged by the Student and his Parent.

The Parent notes also that despite multiple and persistent parental requests for an evaluation using the ASD criteria consistent with medical recommendations, the independent education evaluation (IEE) remains incomplete and no team meeting has been provided to discuss the results of the IEE.

The problem with this accusation is that many of the delays in completing the IFE are attributable to the Parent.

The Parent stresses that a special education rule requires that "the team determining eligibility and educational programming *must include at least one professional with experience and expertise in the area of ASD due to the complexity of this disability and the specialized intervention methods.*"³⁶⁷ She notes that the District offered no evidence that any team member working with the Student had either

³⁶⁷ Minn. R. 3525.1325, subp 4(emphasis added).

experience or expertise in the area of Autism,³⁶⁸ and that by ignoring not only the rule-out criteria,³⁶⁹ but the requirement for a qualified professional to assist with evaluation, the District misidentified the Student as early as February 2008.

The ALJ cannot agree. The absence (if any) of a professional with experience/expertise in ASD fails to establish that the Student, in fact, has been misidentified over the years. The Parent assumes also that the District would have declared the Student to be ASD eligible if an autism specialist had been on the evaluation team. For the ALJ to speculate on the team's recommendation, and from that to declare that the Student is ASD – eligible (as Parent requests) would be inappropriate.

The Parent notes that in 2006, her son was diagnosed with PDD-NOS Autism.³⁷⁰ She alleges she provided the medical diagnosis and requested a re-evaluation to consider and evaluate the Student's diagnosis, but the District refused to do so, without notice to her. She alleges that the only evaluation provided by SPPS is dated April 27, 2010, from Vento, which has not been updated or changed despite multiple requests from the Parent.³⁷¹

Parent ignores the fact that she agreed with that evaluation at the time, and the evidence establishes that the District evaluated the Student every three years, as required. It was not required to re-evaluate his status more frequently.

The Parent alleges that all of the IEPs, including the IEPs that exist today, are fatally flawed for the following reasons: 1) EBD eligibility rather than ASD; 2) inadequate present levels of performance; 3) no information regarding the Student's disabling condition and the effects such condition has on his performance in either regular or special education curricula; 4) non-measurable and inadequate goals and objectives; 5) goals and objectives that are repeated year-after-year; 6) persistent reduction in goals and objectives to be obtained; and 7) no positive behavior intervention plan.³⁷²

Her evidence fails to support all these allegations, or that the Plans developed for the Student are fatally flawed.

The Parent argues that refusing her son's admission to Linwood and referring him to schools that had failed to obtain Adequate Yearly Progress (AYP) were used as punishment to respond to his disability.

There is no support in the record for that argument – the Student was not refused admission at Linwood, only apprised of how the school may present challenges.

³⁶⁸ See Ex. 11.

³⁶⁹ Parent alleges that a diagnosis of autism "rules out" designation/programming for the Student under EBD criteria.

³⁷⁰ Ex. 178.

³⁷¹ Ex. 13.

³⁷² Exs. 204; 25; 26; 37; 192;202; 210;and 213.

Likewise, the record does not establish that the Student was punished because of his designation as EBD.

Parent alleges also that the Student was deprived of access to his non-disabled peers by refusing him lunch, recess, specialist classes, field trips and school parties.³⁷³

The record reflects a short-term denial of recess, which was corrected as soon as the social worker heard of it. Any denial of FAPE in that context is *de minimus*.

Parent argues further that the Student was removed from Linwood without due process through an administrative transfer, and that when his parent advocated on his behalf, the Linwood Administration issued a retaliatory No Trespass Order such that she could no longer effectively advocate for her son.³⁷⁴

To the contrary, the record reveals that the administrative transfer was not done without notice,³⁷⁵ and that the No Trespass Order was an appropriate response to the Parent's actions at the time.

In the first grade at Linwood, the Student was taught by Ms. Mary Morgan. Parent argues that Ms. Morgan refused to assist the Student with any of his school work while in the classroom, ignored him when he raised his hand to participate and she refused to acknowledge that he was experiencing sensory overload at times.³⁷⁶ She argues that the most rudimentary interventions were not implemented. Instead, it is alleged that Ms. Morgan referred to the Student in front of his peers and other professionals as a "bad boy", a "naughty boy", and routinely sent him to sit in the "take a break chair" or the "take a break room."³⁷⁷

The evidence does not support these allegations.

The Student's education was allegedly further damaged by Ms. Sekorski, who allegedly physically assaulted him by hitting him on the back of his head, dragging him around by his armpits, and dragging him around while digging her fingers into his rib cage.³⁷⁸

These allegations are not supported by the record. Ms. Sekorski's denials of the allegations are credible.

The Parent alleges also that her requests have been ignored from November 30, 2011 until she filed her Hearing Request. Despite her requests, the Parent alleges that

³⁷³ *Trans. 1374.*

³⁷⁴ *Ex. 56.*

³⁷⁵ Exhibit 265, prior written Notice of Administrative Transfer, 4/14/11.

³⁷⁶ *Trans. 1375.*

³⁷⁷ *Id.*

³⁷⁸ *Ex. 247; Trans. at 1631-39.*

no IEP team meeting was held to address her concerns, no re-evaluation was offered or discussed, and no autism consultant was offered.

While the Parent agrees that her son is presently safe at Museum Magnet and doing well as a result of the compassionate and caring staff there, she argues that the same issues raised by her in multiple correspondence to the District remain unresolved.

These allegations lack evidentiary support, or are immaterial. The record is clear that the District was not required to agree to re-evaluations during that time period.

The Parent notes that federal regulations require that Districts respond to parental requests by providing a written notice when the District:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.³⁷⁹

An evaluation under federal law must be completed within 60 days of the request.³⁸⁰ An independent educational evaluation follows the same timelines and includes:

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, *without unnecessary delay*, either—

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense . . .³⁸¹

The record is clear that delays contributing to any untimely completion of evaluations are attributable to the Parent, and that no procedural delays relate to unreasonable actions or inactions by the District.

The Student alleges that while a special needs student could receive the necessary services under the wrong criteria, that does not obviate the District's responsibility to apply the correct criteria. She maintains a child is entitled as a matter of law to be properly identified with his or her identified disability.

³⁷⁹ 34 C.F.R. § 300.503.

³⁸⁰ 34 C.F.R. § 300.501(c).

³⁸¹ 34 C.F.R. § 300.502(b)(2)(emphasis added).

Even if that proposition were correct (which the ALJ concludes it is not) the record does not establish misidentification of the Student.

Parent argues there is no evidence that the District or Linwood Elementary ever met with her to discuss her concerns or any medical and evaluative information regarding her request for ASD criteria, and that the record is clear that an IEP team meeting was never held to discuss the Parent's concerns or to alter the IEP in any meaningful manner consistent with her request.

These broad allegations are not supported by the record. The record establishes that the District's IEP team gave appropriate consideration to the reports supporting an ASD designation for the Student.

The record reflects that the District convened a resolution meeting with the Parent, and that her position that the Student should be designated as ASD-eligible was discussed.

The Parent notes it has been found that a district's obligation to consider a BIP for a student whose behavior impedes his own learning or the learning of others exists regardless of whether the district has contemplated disciplinary action for the student's behavior. A district's failure to develop a BIP can amount to a denial of FAPE.³⁸²

The Parent argues that in this case, the FBA and subsequent BIP must be found inappropriate on the basis that the Student's unique needs were not addressed and he was not provided with adequate support services in his education settings. In *Kingsport City Sch. Sys. v. J.R. by Rentz*, 51 IDELR 77 (E.D. Tenn. 2008), the U.S. District Court for Eastern Tennessee held that deficiencies in a student's BIP amounted to a denial of FAPE. The court noted that the purpose of the BIP was to improve the student's interaction with peers. The Parent alleges that here, rather than providing counseling or social skills training, the BIP essentially provides an outlet for the District, exemplified by addition of the District's ability to restrain and seclude the Student.³⁸³

The Parent has not established that the problems noted in *Kingsport*, supra, occurred in this case. The Parent notes that the IDEA's procedural framework clearly provides that there can be no IEP unless an IEP conference is conducted first.³⁸⁴ Because the District never convened an IEP conference, it is argued that the "draft" IEPs that the District presented to Parent cannot properly be considered as IEPs.

³⁸² See, e.g. *Rialto Unified Sch. Dist.*, 48 IDELR 296 (SEA CA 2007) (ordering a district to provide 250 hours of compensatory education to a sixth-grader who was expelled because of his escalating behavioral problems); *Neosho R-V Sch. Dist. v. Clark ex rel. Clark*, 38 IDELR 61 (8th Cir. 2003) (any slight academic benefit the student received was lost because of ongoing behavior problems that interfered with his ability to learn).

³⁸³ See *Ex. 22 and 23. p. 6.*

³⁸⁴ See 20 U.S.C. § 1401(a)(20); 34 C.F.R. § 300.343(c); 34 C.F.R. pt. 300, app. C.

Putting aside that this argument is illogical, the record in this case fails to establish slippage in the development of IEPs in this case. It is noted that the Parent actually agreed to some of the IEPs developed for the Student.

It is argued that the District in this instance did not create an Individualized Education Program for the Student that would meet his specialized needs. The Parent alleges that if the District complied with the procedural safeguards and worked cooperatively with his Parent as the Parent repeatedly requested, an IEP could have been designed to meet his educational needs. Instead, the District's punitive responses to the Parent and the Student marred an entire year of his education within the District.

This argument fails because the Parent has not shown that the IEP developed for the Student was incorrect, or that her requests generated punitive responses.

The Parent notes that for purposes of removal of a child with a disability from the child's current educational placement under §§ 300.530 through 300.535, a change of placement occurs if—

- (1) The removal is for more than 10 consecutive school days; or
- (2) The child has been subjected to a series of removals that constitute a pattern—
 - (i) Because the series of removals total more than 10 school days in a school year;
 - (ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
 - (iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.³⁸⁵

The Parent alleges the record reflects that the Student's placement was changed and he was denied access to his education program through a series of suspensions, extended suspensions, and denials of return to school. In addition, she alleges that homebound instruction was not provided to address the denials of access to his education.

The Parent's perception of the record in this regard is misplaced. The suspensions of the Student were appropriate discipline, the extended time for some of them is attributable to the Parent, and homebound instruction was offered at a reasonable, logical location. No unilateral change of placement has been established.

³⁸⁵ 34 C.F.R. § 300.536(a)(i) - (iii).

The Parent argues that not only were no special education and related services provided to the Student until the administrative transfer went into effect, but also no consideration was given to her request for an FBA and a positive behavior intervention plan.

The record does not support such allegations. Special education services have been provided to the Student consistent with his needs from kindergarten on, and the Parent's requests for FBAs and BIPs were, in fact, considered.

When a disabled child has been suspended for more than ten days without a change in placement, the child must continue to receive educational services "so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP."³⁸⁶

This provision was not violated by the District. Homebound instruction was provided during the periods of suspension.

The Parent notes that none of the actions taken by the District, even after entering into two separate mediation agreements, led to compliance, procedurally or substantively, with the law. As a direct result, it is argued that the Student was unlawfully kept from his education,³⁸⁷ and deprived of access to the entirety of his education including recess, lunch, music, art and drama, unilaterally removed from his education and ultimately forced to accept a transfer into another school.

The dire results noted in this argument have not been established. The record does not establish that the Student was denied FAPE.

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³⁸⁶ 34 C.F.R. §§ 300.530(c), (d)(1)(i) (effective Oct. 13, 2006).

³⁸⁷ The Student was to receive Occupational Therapy under the stay-put IEP. Victoria Olson, the Occupational Therapist working with him, wrote on the 7th of March 2011 (Ex. 250) that his progress was inconsistent "[d]ue to multiple suspensions" and that "Student has been seen infrequently."