

**ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit**

IN RE:

XXXXXXXXXXXXXXXXXX

Parents on behalf of **XXXXXXXXXX**, Student

PETITIONER

VS.

CASE NO. H-15-04

Bentonville School District

RESPONDENT

HEARING OFFICER’S FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether the Bentonville School District (hereinafter “District” or “Respondent”) denied Student a free, appropriate, public education (hereinafter referred to as “FAPE”) during the 2012-2013 school year, in violation of certain procedural and substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter referred to as “IDEA”), by: (1) failing to provide an individualized educational program (hereinafter “IEP”) reasonably calculated to provide educational benefit; (2) failing to properly address Student’s ongoing behavior issues; (3) engaging in improper restraint and seclusion of Student; (4) failing to educate Student in the least restrictive environment; (5) failing to afford Parents meaningful participation in Student’s education (IEP meetings, etc.); (6) failing to obtain proper consents for a functional behavior assessment; and (7) failing to grant Parents access to Student’s due process file and related records.

PROCEDURAL HISTORY:

On September 30, 2014, the Arkansas Department of Education (hereinafter referred to as “Department”) received a written request from Parents to initiate due process hearing procedures on behalf of Student. Parents requested a due process hearing because they believed that the District failed to comply with the IDEA, as well as the regulations set forth by the Department, by failing to provide an IEP reasonably calculated to provide educational benefit, failing to properly address Student’s ongoing behavior issues, engaging in improper restraint and seclusion of Student, failing to educate Student in the least restrictive environment, failing to afford Parents meaningful participation in Student’s education (IEP meetings, etc.), failing to obtain proper consents for a functional behavior assessment, and failing to grant Parents access to Student’s due process file and related records.

At the time that Parents filed their request for a due process hearing, Student (male) was eleven years old and being home schooled by his Parents. Student has not been enrolled in the District since March 14, 2013 when Parents voluntarily withdrew him from school. Because of the two-year statute of limitations, this case pertains only to issues going back to September 30, 2012. Considering Student’s dates of attendance during the statutory period, the issues raised by Parents fell within the 2012-2013 school year, when Student was in the third grade.

In response to the Parent’s request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the date of November 10, 2014 was set as the date on which a hearing would commence if the Parents and District failed to reach resolution

prior to that time. An order setting preliminary timelines and instructions for compliance with the order was issued on October 1, 2014.

On October 30, 2014, a prehearing conference regarding this matter was conducted in person at the offices of the Department. Counsel for both parties participated in the hearing. During the prehearing conference, the parties discussed unresolved issues to be addressed at the hearing, as well as the witnesses and evidence necessary to address same. Also, counsel for Petitioner and Respondent jointly requested a continuance of the scheduled due process hearing. Thereafter, an Order granting the requested continuance was entered on November 6, 2014.¹ Pursuant to this Order, the due process hearing for this matter was continued to November 11, 2014 and was set for four days.

Thereafter, the closed hearing began as scheduled on November 11, 2014. Testimony was heard on November 11, 2014, November 12, 2014, November 13, 2014, and November 14, 2014. The hearing was then continued to December 15, 2014 and was concluded on the same date.² The following witnesses testified in this matter: XXXXXXXX, Jason Travers, Lindsey Loveday (hereinafter referred to as “Loveday”), Angela Cynova (hereinafter referred to as “Cynova”), Mandie Thompson Byrd (hereinafter referred to as “Byrd”), Christina Fogarty (hereinafter referred to as “Fogarty”), and XXXXXXXX. Parents had the burden of proof regarding the issues raised in this case.

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended, and Arkansas Code Annotated §§ 6-41-202 through 6-41-223, Danna J. Young, J.D., Hearing Officer for the Arkansas Department of Education,

¹ See Hearing Officer Binder of Pleadings and Orders.

² See *generally* Transcript, Volumes 1 through 4.

conducted a closed impartial hearing. Parent was represented by Theresa Caldwell (Little Rock, Arkansas) and the District was represented by Marshall Ney (Rogers, Arkansas).

Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, and both timely submitted briefs in accordance with the deadline set by this Hearing Officer.³

FINDINGS OF FACT:

Student is an eleven-year-old male and is currently being home schooled by his Parents.⁴ Student has been home schooled since March 14, 2013, when Parents withdrew him from the District.

Parent (mother) testified that she knew by the time that Student was two years old that Student was not progressing on cue with his age.⁵ Student began exhibiting speech delays, lining up toys, and repeating scripts from movies.⁶ Student began receiving speech and occupational therapy at age four and was subsequently diagnosed with autism when he was in kindergarten.⁷ Student attended school in the District from kindergarten until the spring of 2013.⁸ During the 2012-2013 academic year, Student was a third grader at Elm Tree Elementary School.⁹ Student received special education services during the 2012-2013 academic year, as he had in previous years, pursuant to the IDEA and based on

³ See Hearing Officer Binder of Pleadings and Orders.

⁴ Transcript, Volume 1, p. 48; Volume 4, p. 49.

⁵ *Id.*; Volume 4, p. 190.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*; Volume 1, p. 23.

⁹ The two-year statute of limitations in this case covers September 30, 2012 through September 30, 2014. During this two-year period, Student was enrolled in the District from September 30, 2012 through March 13, 2013.

his diagnosis of autism.¹⁰ Parents were actively involved in Student's education when he was enrolled in the District.

On September 30, 2014, Parents filed a complaint with the Department and, therein, requested a due process hearing. In the complaint, Parents alleged procedural and substantive violations of the IDEA, specifically stating that Student had been denied FAPE.¹¹ On the date that the due process hearing in this matter concluded, Parent (mother) stated on the record that it was her desire to have Student return to school under the transition recommendations set forth by her expert witness in this case, Dr. Jason Travers.¹²

At the beginning of the 2012-2013 academic year, Student's third grade year, Student was operating under an IEP that was developed on March 30, 2012 (duration of services to be through March 30, 2013). Pursuant to the IEP, Student was scheduled to receive 900 minutes of general education and 1200 minutes of special education per week.¹³ In addition, Student was scheduled to receive occupational therapy one time per week for duration of 30 minutes, and speech therapy two times per week for duration of 60 minutes.¹⁴ The IEP contained a statement of present levels which addressed test scores from the most recent evaluation, as well as a statement regarding Student's behaviors as of the date that the IEP was developed.¹⁵ Included in this section was also a statement regarding Student's functional level which stated that Student was performing below grade

¹⁰ Transcript, Volume 1, p. 27.

¹¹ See Hearing Officer Binder of Pleadings and Orders.

¹² Transcript, Volume 5, p. 50.

¹³ Parent Binder, pp. 78-108; District Binder, pp. 271-287.

¹⁴ *Id.*

¹⁵ *Id.*

level compared to peers of the same age.¹⁶ It further stated that Student had mastered “2/2 literacy goals, 2/2 math goals and 2/4 behavioral goals” (did not master goals of reacting appropriately on the playground and keeping hands to himself).¹⁷ Student’s STAR reading report reflected a reading grade ability equivalent of 0.5, and his STAR math report showed a mathematics grade level ability equivalent of 1.4.¹⁸ Student’s Developmental Reading Assessment (hereinafter referred to as “DRA”) level was two.¹⁹

The March 30, 2013 IEP contained thirteen annual goals: three behavioral goals, five English language arts goals, two math goals, and three English language arts/speech goals. Cynova, Student’s special education teacher during the 2012-2013 academic year, testified that there were no specific goals for the subjects of science and social studies because both of these subjects were taught through the reading goals pursuant to common core.²⁰ As of January 10, 2013, the last date that goal progress was entered, Student had mastered none of these goals, and each goal was listed as needing to “continue.”²¹ Cynova, Student’s teacher in the autism room, testified that she used rubrics to calculate percentages on the goals and objectives that appeared on Student’s IEP.²²

Finally, the March 30, 2013 IEP contained instructional modifications, supplemental aids, and supports for Student. Specifically, Student was to have reduced assignments when appropriate, extra time for completing assignments, repeat of instructions, extra time on tests, frequent breaks, and certain test items read aloud. Regarding management of

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Transcript, Volume 3, pp. 170-178.

²¹ Parent Binder, pp. 78-108; District Binder, pp. 271-287.

²² Transcript, Volume 3, pp. 131-33, 152-170; District’s Binder, pp. D-236-D-241.

Student's behavior, Student was to receive frequent reminders to maintain on task behaviors, clearly defined limits/rules and consequences, praise for appropriate behavior, close proximity to teacher, and structured routines.²³

Parent (mother) was present at the IEP meeting on March 30, 2012, and signed indicating her participation.²⁴

During Student's second grade year, Parent (father) reported that Student did not have significant behavior issues.²⁵ This changed, however, during the 2012-2013 academic year. Student's behavior became more aggressive at the beginning of third grade and, on September 4, 2012,²⁶ shortly after school began, Student's IEP team held a separate programming conference to address Student's aggressive behavior in light of an incident that had occurred on August 23, 2012.²⁷ Parent (mother) had requested this meeting because she was concerned about how the incident was handled by staff, specifically stating that she did not feel that the incident warranted Student being transported.²⁸ The purpose of the conference was to begin the process of creating a behavioral plan for Student. The IEP team agreed to an "immediate plan" which included, but was not limited to, line cards, a token system, positive reinforcements, spot checks at recess, a

²³ *Id.*

²⁴ *Id.*

²⁵ Transcript, Volume 1, p. 28.

²⁶ Please note that the date of this separate programming conference falls outside of the two-year statutory period at issue in this case; therefore, none of the events of this meeting are actionable in this case. However, these facts are important for background purposes so as to understand the origin of the functional behavior analysis and behavior intervention plan, which are applicable to the statutory timeframe.

²⁷ Please note that the date of this incident falls outside of the two-year statutory period at issue in this case; therefore, none of the events pertaining to this incident are actionable in this case. However, the existence of this incident is important for background purposes so as to understand the origin of the functional behavior analysis and behavior intervention plan, which are applicable to the statutory timeframe.

²⁸ Parent Binder, pp. 243-245; District Binder, pp. 23-25.

communication journal, and skill streaming.²⁹ The team further agreed that a functional behavior assessment (hereinafter referred to as “FBA”), as well as behavioral observation would be conducted.³⁰ During this meeting, Parent (mother) requested that she be allowed to meet with Student’s teacher to discuss some of the calming techniques that she used with Student, such as a prayer blanket and singing “Jesus Loves Me.”³¹ On September 5, 2012, Parent (mother) signed an informed consent for a FBA to be conducted, as well as an informed consent for behavioral observation of Student.³²

On September 7 and September 13, 2014, Student was involved in behavior incidents that were the result of Student being upset by a specific child with which Student attended recess.³³

On October 3, 2012, a separate programming conference was held for the purpose of reviewing the behavior plan that had been developed for Student.³⁴ Pursuant to the separate programming conference decision form, Parent (mother) was provided the behavior support plan in advance of the meeting for review.³⁵ Additional components were then added to the behavioral support plan at the conference.³⁶ The FBA, as well as a behavior support plan exist in the record and are both dated October 3, 2012. The FBA

²⁹ *Id.* at pp. 131-135; District Binder, pp. 464-466.

³⁰ *Id.*

³¹ *Id.* at p. 243; District Binder, p. 23.

³² *Id.* at pp. 136-137; District Binder, pp. 583-584.

³³ *Id.* at pp. 248, 250; District Binder, pp. 27, 30. Please note that the dates of these incidents fall outside of the two-year statutory period at issue in this case. However, the nature of these incidents is important for background purposes so as to understand the origin of the FBA and behavior intervention plan, which are applicable to the statutory timeframe.

³⁴ *Id.* at p. 142; District Binder, p. 447.

³⁵ *Id.*

³⁶ *Id.*

does not indicate who performed the evaluation.³⁷ The behavior support plan is signed by the IEP team, including Parent (mother).³⁸ The October 3, 2012 meeting was very productive, and input from Parent (mother) was incorporated into the behavior support plan. Both Parent (mother) and advocate Kim Parker commented that it was one of the best meetings that they had been in as far as productivity was concerned.³⁹

The FBA lists Student's problem behaviors as follows:

1. When in the general education setting the behavior will start with competing (always with a specific child) for teacher attention, peer attention, or line position. Competing could look like boasting that it is his day to be first in line or that it is his day to pick friends to go outside for recess, seeing the other getting teacher attention or peer attention, racing to get papers turned in first, etc. If [Student] does not "win" or get attention he desires, then he will cry, kick and hit general education teacher, other student, or para, crawl under table, or say things such as "I'm gonna leave," "I'm not telling you" "I want my mom," "I hate you."
2. Refusal to do work. This will look like him putting his head down first, then starts crying while saying "I want mommy" in the general education setting. While in the special education classroom it will look like him saying "I can't do this." Will put his head down and try and leave the table.⁴⁰

The FBA indicates that the competing behavior occurred three times or more each week when a specific child, as mentioned in the description of behaviors, was present. The refusal to do work occurred at least two times per week in the autism classroom and nearly daily in the regular education classroom.⁴¹ The antecedents for the described competing behaviors were exposure to the specifically mentioned child during lunch or in the general education classroom, witnessing other children receiving something that Student wanted

³⁷ *Id.* at pp. 210-213.

³⁸ *Id.* at pp. 224-231.

³⁹ Transcript, Volume 3, pp. 69-70.

⁴⁰ Parent's Binder, p. 210.

⁴¹ *Id.*

(*i.e.* attention), and perceiving something as unfair. The antecedent for refusal to work was listed as presentation of work to Student in the general or special education classroom.⁴² The FBA stated that the staff's response to Student becoming angry and engaging in crying, kicking, and hitting was to speak to Student in a calm voice to diffuse anger. In addition, applying deep pressure, softly touching Student's hair, and singing to him were used as needed. Last, dividers were utilized to keep peer and adult attention to Student's behaviors to a minimum.⁴³ The FBA stated that Student's behaviors were new, and that teachers and staff were using positive reinforcement and social skill building in the hopes of increasing Student's self-esteem and reducing his need for attention. It was further noted that a behavior support plan was needed because current methods had not been "entirely effective."⁴⁴

The behavioral support plan provided several "curriculum modifications" to address the behaviors described in the FBA. Regarding changes in time, it was decided that Student would go to activities with another class so that he would not be exposed to the specific child that triggered competing and aggressive behavior. It was also decided that Student would go to separate recess, and that he and the other child would alternate between the two playgrounds depending on the day of the week. The behavioral support plan was very specific in setting out the recess protocol, providing that on days in which Student went to the front playground, he would be permitted to pick five friends from his general education classroom to go and play with him. When Student was assigned to the back playground, he would be participating in recess with all third grade students. There was a specific

⁴² *Id.* at 211.

⁴³ *Id.*

schedule provided in the behavioral support plan, providing that Student would go to the front playground on Monday, back playground on Tuesday, adaptive P.E. on Wednesday, back playground on Thursday, and adaptive P.E. on Friday.⁴⁵

The behavior support plan provided for other changes as well. Specifically, Student would be placed across the room and facing away from the child that triggered his aggressive behavior (change in space); Student would be provided with a visual timer to indicate changes in schedule (change in instructional materials); Student would be provided research-based methods such as Applied Behavior Analysis, Picture Exchange Methods, or story-based intervention (change in curriculum); Student's functional routines in the classroom would be addressed (change in curriculum); Student would be provided with a sensory diet (change in the curriculum); Student would be provided with quiet time after recess, whereby he could listen to calming music and sleep until he awakened (change in curriculum); and Student would have a designated time each day to work with his special education teacher on social skills (change in curriculum). The identified replacement behaviors sought by the team included, but were not limited to, Student identifying when he is upset using the "5-point scale," using a help card when he feels that he needs assistance, and learning waiting behaviors with the use of a timer.⁴⁶

On October 29, 2012, a separate programming conference was held, at which time classroom and home observation reports were reviewed. In addition, Student's current IEP was reviewed as well.⁴⁷ Student's IEP team decided at this conference that current data was

⁴⁵ *Id.* at p. 228; District Binder, p. 262.

⁴⁶ *Id.* at p. 229; District Binder p. 263.

⁴⁷ *Id.* at p. 145; District Binder p. 443.

“not available to address performance of IEP goals” as of the date of this conference.⁴⁸ Parent (mother) was present for and participated in this conference and, on this same date, signed an informed consent to allow District to perform a reevaluation for the purpose of measuring Student’s skill development in academic content areas.⁴⁹

On November 28, 2012, a separate programming conference was held for the purpose of discussing the results of the academic testing administered to Student in the month since the previous conference.⁵⁰ The notice of conference in this case proposed to change Student’s IEP so as to address progress and educational placement.⁵¹ On the evaluation/programming conference decision form, Student’s IEP team noted the following as a “Description of Adverse [E]ffect on Educational/Developmental Performance”: “[Student] demonstrates mild articulation and moderate language deficits that adversely affect his ability to effectively and efficiently communicate information to peers and staff during oral speaking tasks in the classroom setting.”⁵² As a result, it was determined that Student would begin receiving 600 general education minutes per week, thereby increasing his weekly special education minutes to 1500.⁵³ Parent (mother), as well as Parent’s chosen child advocate, Kim Parker, were present at this meeting and signed the evaluation/programming conference decision form.⁵⁴ Student’s IEP was amended on this same date so as to reflect the change in minutes.⁵⁵ Both Parent (mother) and child advocate, Kim Parker, signed the IEP modification on November 28, 2012. Also present at

⁴⁸ *Id.*

⁴⁹ *Id.* at 146; District Binder, p. 578.

⁵⁰ *Id.* at 148; District Binder, p. 569.

⁵¹ *Id.*

⁵² *Id.* at p. 152; District Binder, p. 519.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at pp. 78-108; District Binder, pp. 271-287.

the meeting and signing the IEP were the following team members: Lindsey Loveday, ABA Specialist, Terri Dombroski, 3rd Grade Teacher, Resource Room Teacher, Cynova, Autism Teacher, Byrd, Principal, Irene Sargent, SLP, Lynette Menna, OT, and Deb Seal, Ed.D, SPS.

On December 7, 2012, approximately two months following the implementation of the behavior support plan, and one week following the modification of Student' IEP, Student was involved in a behavioral incident at school.⁵⁶ Pursuant to an incident report prepared on the same day, Student was working on his spelling activities with a substitute teacher when he began to get frustrated. As Student's frustration with the assignment escalated, he became upset, at which point he put his feet on the desk and pushed backward. Student's chair collapsed and the substitute teacher caught Student before he fell to the ground. When Student's autism teacher, Cynova, saw Student fall toward the floor, she rushed over to help. She began applying deep pressure to his hands in an effort to calm Student. Student was screaming "NO" and was swinging and kicking rapidly while Cynova attempted to speak calmly and calm him down. At that time, the instructional assistant, who was in the hallway, heard Student scream and rushed to the classroom to assist. The instructional assistant also began applying deep pressure to one hand while Cynova did the same to Student's other hand. The instructional assistant also put her hand on Student's feet so that he could not kick her in the face. Eventually, Student rolled over on his stomach and began to calm down while Cynova rubbed his hands and the instructional assistant rubbed his back. In addition, the instructional assistant began singing "Jesus Loves Me" and Student continued to calm down. Student then stated that he

⁵⁶ *Id.* at p. 251; District Binder, p. 34.

wanted to rest so he walked over to the sensory area and laid down on the bean bag, where he remained for the rest of the day.⁵⁷

On December 13, 2012, Student had two separate behavior incidents. First, he became upset with his instructional assistant and began hitting her. In this case, Student was lying on the ground with Cynova near his head and the instructional assistant by his side near Student's feet. A pillow was brought to Student, his arms were pulled up on his chest, and Student calmed down.⁵⁸

At another point on this same day, Student was walking across the room when another child made a loud noise. Student became upset and began to scream and push the room divider toward the child. The instructional assistant intervened by stepping between Student and the child who had made the loud noise. Student continued to be angry and the instructional assistant approached him "to hug him in efforts to calm him." Student began hitting the instructional assistant in the back of the head with his fist, at which point Cynova came over to assist in calming Student. Cynova stated the following in her incident report:⁵⁹

I took his hand to gently apply pressure as this is a calming technique for [Student]. He continued to punch at [instructional assistant] preventing me from being able to apply pressure. [Instructional assistant] told Student that she was going to lay him down and I protected his head as she placed him gently to the floor. He continued to kick and punch toward [instructional assistant]. She sat down next to him and placed her body where he could not kick her. He continued to try therefore she removed his shoes. While she was blocking his kicks, we continued to try to apply pressure to his hands. I was able to open his hands for only a second before he quickly made a fist and punched toward [instructional assistant] again. He tightened his body and pulled upward before he quickly made a fist and punched toward

⁵⁷ *Id.*

⁵⁸ *Id.* at p. 252; District Binder, p. 36.

⁵⁹ *Id.* at p. 253; District Binder, p. 35.

[instructional assistant] again. He tightened his body and pulled upward to reach her. I was able to hold his hand and he brought my hand to his mouth trying to bite me. When he pulled my hand to his mouth his hand was between my hand and his mouth. He immediately stopped trying to bite when he realized it was his hand he was about to bite. When he opened his mouth to bite, I noticed and made comment that his throat must be sore because it was very red. I also noticed dried blood on his nostrils at this time. [Instructional assistant] commented that his eyes were rolling. This I could not see due to my position. He continued to punch toward [instructional assistant]. I said to [instructional assistant] that I think he is against her. She removed herself from the room and he first tried to crawl after her. I said, it is ok [Student], calm down. [Instructional assistant] left the room, and he stopped, laid on the floor beside where I was sitting for approximately 30 seconds. I rubbed his back then he crawled to the doorway and sat. I asked him if he felt better and he said yes. It was time for me to attend a meeting so I asked [Student] if he wanted to go with me or stay in the classroom. He stated that he wanted to go with me. He gathered his next task (independent task boxes), a snack, and came with me to my PLC. He sat at a desk, ate his snack, and worked on his task boxes. He asked if he could use the restroom. He left the room and returned immediately after taking care of his business. Approximately 2 minutes before time to be dismissed, I returned Student to the classroom to prepare for dismissal.⁶⁰

On January 30, 2013, Parent (mother) sent an email to Principal Byrd which stated that she no longer wanted Student in the autism room all day, and further stated that she did not want the instructional assistant that had been involved in the previous behavioral incidents to be by Student's side all day.⁶¹ Parent stated in the email, however, that she did not have any concerns regarding Cynova and felt that she was doing a great job.⁶²

On February 1, 2013, Byrd emailed Parent (mother) to follow up on Parent's request. She proposed a time for Parent to meet with her regarding the placement issue that was raised.⁶³ On February 4, 2013, Parent (mother) met with Byrd. Byrd subsequently followed up the meeting with an email dated February 5, 2013, which

⁶⁰ *Id.*

⁶¹ District Binder, p. D-140.

⁶² *Id.*

⁶³ *Id.* at p. D-146.

addressed the need for a placement conference, as well as district policy issues and staff training.⁶⁴ The email stated that Fogarty was excited that Student would possibly be moving onto her caseload, but that she wanted to review Student's IEP and meet as a committee as well to discuss.⁶⁵ A meeting date of Wednesday, February 6, 2013 was proposed for this meeting. The email also stated that there would be instructional aides in Fogarty's class who would be working with Student. Parent (mother) responded to this email on February 5, 2013, and stated that she would prepare Student for the upcoming change. She also stated that she did not agree with the decision to keep instructional aides in the autism classroom and for that reason would be looking at other options for Student's schooling.⁶⁶

On February 7, 2013, Parent (mother) sent an email to Byrd which stated that Student had had a great day on February 6, but that there were some issues at pickup on that same afternoon.⁶⁷ Parent's (mother) email stated as follows:

[Student] had a great day yesterday :) but pick up was not so good. There [sic] was another child who went running up to [Student] and from there it went south. For everyone's safety we should probably meet. [Student] was hitting Mrs. F outside in front of everyone and I do NOT want him to hurt her baby. I have talked with [Student] about this and he does understand, but in those moments he is not thinking but reacting to a situation he is overcome by. I had to jump out of my car and run over to stop him, my fear is what if I was far back in the car line and didn't see it. What would have happen[ed] [sic]? Who would have stopped him? What if he would have took off running?⁶⁸

⁶⁴ *Id.* at p. D-141.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at p. D-143

⁶⁸ *Id.*

Apparently, earlier the same day, Student had another behavioral incident which was documented in an incident report.⁶⁹ Regarding that incident, an instructional assistant was assigned by Fogarty to be with Student at recess for purposes of transitioning and interacting with peers. This same assistant was also there to ensure that another child did not approach Student. At 12:38 p.m., the instructional assistant noticed that the other child was getting near the area of the playground where she and Student were playing. She positioned herself between location where Student was playing and the area where the other child was walking. She further encouraged the other child to move with his friends to another area, which he did.

After a few minutes had passed, Student looked up and saw the other child and began to run towards him. The instructional assistant followed immediately after Student, who by this time had reached the playground equipment where the other child was playing and had pushed him off of the equipment. The child, who had been on the playground equipment, immediately left the area. The instructional assistant was attempting to comfort Student and, in her attempts to block his hitting, was struck in the left eye by Student. Student continued to kick and hit the instructional assistant, with the instructional assistant continuing to block his hands and feet. The instructional assistant asked another teacher to notify the office to send someone to help on the playground, and, thereafter, Nurse Bridges responded to the back playground.

When the nurse arrived, the instructional assistant was standing with Student in front of her and was hugging him. Both Student and the instructional assistant were crying and, upon examination, the nurse noticed that the instructional assistant had been hit in

⁶⁹ Parent Binder, pp. 254-255; District's Binder, pp. 37-38.

the eye. While this was happening, another child walked up to speak to Student and the Nurse asked the child to go play. This further upset Student who then yelled at the nurse to not be mean to his friends and attempted to strike the nurse with his hands and feet. The instructional assistant once again blocked Student so that he was not able to hit anyone and she continued to speak with Student and assure him that everything was alright. At that time, Cynova and another staff member arrived to help comfort Student. Cynova observed that the nurse had Student by the hands and was trying to get Student to come with her. Student was pulling away from her in an effort to get away. Cynova began talking to Student and inquiring what was wrong. While talking to Student, she took one of his hands and Student began to calm down, however, Student refused to stand or walk. The team felt that Student needed to be moved off of the playground and away from the other child in order for him to be safe and calm down completely. Cynova and the nurse agreed that the safest method of walking inside would be for one person to walk on each side of Student with Cynova walking behind. Student did not want to go inside and sat on the ground. He then was no longer sitting on the ground and was holding the hand of one of the staff members. At this point, Student was transported into the building by placing their bent arms under Student's upper arms. Student's feet remained on the ground at all times and he walked himself inside in a calm manner.

Once inside, Student then swung his arm and hit one of the staff members in the jaw, after which he pushed over a bookshelf and walked over to be by himself. Student paced the classroom for a while and eventually acknowledged Byrd, who had arrived in the classroom. Within a short time, he was standing next to Byrd and talking to her. Student

then requested to go back outside and was allowed to do so for five minutes. Student was able to return to class and interact well with his classmates. There were no other issues for the remainder of the day.⁷⁰

On February 8, 2013, a separate programming conference was held to address numerous issues. It was decided, in accordance with discussions that occurred in the February 4, 2013 meeting, that Student would be moved to the academic self-contained classroom with Fogarty assigned as his caseload teacher. The statement of actions on the separate programming conference decision form included preparation of a “crisis plan.”⁷¹

On March 12, 2013, Student had another behavior incident. Student again tried to charge another child and was screaming and attempting to attack him. Student was transported to the conference room, where he ate his lunch and calmed down before returning to the classroom. Later in the day, Student ran out of the classroom and was running around the school. He slipped and fell in the cafeteria while pretending to ice skate in only his socks. Student calmed down and said he had hurt his leg when he fell. The nurse came and looked at Student’s leg but Student denied that he needed to be examined by her. Near the end of this same day, Student hit another child and left the room with another teacher. Student remained in the office area with this instructor until he had time to regroup and return to the classroom for dismissal.⁷²

The following day, on March 13, 2013, a separate programming conference was held for the purpose of discussing Parents’ circuit complaint referral and revisiting Student’s

⁷⁰ *Id.*

⁷¹ Parent Binder, p. 157; District Binder, p. 439.

⁷² *Id.* at p. 279; District’s Binder, p. 46.

behavior plan.⁷³ At this meeting, Parent (mother) submitted to the IEP team a note from Bentonville Pediatrics, P.A. which stated that Student has panic attacks. It further stated “I do not believe it is in his best interest to restrain him or place him in a seclusion room as this may exacerbate his symptoms.”⁷⁴ The meeting eventually became heated, with Parent (mother) saying that she did not want anyone to lay hands on Student. Summerford then stated that the District might have to transport Student if necessary to protect other students or staff.⁷⁵ The meeting ended with Kim Parker, Student’s advocate, and Parent (mother) yelling about restraints and storming out of the meeting.⁷⁶ On March 14, 2014, Parents officially withdrew Student from school in the District.

Loveday, an ABA specialist for the District, testified that she was responsible for collecting the ABC (antecedent behavior consequence) data for Student’s FBA. Loveday, when asked about whether the 5-point scale used by the District in Student’s behavior support plan was evidence-based, testified that the scale was a method of self-management, which is considered evidence-based.⁷⁷ Lovelady testified that all data that she collected, most of which was gathered in the autism classroom, was eventually left with Student’s teacher and that she did not know where the data was at this point.⁷⁸ She also stated that she did not include certain calming techniques, such as singing to Student and applying deep pressure to his hands, on the behavior support plan because these calming

⁷³ *Id.* at p. 159; Districts Binder, p. 426.

⁷⁴ *Id.* at p. 326; Districts Binder, p. 147.

⁷⁵ Transcript, Volume 3, pp. 159-160.

⁷⁶ *Id.* at p. 160.

⁷⁷ Transcript, Volume 2, p. 54-55.

⁷⁸ *Id.* at 88.

techniques were not technically interventions.⁷⁹ Lovelady further testified that CPI transport was never listed as an intervention on a behavior support plan because transports are only used in times of crisis, and the behavior support plan addressed behaviors occurring outside of a crisis.⁸⁰ Crisis intervention plans are separate documents in the District.⁸¹ Lovelady testified that hitting and kicking were addressed on the behavior support plan, but that there were differing degrees of those behaviors as well. Depending on the circumstances, hitting and kicking is considered to be a crisis if Student, other students, or staff are in danger.⁸² It is up to the discretion of staff working with Student during a behavior incident to determine when and if the incident is escalated to a crisis.⁸³ If a crisis is ensuing, only staff members who are CPI certified can assist with transports or restraints.⁸⁴ Byrd added that the behavior plan is the overarching plan that is following throughout Student's day. A crisis plan, on the other hand, is initiated when a student reaches a point that he or she is a danger to himself or others.⁸⁵

Lovelady described a CPI transport. Specifically, a CPI transport is one person on each side of a student, assisting the student in walking to a safe location. The student has feet on the ground at all times. If a student sits down and refuses to walk, staff is permitted to assist the student to their feet again. Staff is not permitted to drag a student if they refuse to walk.⁸⁶ A transport is never used as a punishment or to correct behavior.⁸⁷

⁷⁹ Transcript, Volume 3, pp. 21-22.

⁸⁰ *Id.*

⁸¹ *Id.* at pp. 23-25.

⁸² *Id.* at p. 37.

⁸³ *Id.* at p. 38.

⁸⁴ *Id.* at pp. 42-43.

⁸⁵ *Id.* at p. 231.

⁸⁶ *Id.* at pp. 43-45; District Binder, p. 47.

⁸⁷ Transcript, Volume 3, pp. 62-64.

Fogarty testified that she had never heard of Student being placed in a restraint or a seclusion room at District. She had witnessed Parent (mother) restrain Student in early February when Student was aggressive with Fogarty, she was aware one other situation in which Parent (mother) restrained Student. Fogarty was aware that Student had been transported.⁸⁸

Byrd testified that there was no seclusion room at Elm Tree Elementary. She stated that there was a “cool down” room, but that it was not a seclusion room.⁸⁹ Children are not locked in the “cool down” room, sometimes referred to as the “pass” room, and an adult is present with children while they are in the room.⁹⁰ The cool down room has a conference table and chairs, and children’s art on the walls.⁹¹ Byrd recalled one time when Student was in the “cool down” room. She explained that he chose to go in there and lay on a mat that was there. In addition, an adult was present with him at all times and all doors were opened.⁹² Student was transported out of the cafeteria to the “cool down” room after he began hitting adults in the cafeteria. He was transported out of the cafeteria because Student was a threat to himself and others.⁹³

On September 20, 2013, Lisa Fitzgibbons, Ph.D. (hereinafter referred to as “Dr. Fitzgibbons”), conducted psychological testing on Student for the purpose of determining his cognitive and social strengths and weaknesses, as well as making recommendations for

⁸⁸ *Id.* at pp. 156-159.

⁸⁹ Transcript, Volume 3, p. 223.

⁹⁰ *Id.* at p. 224.

⁹¹ *Id.* at p. 225.

⁹² *Id.* at pp. 224-225.

⁹³ *Id.* at p. 229.

treatment and educational planning.⁹⁴ Dr. Fitzgibbons stated that Student struggled with significant anxiety, but she noted that Student's anxiety had been ongoing. Specifically, she explained that he suffered from significant anxiety which interfered with his social and academic functioning at the time that he was initially evaluated in 2009.⁹⁵ According to the report, Parent (mother) reported to Dr. Fitzgibbons that there was a lack of consistency in Student's schedule when he was in the third grade in the District. Student was given a variety of tests for the purpose of measuring cognitive abilities, academic functioning, attention, sensorimotor issues, learning and memory, and adaptive functioning. Based on the test results, Dr. Fitzgibbons concluded that Student's expressed speech was much more organized than it had been when initially evaluated in the year 2009. She also noted that Student displayed improved ability to self-regulate his emotion. Dr. Fitzgibbons observed that Student was whiney and sad during the 2009 testing when things did not go his way; however, in the 2013 reevaluation, he "remained engaged in the testing with prompting."⁹⁶ She concluded that, although there were still some areas of concern, Student had made gains in his social communication and social-emotional functioning.⁹⁷ With regard to academic functioning, however, Dr. Fitzgibbons concluded that Student's current skills were far less developed than his same-age peers, noting that the "magnitude of the observed discrepancy between his observed scores and his expected scores is quite

⁹⁴ Parent Binder, pp. 200-209.

⁹⁵ *Id.* at pp. 201, 206.

⁹⁶ *Id.* at p. 206.

⁹⁷ *Id.*

concerning” and that Student will need significant remediation and support to develop academic skills.⁹⁸

The record contains a report by Dr. Jason Travers, Ph.D, BCBA-D. Dr. Travers met with Student and Parents in their home on November 2, 2014.⁹⁹ He stated in his report that Student was articulate, well-spoken, behaved, and polite during the time that he was being interviewed.¹⁰⁰ Travers made two conclusions in his report: (1) “No evidence was found in support of school use of intervention methods or strategies supported by empirical evidence”; and (2) “There also exists clear evidence the school and district [did] [sic] not provide basic elements of specialized education students with autism.”¹⁰¹

Dr. Travers addressed evidence-based strategies for addressing challenging behavior in his report. Specifically, the evidence-based strategies that he discussed included, but were not limited to, FBAs, the use of reinforcement, antecedent-based strategies (*i.e.* visual schedules and reminders), and consequence-based strategies (*i.e.* positive reinforcement, token economy system).¹⁰² He made the following recommendations: (1) completion of a functional behavior assessment by a Board Certified Behavior Analyst; (2) completion of a new positive behavior interventions and supports plan using only evidenced-based practices; (3) completion of a formal program review of both the autism program and programming specific to Student by a qualified expert in special education; (4) school-wide staff training on principles of behavior; (5) staff training on appropriate interpretation of collected data for ongoing evaluation and

⁹⁸ *Id.* at p. 207.

⁹⁹ *Id.* at p. 4.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at pp. 5-6.

¹⁰² *Id.* at p. 36.

decision-making; (6) staff training on specific strategies identified in the new positive behavior interventions and supports plan developed for Student; (7) ongoing data collection on all behavioral and IEP goals on a daily basis; (8) review of data and progress monitoring on a bi-weekly basis by a qualified independent Board Certified Behavior Analyst; (9) opportunities for Student to actively participate with same-aged peers throughout the majority of his school day; (10) consultation with an independent qualified Board Certified Behavior Analyst; and (11) gradual desensitization to school to increase management of anxiety-related association to school.¹⁰³

The signature on Dr. Travers' report is dated October 26, 2014.¹⁰⁴ Pursuant to the report, he did not interview Student until November 2, 2014.¹⁰⁵ Dr. Travers explained this discrepancy in testimony, stating that he sent a draft of the report to Petitioner's counsel prior to interviewing Student and Parents so that he could get feedback about the accuracy of the report.¹⁰⁶ He stated that most of the report was based on the documents that he was provided for review.¹⁰⁷ He further stated his recommendations were made without knowing what specific expertise existed in the District.¹⁰⁸

The record establishes that Parents and District communicated by email on a regular basis regarding Student prior to Parents withdrawing him from the District.¹⁰⁹ In

¹⁰³ *Id.* at pp. 45-46.

¹⁰⁴ *Id.* at p. 46.

¹⁰⁵ *Id.* at p. 4.

¹⁰⁶ Transcript, Volume 1, p. 272.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at pp. 273-274.

¹⁰⁹ District Binder, pp. 11-115.

addition, Parent received daily communication sheets which allowed for staff comments next to each of Student's daily activities.¹¹⁰

Parent (mother) testified that she had never made a FERPA request for documents pertaining to Student's education.¹¹¹ She explained that she had previously picked up a packet of information from the District that contained approximately 300 pages, including items such as a copy of Student's social security card, birth certificate, a gas bill from when Student was enrolled in school, and some IEP meetings.¹¹² On cross-examination, Parent testified that her signature appeared on a letter to the District with the subject line "[Student], FERPA Request."¹¹³ Parent also testified that her signature existed on a form indicating that records had been released to her.¹¹⁴

Elm Tree Elementary operates on a year-round schedule. Beginning in October, there is at least a one-week break every single month. Students are out of school two weeks in October, one week in November, the holiday break in December, one week in February, and one week in March for spring break.¹¹⁵ Following the October 3, 2012 meeting pertaining to the development of a behavior plan for Student, the school had a two-week intercession.¹¹⁶ Between October 3, 2012, when Student's behavior plan was developed, until March 14, 2013 when he was withdrawn from school, Student attended school at total of 48 days.¹¹⁷

¹¹⁰ Parent Binder, pp. 263-280. These are a few of the many daily behavior sheets that exist in the record.

¹¹¹ Transcript, Volume 5, p. 61.

¹¹² *Id.* at pp. 61-62.

¹¹³ *Id.* at pp. 113, 114; District Binder, p. D-10.

¹¹⁴ *Id.* at pp. 114-115; District Binder, p. D-2.

¹¹⁵ Transcript, Volume 3, pp. 72-73.

¹¹⁶ *Id.* at p. 73.

¹¹⁷ *Id.*

CONCLUSIONS OF LAW AND DISCUSSION:

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one.¹¹⁸ In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by courts and hearing officers in determining whether a school district has failed to provide FAPE as required by federal law.¹¹⁹ Pursuant to *Rowley*, the first inquiry that a court or hearing officer must make is that of whether the State, *i.e.* local educational agency or district, has complied with the procedures set forth in the IDEA. Thereafter, it must be determined whether the IEP(s) developed pursuant to IDEA procedures was reasonably calculated to enable the student to receive educational benefits.¹²⁰

Allegations of Procedural Violations of the IDEA

It must first be determined whether District complied with the procedures set forth in the IDEA. In the present case, Petitioner asserts that District procedurally violated the IDEA by denying Parents the opportunity to meaningfully participate in the development of Student's IEPs and, in general, his education. Specifically, Parents contend that the District failed to afford them meaningful participation in Student's education, failed to obtain proper consents for a functional behavior assessment, and failed to grant Parents access to Student's due process file and related records.

Parental Participation. The IDEA requires that the parents of a child with a disability either be present at each IEP meeting or be afforded the opportunity to

¹¹⁸ 20 U.S.C. § 1412(a); 34 C.F.R. § 300.300(a).

¹¹⁹ 458 U.S. 176, 206-07 (1982).

¹²⁰ *Id.*

participate.¹²¹ Furthermore, a school district can neither refuse to consider parents' concerns when drafting an IEP, nor predetermine the educational program for a disabled student prior to meeting with parents.¹²² Such predetermination could deprive parents of a meaningful opportunity to participate in the formulation process pertaining to the IEP.¹²³ "The IDEA explicitly requires school district to include parents in the team that drafts the IEP to consider 'the concerns of the parents for enhancing the education of their child' and to address 'information about the child provided to, or by, the parents.'"¹²⁴ Certainly, a school district's obligation under the IDEA regarding parental participation in the development of a student's IEP "should not be trivialized."¹²⁵

In *Rowley*, the Court stated that "[i]t seems . . . no exaggeration to say that Congress placed every bit as much emphasis on compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard."¹²⁶ It should be noted, however, that by requiring parental participation, the IDEA in no way requires a school district to accede to parents' demands without considering suitable alternatives. A district does not procedurally violate the IDEA simply by failing to grant a parent's request.

In the present case, and considering the two-year statute of limitations, only actions occurring between September 30, 2012 and September 30, 2014 can be considered.

¹²¹ *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 427 (8th Cir. 2010).

¹²² *Schaffer v. Weast*, 546 U.S. 49, 53 (2005).

¹²³ *Gray*, 611 F.3d at 424 (citation omitted).

¹²⁴ *M.M. ex. rel. L.M. v. Dist. 0001 Lancaster County Sch.*, 702 F.3d 479 (8th Cir. 2012) (citing 20 U.S.C. § 1414(d)(3)(A)(ii), (d)(4)(A)(ii)(III)).

¹²⁵ *Rowley*, 458 U.S. at 205-06.

¹²⁶ *Id.*

During this timeframe, Student was only in school from September 30, 2012 to March 13, 2013. Because Elm Tree Elementary operates on a year-round schedule, and subtracting Student's absences during that time period, Student was in school a total of 48 days between September 30, 2012 and March 13, 2013. In this short time period, Parents were present and participated in a total of five separate programming conferences for the purpose of reviewing Student's IEP, developing an FBA and behavior support plan, and addressing Student behaviors that were of concern.

Specifically, the dates of the conferences falling within the statutory period are October 3, 2012, October 29, 2012, November 28, 2012, February 8, 2013, and March 13, 2013. There is also evidence that Parent (mother) participated in other meetings with staff, such as the meeting with Byrd on February 4, 2013 as well, that were not official IEP or separate programming conferences. A review of the evidence indicates that Parents were not only in attendance at the meetings, but that they shared their views regarding IEP modifications, as well as the development of a FBA and behavior support plan. In addition, Parents requests for placement were considered and implemented as well. In some of these meetings, Parents brought with them a child advocate, specifically Kim Parker, further indicating that Parents were fully participating in the meetings and, in the event that they did not understand something presented, had an advocate to assist them.

It is also noted that there are numerous pages of email correspondence in the record between Parents and the District. Aside from allowing Parents full participation in IEP and separate programming conferences as required by law, the District also communicated

with Parents on a regular basis regarding topics such as Student's programming, daily activities, and behavioral issues.

It is undisputed that Parents disagreed with certain decisions proposed or implemented by the District, *i.e.* the use of CPI transport in situations in which Student was a danger to himself or others; however, the IDEA does not require that a parent's preference be determinative of educational decisions. There is no evidence in the record to suggest that District refused to consider suggestions from Parents or Kim Parker. Therefore, it is the conclusion of this Hearing Officer that Parents were given a meaningful opportunity to participate in the modification of Student's IEPs and the development of a FBA and behavior support plan in fall of 2012 and early spring 2013.

Informed Consent. Parents asserted that they did not give the District informed consent to conduct a FBA on October 3, 2012. The record, however, contains an informed consent form dated September 5, 2012, in which Parent (mother) specifically gave consent to the District to conduct such evaluation. In addition, on that same day, Parent (mother) signed an informed consent form to allow the District to conduct behavioral observations of Student. Therefore, it is the conclusion of this Hearing Officer that Parents fully consented to the FBA that was conducted on Student and presented to them on October 3, 2012.

Access to Records. Parents assert that the District did not provide to them all of Student's educational records, as requested prior to and during the pendency of this matter. In addition, Parents assert that this Hearing Officer denied them access to Student's due process file during the hearing of this matter. District contends that it has

presented to Parents everything that it has in its possession. District admitted during the due process hearing that certain testimony had caused it to realize that there were missing documents. Upon another search for records, the District located some additional documents that had not been included in the Student's due process file on account of the fact that they had been set aside following a FERPA request filed by Parents. These documents were made immediately available to Parents during the hearing and this Hearing Officer allowed sufficient time off of the record for Parents and their counsel to review the records provided. It should be noted that District admits its error in this case; however, it is the conclusion of this Hearing Officer that, despite the District's oversight, no procedural due process violation exists. This is because the record clearly indicates that Parent (mother) made a FERPA request and obtained from the District approximately 300 documents in response thereto. Parent (mother) testified that her signature appeared on a letter to District pertaining to the FERPA request, and that her signature existed on a form indicating that records had been released to her.

Regarding the request of Parents and their counsel to view the original due process file for Student during the due process hearing of this matter, this request was denied by this Hearing Officer. The District asserted that it had provided copies of the due process file to Parents, and documents from Student's due process file, which had been bated and stamped by District at the time of disclosure to Parents, were included in Parents' exhibit binder. In fact, these documents had been referred to extensively throughout the hearing of this matter by Parents and their counsel. As such, Parents and their counsel had been provided the requested records and were only denied access to *original* copies of the file,

which were being actively used by District's counsel in its defense of these proceedings. In essence, Parents and their counsel were not denied these records.¹²⁷

Conclusion. Having considered Parents allegations of procedural due process violations, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer that Student was not denied FAPE as a result of procedural violations of the IDEA.

Allegations of Substantive Violations of the IDEA

Having analyzed the first prong of the FAPE analysis, it is now necessary to consider whether the District substantively denied FAPE to Student. Pursuant to *Rowley*, the goal of the IDEA is “more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.”¹²⁸ Essentially, an IEP is not required to be designed to “maximize a student’s potential commensurate with the opportunity provided to other children,” thus making the standard that District must meet very minimal.¹²⁹ However, what constitutes educational benefit when dealing with a disabled student must be determined on a case-by-case basis. Specifically, “[t]he IDEA requires public school districts to educate ‘a wide spectrum of handicapped children,’ and the benefits obtainable by children at different ends of the spectrum will ‘differ dramatically.’”¹³⁰

The IDEA also requires that students with disabilities be educated in the least restrictive environment pursuant to 20 U.S.C. §1412(a)(5). There is a “strong preference in

¹²⁷ Transcript, Volume 4, includes a full discussion of this issue on the record.

¹²⁸ *Id.* at 192

¹²⁹ *CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630, 68-39 (8th Cir.), *cert. denied*, 540 U.S. 984 (2003).

¹³⁰ *C.B., by and through his parents, B.B. and C.B. v. Special Sch. Dist. No. 1, Minneapolis, MN*, 636 F.3d 981 (8th Cir. 2011) (quoting *Rowley*, 458 U.S. at 202).

favor of disabled children attending regular classes with children who are not disabled,” resulting in a “presumption in favor of public school placement.”¹³¹ However, the IDEA “significantly qualifies the mainstreaming requirement by stating that it should be implemented to the ‘maximum extent appropriate.’”¹³² Essentially, a disabled student should not be separated from his or her peers unless the services that make segregated placement superior cannot be “feasibly provided in a non-segregated setting.”¹³³ The requirement to mainstream is not applicable when it “cannot be achieved satisfactorily.”¹³⁴ As such, it is permissible to remove a disabled child from a mainstream environment when he or she would not benefit from mainstreaming or when the “marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting.”¹³⁵

In the present case, Parents asserted that the District failed to provide FAPE when it: (1) failed to develop and implement an appropriate IEP for Student that was reasonably calculated to provide educational benefit; (2) failed to properly develop and implement a behavior support plan to address Student’s ongoing behavioral issues; (3) engaged in improper restraint and seclusion of Student when it used CPI transports to move Student from one location to another in times of crisis; and (4) failed to educate Student in the least restrictive environment.

Appropriate IEP. Parents asserted that the District failed to develop and implement an appropriate IEP that was reasonably calculated to provide educational

¹³¹ *CIN*, 323 F.3d at 641.

¹³² *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006); see also 20 U.S.C. § 1412[a](5).

¹³³ *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

¹³⁴ *Pachl*, 453 F.3d at 1068.

¹³⁵ *Roncker*, 700 F.2d at 1063.

benefit to Student. Parents argue that there is not sufficient data to support that Student was making academic progress at Elm Tree Elementary. As evidence of Student's lack of progress, Parents rely on a psychological evaluation prepared by Dr. Fitzgibbons on September 20, 2013. After administering Student a variety of tests for the purpose of measuring cognitive abilities, academic functioning, attention, sensorimotor issues, learning and memory, and adaptive functioning, Dr. Fitzgibbons concluded that Student had made gains in his social communication and social-emotional functioning in that he was able to remain engaged in testing and more appropriately self-regulate behavior that he was during his initial evaluation in 2009. Dr. Fitzgibbons concluded, however, that despite these gains Student was far less developed than his same-age peers and would require significant remediation and support to develop academic skills. In addition to Dr. Fitzgibbons' report, Parents assert that the District provided insufficient evidence to establish academic progress of Student.

"Academic progress is an 'important factor' in deciding 'whether a disabled student's IEP was reasonably calculated to provide educational benefit.'"¹³⁶ For children who are Student's age, the IDEA requires that IEPs include the following: "(1) a statement of the student's present levels of academic and functional performance, (2) measurable annual goals, (3) a description of how progress will be measured, (4) a statement of educational and related services to be provided, (5) an explanation of the extent to which the student will not be in the regular classroom, (6) a statement of accommodations necessary to measure achievement, and (7) the date on which services will commence."¹³⁷

¹³⁶ *M.M.*, 702 F.2d at 479 (citing *CJN*, 323 F.3d at 638 (citing *Rowley*, 458 U.S. at 202)).

¹³⁷ *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762 (8th Cir. 2011). See also 20 U.S.C. § 1414(d)(1)(A)(i).

In the present case, the record shows that Student's IEP was reasonably calculated to enable Student to receive educational benefit while at Elm Tree Elementary. The District prepared an IEP for Student prior to the 2012-2013 academic year that included specific goals for math, English language arts, behavior, and speech. Cynova, Student's teacher in the autism classroom, testified that there were no specific social studies or science goals because, at Student's age, these subjects were measured through the English language arts goals.

In addition to thirteen separate goals, Student's IEP included a statement of the student's present levels of academic performance, progress indications, a statement of educational and related services being provided to Student, an explanation of the extent to which Student would be in special education classes versus the general education, a statement of accommodations necessary to measure Student's achievement, and the date on which services outlined in the IEP would commence. The IEP also outlined Student's progress toward his goals, in that each goal included a percentage per quarter which represented Student's level of mastery. Cynova explained extensively on the record how she arrived at these percentages for reporting purposes, walking through the progress sheets that she utilized to calculate Student's percentage of progress for the IEP goals. A review of all goals indicated that, although Student did not master any of the thirteen stated goals in the first or second quarter of third grade, he had made progress toward mastery.

Parents assert that Dr. Fitzgibbons' report indicates that, despite having been in the District for some time, Student tested far less developed academically than his same-age peers. It should be noted, however, that Dr. Fitzgibbons reevaluated Student and prepared

a report in September 2013, approximately six months after Parents voluntarily removed Student from the District and began home schooling him. For this reason, it is difficult to ascertain whether Student's academic levels at that time were attributable to the educational programming offered by District.

In sum, Parents have failed to meet their burden in regards to establishing that Student was not academically progressing at Elm Tree Elementary School.

Development and Implementation of Behavior Plan. Parents asserted that Student was not provided FAPE on account of the fact that the behavior support plan developed by the District was inappropriate in light of Student's behaviors, and, further, was not properly implemented and followed. In support of these arguments, Parents relied on the report and testimony of expert witness, Dr. Jason Travers. Dr. Travers concluded that many of the District's interventions served to reinforce negative behavior and did not comport with evidence-based practices.

"When a child's learning is impeded by behavioral issues, the IDEA requires that the IEP team 'consider the use of positive behavioral interventions and supports, and other strategies, including positive behavioral interventions.'"¹³⁸ A failure to address behavioral issues appropriately can amount to a denial of FAPE for a student.¹³⁹ The Eighth Circuit Court of Appeals has stated that "it is 'largely irrelevant' if the school district could have employed 'more positive behavior interventions' as long as it made a 'good faith effort' to help the student achieve the educational goals outlined in his IEP."¹⁴⁰ Although a district must consider all outside evaluations, it is not required that such recommendations be

¹³⁸ *M.M.*, 702 F.2d at 479 (citing 20 U.S.C. §1414(d)(3)(B)(i)).

¹³⁹ *Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003).

¹⁴⁰ *M.M.*, 702 F.2d at 479 (citing *CIN*, 323 F.3d at 639).

adopted. To require this from a district would result in “requiring a school to change methodologies based on the preferences of each parent” and would create the potential that a school district could be required to provide more than one method for different students based on parents with different preferences.¹⁴¹

In the present case, the District conducted a FBA and developed a behavior support plan, with significant parental input and support, on October 3, 2012. At the time, the IEP team was responding to three incidents that had occurred at the beginning of Student’s third grade year, specifically in August and September 2012. All three of these behavioral incidents dealt with situations in which Student became upset and aggressive on account of being in proximity of, or socializing with, another specific child who also appeared to have significant behavior issues. Based on these three incidents, which formed the basis for the District’s behavior support plan, it is logical that the October 3, 2012 behavior support plan, as well as the underlying FBA, addressed Student’s behavioral issues arising from his interactions with the specific child in question. In addition, the behavioral support plan addressed situations in which Student refused to work.

The behavioral support plan provided several “curriculum modifications” to address the behaviors described in the FBA. Regarding changes in time, it was decided that Student would go to activities with another class so that he would not be exposed to the specific child that triggered competing and aggressive behavior. It was also decided that Student would go to separate recess, and that he and the other child would alternate between the two playgrounds depending on the day of the week. The behavioral support plan was very

¹⁴¹ *M.M.*, 702 F.2d at 479 (citing *K.E., ex. rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 805-06 (8th Cir. 2011); *E.S. v. Indep. Sch. Dist., No. 196*, 135 F.3d 566, 569 (8th Cir. 1998)).

specific in setting out the recess protocol, providing that on days in which Student went to the front playground, he would be permitted to pick five friends from his general education classroom to go and play with him. When Student was assigned to the back playground, he would be participating in recess with all third grade students. There was a specific schedule provided in the behavioral support plan, providing that Student would go to the front playground on Monday, back playground on Tuesday, adaptive P.E. on Wednesday, back playground on Thursday, and adaptive P.E. on Friday.¹⁴²

The behavior support plan provided for other changes as well. Specifically, Student would be placed across the room and facing away from the child that triggered his aggressive behavior (change in space); Student would be provided with a visual timer to indicate changes in schedule (change in instructional materials); Student would be provided research-based methods such as Applied Behavior Analysis, Picture Exchange Methods, or story-based intervention (change in curriculum); Student's functional routines in the classroom would be addressed (change in curriculum); Student would be provided with a sensory diet (change in the curriculum); Student would be provided with quiet time after recess, whereby he could listen to calming music and sleep until he awakened (change in curriculum); and Student would have a designated time each day to work with his special education teacher on social skills (change in curriculum). The identified replacement behaviors sought by the team included, but were not limited to, Student identifying when he is upset using the "5-point scale," using a help card when he feels that he needs assistance, and learning waiting behaviors with the use of a timer.¹⁴³

¹⁴² *Id* at p. 228; District Binder, p. 262.

¹⁴³ *Id.* at 229; District Binder p. 263.

Although Parents' expert testified that the behavior support plan was inappropriate for lack of evidence-based strategies and interventions, a close look at the behavior support plan in light of the expert's recommendations shows that many of the recommendations were followed. For example, positive reinforcement was addressed, and a token system was implemented. In addition, the District completed a FBA and implemented antecedent-based strategies (*i.e.* visual schedules and reminders) to assist Student.

After the development and implementation of the behavior support plan on October 3, 2012, there were no significant (*i.e.* aggressive) behavior incidents reported for two months. However, that changed beginning in December 2012. There were two incidents in December 2012, one in February 2013, and another in March 2013. While one of these incidents occurred as a result of Student being triggered by the specific child addressed in his behavior support plan, the remaining incidents were different in nature. Specifically, Student was aggressive toward staff in situations in which the other triggering child was not present. Student was reported to have punched and kicked staff, as well as knocked over furniture such as his desk and a bookshelf. On one occasion, Student attempted to push a room divider into another child in response to that child making a loud noise. In a particularly alarming situation, Student became physically aggressive with his pregnant teacher.

On February 8, 2012, Student's IEP team met for a separate programming conference to discuss the behavioral issues. Documentation from that meeting indicates that the team concluded that it needed to create and implement a crisis plan as a result of Student's escalating behaviors.

This chain of events establishes that the District responded to Student's initial behavior issues at the beginning of the 2012-2013 academic year, and, as a result, developed a behavior support plan approximately a month later to address same. When Student's behaviors significantly changed, the District once again met with Parents and addressed the new behaviors, at which time the IEP team determined that Student needed a crisis plan. Based on these facts, it cannot be concluded that the District's actions regarding Student's ongoing behavioral issues constituted a denial of FAPE. The District made a good faith effort to address Student's ongoing behavior issues, as well as assist Student in achieving the educational goals outlined in his IEP.

Parents in this case argue that the continued escalation of Student's behavior issues is evidence that the District was not properly implementing Student's behavior support plan. This Hearing Officer disagrees. The evidence is clear that Student's behaviors changed significantly over a short period of time, and the District was taking steps to address the various behaviors, and their contributing triggers, as they occurred. Parents also argue that the District failed to properly follow the stated behavior plan, citing evidence that one of Student's behavior incidents, specifically the one in February 2013, occurred after he was allowed to go to recess with the specific child that had triggered his aggressive behavior at the beginning of the year. There is no question that Student ended up on the playground with the other child, and that this was an issue addressed by the October 3, 2012 behavior support plan. The evidence suggests, however, that this was an isolated situation and that, at all other times, the District had followed Students behavior support plan without incident. The evidence also suggests that an instructional assistant

was sent to the playground with Student on the date of that incident, indicating that measures were put in place to monitor Student pursuant to the behavior support plan.

Finally, it is worth noting that this Hearing Officer was concerned about the integrity of Dr. Travers' report given that he completed his report and sent it to Parents' counsel to review for accuracy prior to meeting and evaluating Student.

In sum, there is insufficient evidence based on the facts of this case to conclude that the District failed to properly develop, implement, and follow a behavior support plan for Student. To the contrary, the evidence suggests that the District continually acted quickly in response to Student's escalating behavior, particularly in light of the short time frame, approximately 48 days, in which Student attended school between September 30, 2012 and March 13, 2013. It is impossible to know if the crisis plan contemplated by the District would have been successful on account of the fact that Parents removed Student from the District prior to the development and implement of the plan.

CPI Transports. A major issue in this case was that of whether Student was being improperly restrained or secluded by the District in response to behavioral incidents. Parents were adamant that under no circumstance should Student be restrained, and they defined restraint as also including transport. Parents further testified that they did not want Student to be placed in seclusion, defining seclusion as including the "pass" room or "cool down" room where students in the District were sometimes taken for the purpose of calming down.

The 2014 Arkansas Department of Education Advisory Guidelines for the Use of Student Restraint in Public School or Educational Settings addresses physical restraint and

seclusion, and provides definitions of the terms physical escort, physical restraint, and crisis. “Physical escort” is defined as “a temporary touching or holding of the hand, wrist, arm, shoulder, or back for the purpose of redirecting or inducing a student to move to a safe location.” “Physical restraint” is defined as “a personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely.” The guidelines specifically state that a physical restraint does not include a physical escort. Last, but not least, “crisis” is defined as a “situation where a student is engaging in behaviors that threaten the health and safety of him or herself or others.” The guidelines further state that a crisis is often a situation in school where a student becomes aggressive or violent and is unable to regain self-control without posing a danger of injury to self or others.¹⁴⁴

A significant portion of the transcript in this case is dedicated to questioning regarding seclusion, restraint, and whether the actions taken to address Student’s aggressive behavior fell within either category. Witnesses for the District all testified that Student had never been restrained, but that he had been “transported” to the “cool down” room or other appropriate locations where Student could deescalate. Byrd testified that certain members of her staff were CPI trained and, as a result, authorized to transport students from one location to another as needed for the safety of the student in question, or other students and staff nearby. A transport was described in the same way that a physical escort is defined *supra*, *i.e.* two people walking on either side of a student while holding student by the hand or arm. All witnesses that were questioned about transport procedure

¹⁴⁴ Arkansas Department of Education Advisory Guidelines for the Use of Student Restraints in Public School or Educational Settings (2014), pp. 5, 8.

explained that the Student always walks during a transport. Further, there is sufficient testimony that it is never appropriate to drag a student to a desired location when they refuse to walk.

Byrd testified that there is a room adjacent to the office that is called the “cool down” or “pass” room. She testified that it is a conference room, with a table and chairs, with doors on each end. There is children’s art on the walls, and a mat and blanket on the floor for students to use for the purpose of calming down. An adult is present at all times when a student is in the “cool down” room. Byrd testified that she could remember one incident in which Student was transported from the cafeteria to the “cool down” room following a situation in which he was aggressive toward others in his vicinity. She testified that Student walked to the room pursuant to a proper transport and laid down on the mat in the room.

Parents testified that they ultimately removed Student from school because the District refused to stop restraining him. First, there is no evidence to suggest that Student was ever restrained within the definitions provided in the Arkansas guidelines. In addition, there is no evidence that the “cool down” room, as described above, is a seclusion room. It is illogical and unreasonable for Parents to have the expectation that Student will never be transported in situations in which he is being aggressive with peers and staff, or, alternatively, posing a physical danger to himself. Certainly, if Student was the victim of another student’s violent behavior, it seems unlikely that Parents would want the school to step back and refuse to protect Student.

In *M.M. v. Dist. 0001 Lancaster County Sch.*, 702 F.2d 479, a case with similar facts to those addressed herein, the Eighth Circuit Court of Appeals held that the school district had not failed to provide a FAPE when it continued using a “calming room” for the purpose of allowing students to calm down and for protecting staff and other students.¹⁴⁵ In that case, as here, the parents did not want the school to place their child in the calming room based on their belief that it caused increased behavior issues. The Eight Circuit held that, although the school district was required to consider Parents requests, they were not required to adopt them if doing so would result in inconsistency in the methodologies used for students in the district.¹⁴⁶

Here, Parents have provided insufficient evidence to establish that Student is being restrained or secluded by the District. Instead, Student is being safely moved from one area to another, via transport, when he is in crisis. There is nothing to suggest that the actions of the District in transporting Student, or in having Student utilize a “cool down” room to calm down, is inappropriate or constitutes unlawful restraint and seclusion. As such, the Student has not been denied FAPE on these bases.

Least Restrictive Environment. Parents alleged that the District failed to education Student in the least restrictive environment. As stated *supra*, the IDEA requires that students with disabilities be educated in the least restrictive environment pursuant to 20 U.S.C. §1412(a)(5). There is a “strong preference in favor of disabled children attending regular classes with children who are not disabled,” resulting in a “presumption in favor of

¹⁴⁵ *M.M.*, 702 F.2d 479.

¹⁴⁶ *Id.*

public school placement.”¹⁴⁷ However, the IDEA “significantly qualifies the mainstreaming requirement by stating that it should be implemented to the ‘maximum extent appropriate.’”¹⁴⁸ Essentially, a disabled student should not be separated from his or her peers unless the services that make segregated placement superior cannot be “feasibly provided in a non-segregated setting.”¹⁴⁹ The requirement to mainstream is not applicable when it “cannot be achieved satisfactorily.”¹⁵⁰ As such, it is permissible to remove a disabled child from a mainstream environment when he or she would not benefit from mainstreaming or when the “marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting.”¹⁵¹

Parents assert that the District’s determination to move Student back into the autism classroom on March 12, 2013 resulted in Student no longer being educated in the least restrictive environment. An IEP meeting was held on March 13, 2013 to discuss this change in placement, as well as Student’s ongoing behavior issues. Despite the modifications which were listed in Student’s current IEP, and despite attempts via the behavior support plan to address aggressive behavior, Student was continuing to struggle academically, socially, and behaviorally. Under these circumstances, it is likely that Student would have received more intensive instruction with increased minutes in the autism classroom. The marginal benefits that were being received from providing student with

¹⁴⁷ *CIN*, 323 F.3d at 641.

¹⁴⁸ *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006); *see also* 20 U.S.C. § 1412[a](5).

¹⁴⁹ *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

¹⁵⁰ *Pachl*, 453 F.3d at 1068.

¹⁵¹ *Roncker*, 700 F.2d at 1063.

more general education minutes were far outweighed by the benefits that could be gained from being in the autism classroom.

It is also worth noting that Parents voluntarily withdrew Student from school on March 14, 2013 for the purpose of providing home schooling to Student. Certainly, Student's environment in the autism classroom was must less restrictive than his environment at home. There is no evidence that he is with any peers, non-disabled or otherwise, while being home schooled. It is illogical that Parents would move Student to a more restrictive educational environment if this was of concern.

Conclusion. Having considered Parents allegations of substantive due process violations, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer that Student was not denied FAPE as a result of substantive violations of the IDEA.

ORDER:

The results of the testimony and evidence warrant a finding for the District. There is not sufficient evidence to warrant a denial of FAPE as alleged by Parents. This case is hereby dismissed with prejudice.

FINALITY OF ORDER AND RIGHT TO APPEAL:

The decision of this Hearing Officer is final and shall be implemented unless a party aggrieved by it shall file a civil action in either federal district court or a state court of competent jurisdiction pursuant to the Individual's with Disabilities Education Act within ninety (90) days after the date on which the Hearing Officer's Decision is filed with the Arkansas Department of Education.

Pursuant to Section 10.01.36.5, Special Education and Related Services: Procedural Requirements and Program Standards (Arkansas Department of Education 2008), the Hearing Officer has no further jurisdiction over the parties to the hearing.

IT IS SO ORDERED.

/s/ Danna J. Young

HEARING OFFICER

01/12/2015

DATE