

**NOTICE OF HEARING OFFICER'S DECISION
KANSAS STATE DEPARTMENT OF EDUCATION
FILE # 16 DP -002**

CHILD'S NAME: _____

PARENT NAME: KB

PARENT'S COUNSEL: *PRO SE*

SCHOOL DISTRICT: USD ____, _____, KS

DISTRICT'S COUNSEL: Sarah J. Loquist
Kansas Association of School Boards
1420 SW Arrowhead Rd
Topeka, KS 66604

HEARING OFFICER: JAMES G. BEASLEY
601 Birkdale Dr.
Wichita, KS 67230

DATE: July 25, 2016

PROCEDURAL STATUS

On November 15, 2015 the parent herein, KB filed a Notice of Parent's Request for Special Education Due Process Hearing, which was received by the District on November 16, 2015. On December 2, 2015 the present Hearing Officer was requested by the parties to preside over the Due Process Hearing and proceedings. Subsequently, the following procedural events occurred:

1. December 22, 2015 the Hearing Officer sent a letter to the parent, notifying her of his appointment. On January 20, 2016, the Hearing Officer spoke by phone with the parent regarding a pre-hearing conference which was set for January 28, 2016.
2. The parties were informed mediation was available; however, the parties elected not to mediate the issues in the hearing.
3. A Pre-Hearing Conference was held on January 28, 2016 by telephone conference. Dates for the completion of discovery, identification of witnesses and motions were set. Pursuant to the Pre-Hearing Order, the Due Process Hearing was set to begin on March 3, 2016 at 9:00 a.m. at the Administrative Center of the District in Hutchinson.
4. The Due Process Hearing was commenced on March 3, 2016. At the completion of the evidence for that day, the matter was to reconvene on the following day, March 4, 2016. The parent contacted the Hearing Officer on the evening of March 3, 2016 to request the matter be continued for hearing due to her child, the student in the matter, was ill, hospitalized for treatment due to her inability to attend the hearing the following day. After consultation with counsel for the District, the matter was continued to March 29, 2016 to begin at 9:00 a.m.
5. The Due Process Hearing commenced at 9:00 a.m. however, the parent of ____ called the Hearing Officer and informed him that she would not be present for the hearing and that she had no intention of attending at a later time. The Due Process Hearing Officer informed the parent that witnesses were present to testify and that the hearing would be held in her absence.

ISSUES TO BE RESOLVED

1. Did the District predetermine ____'s placement at the October 12, 2015 IEP meeting?
2. An issue that had been raised in the Notice of Parent's Request for Special Education Due Process Hearing alleged that ____ had been physically abused and that the District had not sent notices to the parent regarding the abuse and that no action was taken by the District to protect the student from the abuse. (The

parent withdrew that issue at a hearing on January 28, 2016 and the matter is not addressed in the following Decision).

FINDINGS OF FACTS

A. _____ Young, Assistant Principal at _____ Elementary

1. Ms. Young is the assistant principal at _____ Elementary. (Tr. at 26, ln. 5-7.) She has served in that capacity since the beginning of the 2015-2016 school year. (*Id.* at 26, ln. 12-14.) Prior to this year, Ms. Young had worked at _____ as an instructional coach. (*Id.* at 26, ln. 15-20.)
2. Ms. Young has been in education for a total of 11 years. She has a bachelor's degree in Elementary Education, a Master's degree in Curriculum Instruction, a Master's degree in Administration, and her District level administration licensure. (*Id.* at 26, ln. 21 – 27, ln. 13.) Ms. Young is licensed to teach K-9 and is a licensed administrator. (*Id.* at 27, ln. 15-20.) Ms. Young has known____, both in her capacity as assistant principal and her capacity as an instructional coach. (*Id.* at 27, ln. 22 – 28, ln. 4.)
3. _____ has been identified as Other Health Impaired (OHI) for special education. (Tr. at 28, ln. 5-25.) His disability affects his ability to make academic progress due to his behaviors, his sleeping at school, and his lack of academic stamina. (Tr. at 29, ln. 4-13.) Specifically, _____ exhibited behaviors such as avoidance, pacing around the room, leaving the classroom, walking the hallways, destroying property, disrupting the learning of the other students, and sleeping. (*Id.* at 29, ln. 14-22.) Ms. Young testified that _____ slept for a portion of each day. His refusal and task avoidance behaviors sometimes escalated into destruction in the hallway and battery of a staff member. (*Id.* at 30, ln. 1-15.)
4. Ms. Young described a particularly severe incident with _____ that occurred on September 17, 2015. The incident started with _____ attempting to hit another student in P.E. (Tr. at 31, ln. 1-25.) After that, he was removed to the behavior support classroom. (*Id.* at 32, ln. 4-5.) On the way to the classroom, he roamed the halls, kicked over trash

cans, destroyed property, and attempted to get in the elevator. (*Id.* at 32, ln. 6-11.) Once they arrived at the classroom, Ms. Young attempted to deescalate him. Ms. Young told him that he would eat lunch in the classroom and that he would have his recess but not at the same time as the other students. (*Id.* at 32, ln. 12-24.) ___ became very angry. Ms. Hart, the principal, was called for assistance, and they attempted to call Ms. _____. (*Id.* at 33, ln. 2-7.) He was yelling, screaming, throwing things, hitting, and biting. (*Id.* at 33, ln. 8-15.) He took Ms. Young’s walkie talkie and threw it at them, and took a clock off the wall. (*Id.* at 33, ln. 12-14.) Eventually, the Superintendent and the police were called. (*Id.* at 33, ln. 19-25.) ___ finally calmed down after the police arrived. (*Id.* at 34, ln. 1-2. *See also* Dist. Ex. 29.)

5. As a result of the above incident, ___ was given three days of in school suspension at the Alternative Learning Program (“ALP”). (Tr. at 38, ln. 3-9; Dist. Ex. 28.) ALP is at a different location and has a much lower staff to student ratio. (Tr. at 38, ln. 20 – 39, ln. 6.) This action was explained to Ms. _____ on September 18. (*Id.* at 37, ln. 23 – 38, ln. 9.)

6. Ms. Young and Ms. Hart met with Ms. _____ again on September 24, 2015, at the city library. (Tr. at 40, ln. 12-14; Dist. Ex. 30.) During that meeting, they discussed with Ms. _____ that ___ was not making progress, that he was sleeping in school, and his behavior. (Tr. at 22, ln. 10-17.) Ms. ___ indicated that she wanted ___ in general education and also discussed other options such as home school, the day school, and ___’s alternative learning placement the previous school year. (Tr. at 22, ln. 18-25.) They also discussed TLC, the day school, but Ms. Young had never visited TLC and she was not sure what would be best for ___ (Tr. at 24, ln. 6-14.) Ms. Young and Ms. Hart never had the power to say that ___ should be going to TLC. (Tr. at 24, ln. 22-25.)

7. At the end of the meeting on September 24, Ms. _____ informed Ms. Young and Ms. Hart that she had enrolled ___ in virtual school. (Tr. at 40, ln. 19-24.) At no point during this meeting did Ms. Young ever tell Ms. _____ that ___ needed to go to TLC. (*Id.*

at 45, ln. 10-16.) Ms. Young and Ms. Hart do not have authority to determine which students will attend TLC. (*Id.* at 46, ln. 8-11.) TLC would be a more restrictive environment than the behavior support classroom at _____ Elementary. (Tr. at 47, ln. 1-6.)

8. Ms. Young did not speak with Ms. J. on the phone during the meeting at the library on September 24, 2015. (Tr. at 269, ln. 21-23; *id.* at 270, ln. 6-11.) Ms. _____ called Ms. J. and handed the phone to Sherri Hart. Because they were in a public library, Ms. Hart had to walk around the corner to the stairwell. (*Id.* at 269, ln. 24 – 270, ln. 5.) Ms. Young also did not call Ms. _____ later in the evening on September 24, 2015. She reviewed her cell phone records to confirm this. (*Id.* at 270, ln. 12-21.)

9. On September 25, 2015, the school received a request for _____'s student records from a virtual school. (Tr., at 41, ln. 11 – 25.) After receiving the request for records, the school followed up by texting Ms. _____ to make sure she wanted the records sent, and then called Ms. _____, after she had indicated she wanted to have _____ enrolled half-time in the virtual school and half-time in U.S.D. _____, because he could not attend half-time in two different districts. (*Id.* at 42, ln. 1-18.)

10. An IEP meeting for _____ was held on October 12, 2015. (Dist. Ex. 2.) The purpose of the October 12, 2015 IEP meeting was to discuss the current IEP and _____'s current academic levels. (Tr. at 48, ln. 9-14.) During that meeting, Ms. _____ indicated that she wanted him to be placed half time in regular education and half time in special education. (Dist. Ex. 4 at 2-3. *See also* Dist. Ex. 6 for recording of both parts of IEP meeting.) To the contrary, District staff members shared their concerns that _____ was not making academic progress. They shared data regarding his sleeping in class and data showing his lack of academic growth. (Tr. at 48, ln. 16-20.) District staff also shared that _____'s reading was about two grade levels behind where it should be as a fourth grader. (Tr. at 48, ln. 21 – 49, ln. 4.) One of the options discussed during the meeting was the possibility of placing _____ at TLC. (*Id.* at 49, ln. 5-10.) Ms. _____ became upset and left

the meeting when the rest of the team did not agree with her request to place ___half-time regular education and half-time special education, but she returned a short time later and accepted the prior written notice which denied her request and another prior written notice for placement of ___at TLC. (Tr. at 49, ln. 11 – 50, ln. 7; Dist. Ex. 4; Dist. Ex. 5.)

11. Ms. ___ also had___’s grandmother present via phone for the October 12, 2015 IEP meeting, and the meeting lasted over 3 hours. (Tr. at 50, ln. 8 – 51, ln. 21.)

12. TLC was recommended as the placement for ___because he “has shown greater success when provided services in a more restrictive environment at the ALP. This success has not been present at _____. [___]’s behavior reflects the need for greater restriction than can be provided in a comprehensive school.” (Tr. at 60, ln. 4-12; Dist. Ex. 5 at 3.) While the team recognized that ___had greater success during his prior short-term placement at ALP, it is not intended to be a long-term placement for any student and is really intended only to be a 2 or 3 day placement to avoid out of school suspension. (Tr. at 60, ln. 13 – 61, ln. 3.) While ___ as at ALP, he worked with a staff member one on one every day. He was still able to take breaks, but his behavior did not become as elevated there as it did at _____. (Tr. at 61, ln. 4-20.) To the contrary, at _____ elementary, he was in a behavior support classroom with 6 to 9 other students, and he went to lunch, music, PE and recess with his general education peers. Thus, ___went from a 1:1 setting at ALP to a comprehensive school with 450 students. During lunch and recess, ___was with approximately 180 students at _____. (Tr. at 61, ln. 21 – 62, ln. 21.)

13. In addition to Ms.____’s proposed placement and the proposed placement at TLC, the team also considered continuing___’s placement in the behavior support classroom at _____. The team rejected that option due to___’s inability to make progress in the curriculum and with his behaviors. (Tr. at 63, ln. 7-15; Dist. Ex. 5 at 3.)

14. The District had tracked data in both areas for___ His behavior was tracked through daily behavior sheets, and his academic progress was tracked through AIMSweb testing, as well as district and building assessments. The data for both areas demonstrated

that ___ was not making sufficient progress. (Tr. at 63, ln. 16 – 64, ln. 8.)

15. When Ms. ___ left the IEP meeting on October 12, 2015, she took both prior written notices home with her to think about it. (Tr. at 64, ln. 12-23.) However, Ms. ___ did sign consent for the placement at TLC on October 13, 2015. (Tr. at 65, ln. 3-12; Dist. Ex. 5 at 4-5.)

16. Ms. Young testified that the District staff had not predetermined the placement for ___ at TLC. (Tr. at 100, ln. 18-23.) District staff did consider other options during the meeting on October 12, 2015. (Tr. at 100, ln. 24 – 101, ln. 1.) Based upon her knowledge of ___ and her experience in education, Ms. Young believes that the placement at TLC would be the least restrictive environment for ___ (Tr. at 101, ln. 11 – 102, ln. 4.) Ms. Young testified that TLC could offer ___ a lower student to staff ratio, more one on one support, and more structure. (Tr. at 103, ln. 6 – 104, ln. 21.)

17. Sometime after 6 p.m. on October 12, 2015, Ms. ___ called Ms. Young and told her that she had decided to move forward with the placement at TLC. Ms. Young was not sure what needed to be done to change the placement and agreed to call Ms. ___ back after speaking with others. (Tr. at 66, ln. 23 – 67, ln. 12.) Ms. Young later texted Ms. ___ and let her know that H. P. would be contacting her to explain the process of changing the IEP and also offered to go with Ms. ___ to TLC to enroll. (Tr. at 68, ln. 3-16. *See also* Ex. 31.)

18. Ms. Young did meet Ms. ___ at TLC for enrollment. They met with the TLC principal and ___'s teacher and went on a tour of the facility. Ms. ___ signed consent for the placement at TLC while they were there. (Tr. at 71, ln. 4 – 74, ln. 1.)

19. Another IEP meeting was held on October 29, 2015, to revise the IEP to reflect differences in the program at TLC, such as removal of references to music and P.E. which are not available at TLC. (Tr. at 78, ln. 3-8; Dist. Ex. 9.) Ms. Young and other staff from _____ were still invited to this IEP meeting because they knew ___ well and students will transition back to _____ from TLC. (Tr. at 79, ln. 2 – 80, ln. 6.)

provide parents a copy of their rights. Tr. 428: 14-25; School Dist. Ex. 133 at pgs. 323-347.

20. At the IEP meeting on October 29, 2015, Ms. _____ stated that she was concerned about an incident which had occurred at TLC and that she no longer wanted _____ to attend TLC. (Tr. at 80, ln. 23 – 81, ln. 8.) The rest of the team discussed how _____ was doing at TLC and how he had been doing at _____. The rest of team disagreed with Ms. _____ that _____ should be removed from TLC. (Dist. Ex. 10.) Ms. _____ left the meeting before the prior written notice regarding her request could be given to her and before any amendments could be made to the IEP. (Tr. at 81, ln. 18 – 82, ln. 5; Dist. Ex. 10. *See also* Dist. Ex. 14 (audio recording of 10/29/15 IEP meeting).) The prior written notice was mailed to Ms. _____. It indicated that the team had considered Ms. _____'s request to move _____ back to the behavior support classroom in the regular education building, but rejected the request because he had shown a lack of progress there in both behaviors and academics and his behavior had a negative effect on other students. (Tr. at 87, ln. 4-23; Dist. Ex. 13 at 2.) One of the factors considered by the team was that _____ had not attended TLC for very long and they did not feel they had enough data to say that the placement would not work. (Tr. at 88, ln. 6-18; *Id.* at 102, ln. 5 – 103, ln. 5.)

21. Ms. Young also attended the IEP meeting held on December 3, 2015. Ms. _____ attended by phone. Before the team could begin discussing revisions to the IEP, Ms. _____ stated that she wanted to revoke her consent for special education services. Ms. _____ left the conversation and the officer at the jail provided a fax number to which the District could send paperwork for revocation of consent for special education. (Tr. at 90, ln. 17 – 91, ln. 20.)

22. At that point in time, the District had not received anything in writing from Ms. _____ revoking consent for special education services, and Ms. _____ had a history of telling the District that she was going to revoke consent and then changing her mind. (Tr. at 91, ln. 21 – 92, ln. 3.) As a result, Ms. _____ was told that the rest of the team would continue

meeting and would finish revising the IEP. That statement had no impact on Ms. ____'s willingness to stay on the phone conference. (Tr. at 92, ln. 4-18.) Ms. ____ also informed the District that ____ would be enrolled in a district in the Kansas City area. (Tr. at 92, ln. 19 – 93, ln. 4.) Again, at that point in time the District had not received a valid request for records. (Tr. at 93, ln. 5-24.)

B. Jason Marciano, Principal at Transitional Learning Center (“TLC”)

23. Jason Marciano is employed by the ____ County Education Cooperative as the principal at TLC. (Tr. at 129, ln. 15-18.) This was the first year he has held that position. (*Id.* at 129, ln. 19-23.) Prior to this school year, he was a school administrator for 16 years and was a teacher for 4 years before that. (*Id.* at 129, ln. 24 – 130, ln. 7.) Mr. Marciano has a bachelor's degree in elementary education, a master's degree in school administration, and district level certification. His license is for pre-K – 12 building leadership and pre-K – 12 district leadership. (*Id.* at 130, ln. 8-14.)

24. The mission at TLC is to “get these kids reintegrated back to their districts so they can be successful and we do that very incremental, in slow steps.” (Tr. at 155, ln. 19 – 156, ln. 2.) They meet as a team to review behavior data to determine when the student is ready to start integrating back into their district. (*Id.* at 156, ln. 2-11.)

25. Once a student is placed at TLC, Mr. Marciano receives records from the home district. (*Id.* at 159, ln. 3-6.) In the case of ____, he also had conversations with Ms. Young after ____ was assigned to TLC. (*Id.* at 159, ln. 7-20.)

26. Mr. Marciano first became acquainted with ____ on October 13, 2015, when ____ and his mother came to enroll at TLC. He did not know ____ prior to that time. (*Id.* at 130, ln. 15-25.) Mr. Marciano did not learn that ____ was coming to TLC until the morning of the 13th when he was notified by H.P. (*Id.* at 131, ln. 1-8.) Mr. Marciano did not attend the October 12, 2015, IEP meeting for ____ (*Id.* at 131, ln. 9-13.)

27. When Ms. ____ and ____ arrived at TLC on October 13, they discussed the program at TLC, showed them around the school, and answered questions they had. (*Id.* at 132, ln.

2-19.)

28. ___only attended 7 out of 31 possible days at TLC. (Tr. at 132, ln. 20-23.) During that time, there were two major behavioral incidents with ___(*Id.* at 132, ln. 24 – 133, ln. 1.) The first of these incidents occurred on October 20, 2015, at which time ___became upset, started throwing things around the classroom, and started using foul language. (*Id.* at 133, ln. 8 – 134, ln. 21; Dist. Ex. 32.) ___eventually left the classroom and exited the building. Once out in the yard, he threw things at students, climbed the fence, pulled up plants and yard ornaments, and then threw the plants at staff members. (Dist. Ex. 32.) The other students who had been taken outside when ___escalated were returned to the classroom after ___went into the yard. A staff member positioned herself so that ___could not get to the other students, and he rammed her in the back. (Dist. Ex. 32.) Another staff member at whom ___had thrown plants and other items decided to call the police due to___’s battery of her. (Dist. Ex. 32; Tr. at 134, ln. 6-21.) TLC staff members have the right to make police reports if a student strikes them, just as anyone else would. (Tr. at 134, ln. 18-25.)

29. The second behavioral incident with ___occurred on November 4, 2015. (Tr. at 135, ln. 11-16.) Mr. Marciano was not in the building at the time the incident occurred and received a call from his staff regarding ___being out of control. (*Id.* at 135, ln. 17 – 136, ln. 4.) His staff informed him that ___became upset when he did not receive immediate assistance upon request. He began throwing and stomping on his papers, became disrespectful to staff, and left the classroom. (Dist. Ex. 33 at 2.) In the hallway, ___kicked doors, punched and pounded on door windows/wall/drinking fountain, tore papers off the wall, unplugged the drinking fountain, and began directing foul language at staff members. (*Id.*) ___then proceeded to push into two female staff members repeatedly and also punched, kicked and grabbed at them, including grabbing one female staff member’s breast. (*Id.*) Although ___was offered the opportunity to talk to his mother on the phone, he refused to do so and became more physically aggressive,

repeatedly kicking a female staff member in the shin, stomping her foot, punching her in the stomach, and biting her thigh while digging his nails into her ankle. (*Id.*) Police were called due to his increased aggression toward staff. (*Id.* at 3.)

30. Based upon his discussions with Ms. Young, Mr. Marciano stated that the behaviors ___ demonstrated in these two incidents were similar to the kinds of behaviors that had been seen at _____ Elementary. (Tr. at 138, ln. 13-25.) Mr. Marciano explained that there is sometimes an increase in student behaviors when a change in placement occurs. (*Id.* at 140, ln. 18-21.) In Mr. Marciano's opinion, this can be caused by several different things. For example, the student could be mimicking what other students do or the student may be having difficulty with the change. (Tr. at 140, ln. 22 – 141, ln. 9.)

31. Mr. Marciano testified that ___'s behavior was comparable to other students at TLC. (Tr. at 142, ln. 4-14.) Although the police were called twice for ___ during the brief time he attended TLC, they typically only call police once every two or three weeks. It is not something that happens every day at TLC. (*Id.* at 141, ln. 19 – 142, ln. 3.)

32. Mr. Marciano did attend an IEP meeting for ___ on October 29, 2015. (Dist. Ex. 10; Tr. at 143, ln. 5 – 144, ln. 3.) The October 29th IEP meeting was called for the purpose of cleaning up some things in the IEP. (Tr. at 143, ln. 5-10.) Mr. Marciano testified that Ms. ___ raised some concerns regarding whether TLC was the appropriate placement for ___. The rest of team discussed their opinion and reached the conclusion that there had not been enough time to determine whether TLC was the wrong placement for ___. (*Id.* at 143, ln. 11-24.) At that time, Mr. Marciano believed ___ needed to remain at TLC due to the behaviors he had demonstrated and due to the increased number of staff that would be working with him. (*Id.* at 144, ln. 4-14.) TLC differs from a self-contained behavior support classroom because they have a higher staff to student ratio, they have a modified day, and they offer social skills that are addressed by two behavioral interventionists. (*Id.* at 144, ln. 15 – 145, ln. 6.)

33. ___ did return to school after the suspension on November 5, 6, and 9, 2015, but he

did not come back to school after Thanksgiving. (*Id.* at 146, ln. 21 – 147, ln. 20.) As a result of his absences, ___ was turned in for truancy. (*Id.* at 147, ln. 21-24.)

34. Mr. Marciano also attended an IEP meeting for ___ on December 3, 2015. (*Id.* at 148, ln. 4-9.) At that time, they still needed to revise ___'s IEP. (*Id.* at 148, ln. 15-17.) Ms. ___ had determined that ___ was going to attend school in a Kansas City area school district and was discussing revoking her consent for special education services. (*Id.* at 148, ln. 18 – 150, ln. 1.) The IEP team met without Ms. ___ after she refused to participate and determined that TLC was still the appropriate placement. (*Id.* at 149, ln. 9 – 150, ln. 4.)

35. Mr. Marciano continues to believe the appropriate placement for ___ is at TLC because he demonstrates behaviors that would fall under the category of severe emotional disturbance. (Tr. at 150, ln. 5-17.)

C. R.J., ___'s Grandmother

36. Ms. J. testified that she talked to Ms. Young on September 24, 2015, during the conversation at the library. (Tr. at 164, ln. 23 – 165, ln. 2.) Ms. J. claimed that Ms. Young told her that the district had talked about it and they decided it would be best for ___ to attend TLC. Ms. J. stated that she was not comfortable with that decision. (*Id.* at 165, ln. 3-25.)

37. Ms. J. later stated that she had talked to both Ms. Young and Ms. Hart during the meeting at the library. (Tr. at 166, ln. 8-23.) When asked whether the discussion she described took place on September 24 or during the IEP meeting on October 12, Ms. J. testified that it did not matter because she had not changed her stance on either one. (*Id.* at 171, ln. 4 – 172, ln. 20.)

D. _____, Mother

38. Ms. ___ testified that Ms. Young called her the evening of September 24, 2015, after the meeting at the library and claimed that Ms. Young had told her that it would be best to send ___ to TLC and that they could do that outside of the district administration.

(Tr. at 188, ln. 3 – 191, ln. 10.) Ms. ____ testified that she was adamant that ____ would not go to TLC. (*Id.* at 191, ln. 13-21.) Ms. ____ believed the placement at TLC was pre-determined due to the conversation at the library on September 24, and that she signed consent for him to go to TLC because she “felt like she had no other choice.” (*Id.* at 191, ln. 15 – 192, ln. 14.)

39. Ms. ____ testified that the staff at ____ had only called police on ____ once while TLC had called police at least twice. (Tr. at 193, ln. 16-20.) However, on cross-examination, Ms. ____ admitted that she had asked the administration at ____ not to call police and to call her instead. (*Id.* at 195, ln. 194, ln. 25 – 195, ln. 16.) In fact, the day the police were called to ____ Elementary, it was the Superintendent who called – not the school administration. (*Id.* at 195, ln. 17-24.)

40. The IEP meeting on October 12, 2015 was called to discuss Ms. ____’s desire for ____ to go half-time in regular education and half-time in the behavior class. (Tr. at 195, ln. 25 – 196, ln. 16.) Ms. ____ admitted that the IEP meeting lasted at least 2-3 hours. (*Id.* at 196, ln. 19-23.) Ms. ____ also admitted that both she and Ms. J. had the opportunity to share their opinions about what was appropriate for ____ (*Id.* at 197, ln. 1 – 198, ln. 12.)

41. Ms. ____ refused to attend the second day of the hearing in this matter. It had originally been scheduled for March 4, 2016, but, on the evening of March 3, the hearing officer received a call from Ms. ____ stating that ____ was in the hospital with a medical problem. As a result, the hearing officer and counsel for the District agreed to reschedule the second day of the hearing for March 29, 2016. On the morning of March 29, 2016, Ms. ____ was not present for the hearing. The hearing officer was finally able to reach Ms. ____ and spoke with her outside the building, at which time she indicated that she had no intention of attending the hearing, that she was upset with the process, and that she did not want to continue. The hearing officer explained to Ms. ____ that the hearing would proceed without her if she chose not to attend. Ms. ____ had concluded the presentation of her evidence on the first day of the hearing. (Tr. at 265, ln. 21 – 267, ln. 24.)

E. H.P., Special Education Director

42. H.P. is the director of special education for U.S.D. ___ and has served in that capacity since July of 2014. (Tr. at 199, ln. 13-17.) Prior to that time, he was a special education teaching specialist for 3 years for U.S.D. 259 in Wichita and was a special education teacher for 8 years before that. He has been in education for a total of 13 years. (Tr. at 199, ln. 18 – 200, ln. 4.) He has a bachelor's degree in physical education, a master's degree in physical education, and a master's degree in special education. (Tr. at 200, ln. 5-9.) He has a building leadership license and a district leadership license, as well as a license to teach grades 6-12 in physical education and grades 9-12 in special education. (Tr. at 200, ln. 9-17.)

43. He became acquainted with ___ around November 2014 as the result of a call that the building needed help. (Tr. at 200, ln. 20-25.) At that time, ___ was at Morgan Elementary. (*Id.* at 201, ln. 1-4.) Since then, Mr. P. has been involved by trying to find supports for ___, both behaviorally and academically. He has also attended all IEP meetings and has worked with the staff on the IEP and the behavior plan. (*Id.* at 201, ln. 5-16.)

44. Mr. P. attended the IEP meeting on October 12, 2015. (*Id.* at 201, ln. 17-19.) He recorded that meeting and agreed that Part 1 and Part 2 of District Exhibit 6 was the recording from that meeting. (*Id.* at 203, ln. 7-14.)

45. Mr. P. testified that the October 12th IEP meeting had been requested by ___'s mother. (Tr. at 203, ln. 16-21.) Since she requested the meeting, they started off by asking her to tell the team why she had requested the meeting. (*Id.* at 203, ln. 21-23.) Ms. ___ stated that she wanted ___ to be half-time regular education and half-time special education. (Tr. at 203, ln. 24 – 204, ln. 2.) At that point, the team started discussing ___'s academics and behaviors and everyone, including ___'s grandmother who attended by phone, had the opportunity to discuss that. (*Id.* at 204, ln. 3-10.) The team then discussed what ___ needed and most of the team members did not believe it would be appropriate to

place him half-time regular education and half-time special education. (*Id.* at 204, ln. 11-18.) Instead, the team determined that ___'s least restrictive environment would be the day school at TLC. (*Id.* at 18-22.) There was a point during the meeting at which Ms. ___ did not agree with the team decision to place ___ at TLC. (*Id.* at 204, ln. 24 – 205, ln. 1.) However, there were times during the meeting when Ms. ___ agreed, but ___ would become upset and she would change her mind. (*Id.* at 205, ln. 1-8.)

46. After discussing whether the placement requested by Ms. ___ would be appropriate, the team discussed that he wasn't progressing academically or behaviorally in his current placement in the behavior support classroom at _____. The team had tried to work with ___ in different ways, but he was not receiving what he needed and the team did not feel that they could provide what he needed at _____. (Tr. at 205, ln. 9 – 206, ln. 9.) At one point, Ms. ___ indicated that she wanted to revoke consent for special education services and then left the meeting for a while, but she returned and they continued with the meeting. (*Id.* at 206, ln. 10-15.) By the time Ms. ___ returned to the meeting, she had changed her mind and no longer wanted to revoke consent for special education. (Tr. at 206, ln. 23 – 207, ln. 10.) Ultimately, the District gave Ms. ___ a prior written notice refusing the placement that she had requested and gave her a prior written notice seeking her consent to move ___ to the day school. (Tr. at 206, ln. 15-22.)

47. ___ had previously been placed part-time in regular education and part-time in special education when he was at Morgan Elementary. (Tr. at 207, ln. 24 – 208, ln. 3.) That placement was not successful. (Tr. at 208, ln. 19-25.)

48. At the end of the IEP meeting on October 12, 2015, Ms. ___ stated that she would take the paperwork home and review it. (Tr. at 213, ln. 12-20.) Mr. P. later learned that Ms. ___ had contacted Ms. Young and told her that she would consent to the placement at TLC. (Tr. at 213, ln. 21 – 214, ln. 8.) Mr. P. agreed that he would call Ms. ___ the next day to address her questions. (Tr. at 213, ln. 24 – 214, ln. 20.)

49. Mr. P. recorded his phone call the next morning with Ms. _____. (Tr. at 214, ln. 21

– 215, ln. 25; Dist. Ex. 7.) This recording would be allowed under K.S.A. 21-6101 (only a crime if done without consent of one of the parties) and the Fourth Amendment as set forth in *State v. Daniels*, 215 Kan. 164, 166 (1974) (“It is settled law that a state agent may tape-record such a telephone conversation without violating the other party’s Fourth Amendment rights if the agent is a party to the conversation or has the consent of one party.”). Accordingly, District Exhibit 7 will be admitted as evidence in this matter.

50. Mr. P. testified that he was not aware of any district staff member placing any pressure on Ms. ____ to agree to the placement at TLC, nor did he place any pressure on her to give consent for the placement. (Tr. at 218, ln. 8-17.) Likewise, district staff members had not met in advance to determine what ____’s placement should be and did not have prior discussions about specific placements for ____ (Id. at 218, ln. 18 – 219, ln. 3.) In fact, several placement options were discussed during the October 12, 2015, IEP meeting. Those options included the requested change in placement from Ms., ____’s placement in the behavior class at _____, and the special day school at TLC. (Tr. at 219, ln. 4-16.)

51. During the October 12th meeting, they reviewed data regarding his academic progress, his behaviors, and his sleeping. These were the primary factors why the team felt his placement at _____ was not working. (Tr. at 219, ln. 17 – 220, ln. 25.)

52. Mr. P. testified that they take it seriously when they consider moving a student to the day school. They review the data, they want to have a recent reevaluation, and they want to have made adjustments to the behavior plan. (Tr. at 221, ln. 1-12.) In this case, the district had brought in TASN from the State to offer suggestions, and they did a functional behavior assessment to make adjustments to the behavior plan. (Tr. at 221, ln. 13-20.) In addition, Mr. P. personally assisted the team with behavioral interventions. (Tr. at 221, ln. 21 – 222, ln. 24.)

53. Mr. P. testified that when he had talked to Mr. Marciano about the possibility of one student going to TLC, it was not ____ (Tr. at 222, ln. 25 – 223, ln. 25.) None of the

staff from TLC were in attendance at the October 12th IEP meeting. (Tr. at 226, ln. 7-9.) Mr. P. had not called Mr. Marciano in advance of the October 12th meeting. (Tr. at 226, ln. 10-22.)

54. Mr. P. also attended the October 29, 2015, IEP meeting. (Tr. at 224, ln. 1-4.) The purpose of that meeting was to adjust the IEP; however, when the meeting started, Ms. _____ stated that there had been a problem between _____ and another student. (*Id.* at 224, ln. 8-20.) Mr. P. asked her whether she was upset about _____ being at TLC or about the other student, and Ms. _____ initially replied that she was upset about the other student. (*Id.* at 224, ln. 20-25.) During this meeting, Ms. _____ stated that she wanted to revoke consent for his placement at TLC. After discussion, the team continued to believe _____ should remain at TLC. (Tr. at 225, ln. 9-24.)

55. Mr. P. testified that he believed the incident on September 17, 2015, was more severe than the behavior _____ had previously exhibited because he was intentionally trying to harm staff. (Tr. at 229, ln. 3 – 230, ln. 11.) As a result of the September 17th incident, Ms. Hart had bruising on her arms. (Tr. at 230, ln. 13-19.)

56. Mr. P. also attended an IEP meeting for _____ on December 3, 2015. (Tr. at 233, ln. 23 – 234, ln. 1.) The purpose of the meeting was to amend the IEP. (*Id.* at 234, ln. 3-6.) Ms. _____ was incarcerated and attended the IEP meeting by phone. (*Id.* at 234, ln. 16-17.) When it was Ms. _____'s turn for introductions, she announced that she wanted to revoke her consent for special education. (*Id.* at 234, ln. 18-22.) Mr. P. informed Ms. _____ that the District would need to receive that request in writing and also explained the ramifications of revoking consent for special education services. (*Id.* at 234, ln. 22 – 235, ln. 4.) Mr. P. explained that they would like for Ms. _____ to continue to participate in the meeting. The District had tried before to amend the IEP and needed to get it done. Likewise, Ms. _____ had previously said she wanted to revoke consent for special education and then changed her mind. (*Id.* at 235, ln. 9-20.) Ms. _____ refused to continue. (*Id.* at 235, ln. 21.)

57. The District had also received incomplete requests for records from a Missouri school district, but they were signed by ___'s grandmother. (Tr. at 235, ln. 23 – 236, ln. 5.) The District scanned the records request, as well as the form for revocation of special education services, and e-mailed them to the correctional facility for her signature. (*Id.* at 236, ln. 6-15.) Once Ms. ___ refused to participate, the District went forward with the IEP meeting. (*Id.* at 236, ln. 16 -237, ln. 1.)

58. Mr. P. testified that ___'s special education teacher at ____, ____ Ramirez, had done differentiated instruction with ____, as Ms. J. had suggested. In fact, all of the instruction in Ms. Ramirez's classroom would be differentiated instruction. (Tr. at 237, ln. 13 – 239, ln. 1.)

59. Although ___ had previous incidents of hitting and/or biting at Morgan Elementary with a previous teacher, Mr. P. testified that he did not believe ___ was intentionally trying to hurt people at that time. In addition, there were other interventions that he wanted to try with ____, including a new classroom teacher, before he could agree that ___ should go to TLC. The District has now implemented those changes and ___ still was not being successful. As a result, Mr. P. believed the appropriate placement for ___ now was at TLC. (Tr. at 245, ln. 18 – 251, ln. 2.)

60. With regard to TLC calling the police twice on ____, Mr. P. testified that it was his opinion this was an extinction burst. In other words, when you put a new intervention in place, many times the student will resist the intervention and behaviors will increase before they start to see positive changes in the behavior. (Tr. at 253, ln. 8-18.)

61. Mr. P. believes TLC is the least restrictive environment for ___ because they had exhausted their options at a lower level of restriction and still were not seeing progress. (Tr. at 260, ln. 6-14.) ___ struggles to make good choices when he is in a comprehensive school setting and would have a better chance for success at a special day school. (*Id.* at 261, ln. 1-12.)

F. _____ Hart, Principal at _____ Elementary

62. Ms. Hart is the principal at _____ Elementary and has held that position for 3 years. (Tr. at 272, ln. 5-10.) She has an associate's degree, a bachelor's degree, a master's degree in English, English Language Learner ("ELL") certification, educational leadership pre-K – 12, and district level licensure. Her licensure is in educational leadership pre-K – 12 and English 5-12. (*Id.* at 272, ln. 11 – 273, ln. 10.)

63. _____ was a student at _____ Elementary, who has been identified as Other Health Impaired ("OHI"). (Tr. at 273, ln. 12-22.) _____'s disability causes him to struggle to complete academic tasks and to accept help. (*Id.* at 273, ln. 23 – 274, ln. 1.) It has also caused him to have behavior issues. When _____ is unwilling to work, he acts out in the classroom, refuses to work, and engages in task avoidance. (*Id.* at 274, ln. 2-5.)

64. They have had some serious incidents with____, including the incident on September 17, 2015. On that date during P.E., _____ became angry with another student and started to physically attack the student. The Horizons worker stepped between the students, but _____ reached around and tried to grab the other student by the throat. The other students in the class started to run out of the gym because they were scared. (Tr. at 274, ln. 6-21.) The Horizons worker and the para attempted to bring _____ back to the classroom. _____ did not want to go in the behavior support classroom. He started throwing objects and destroying things in the hallway while running around the building. He ran upstairs, went in and out of classrooms upstairs, rode the elevator back down (which students are not supposed to use), and finally went into his classroom. (Tr. at 274, ln. 22 – 275, ln. 8.)

65. Once _____ was in the behavior classroom, Ms. Young tried to talk to him while Ms. Hart spoke with the other student. Ms. Young told _____ that he would have to remain in the classroom for the rest of the day, that he would eat lunch in the classroom, and that he would have recess by himself pursuant to his behavior plan. _____ became upset, started to become physical with the adults in the room, and started throwing and destroying things in the classroom. (Tr. at 275, ln. 21 – 276, ln. 15. *See also* Dist. Ex. 29.) _____ believed the

other student was able to eat lunch and have recess with his peers, even though they told him the other student was not allowed to eat lunch with peers or have recess with peers either. (Tr. at 277, ln. 5-11.) They tried to call Ms. ____ to try to deescalate him, but were unable to reach her. ____ pulled the walkie-talkies off their belts and threw them at the adults. ____ broke the clock, a DVD player, and a walkie-talkie. (Tr. at 277, ln. 20 – 278, ln. 3.) He swung an electric pencil sharpener around and hit Ms. Hart in the arm, causing a bruise that covered her entire forearm. (Tr. at 278, ln. 4-9; *id.* at 278, ln. 17-24.) He also hit Ms. Hart in the back and had her ankle in his mouth. During this episode, ____ was yelling and screaming that he wanted to go to recess. (Tr. at 278, ln. 9-16.) The superintendent and police were both called during this incident. (*Id.* at 279, ln. 9-19.) Once the police officer arrived, he only had to say ____'s name and ____ sat down on the floor. (*Id.* at 279, ln. 20-25.)

66. While the police were there, Ms. ____ did finally call back and talked directly to the police officer. The police took ____ to juvenile intake and assessment. (Tr. at 280, ln. 1-8.) ____ was assigned 3 days at the Alternate Learning Program (ALP) for this incident. (*Id.* at 280, ln. 9-13; Dist. Ex. 28.)

67. Ms. Hart and Ms. Young met with Ms. ____ at the city library on September 24, 2015. They wanted to talk with Ms. ____ about the incident that had happened on September 17th and about his academics. (Tr. at 282, ln. 12-25.) Once they sat down with Ms. ____, she pulled out her cell phone, dialed a number, and asked Ms. Hart to talk to ____'s grandmother, Ms. J. Because they were in a public library, Ms. Hart had to get up and move away to talk. Ms. J. wanted to know why they were meeting. Ms. Hart explained that they had concerns about ____'s lack of academic progress. Ms. J. was confused and thought he was still at Morgan Elementary. Ms. Hart explained that he was now in the behavior classroom at ____ and was doing all of his academics in that setting. (Tr. at 283, ln. 3-23.) Ms. J. asked Ms. Hart what the next step would be in their district and Ms. Hart responded that it would be TLC. Ms. J. wanted ____ to be in a private school

or an alternative school, but Ms. Hart informed her that was not available in the district. (*Id.* at 283, ln. 24 – 284, ln. 10.)

68. When Ms. Hart finished the phone conversation with Ms. J. and returned to Ms. ____'s table, Ms. ____ asked what they had discussed and Ms. Hart told her about the options that were discussed. Ms. ____ talked about home schooling, placement at ALP, and virtual school, as well as asking questions about TLC. (Tr. at 284, ln. 11-23.) Ms. Hart testified that she did not tell Ms. J. or Ms. ____ that ____ needed to go to TLC at any point during that meeting. (Tr. at 284, ln. 24 – 285, ln. 2.) Ms. Young was not ever on the phone with Ms. J. on September 24. (*Id.* at 285, ln. 3-6.)

69. Ms. Hart did speak to Ms. J. again sometime between September 24 and October 12. Ms. J. had called Ms. Hart at school. Ms. J. was asking more questions and wanted to see ____'s IEP. At one point, Ms. J. would say that ____ needed more one on one support and then later in the conversation would say that he should be in the general education classroom more to see how he would do. (Tr. at 285, ln. 7-25.)

70. Ms. Hart attended the October 12 IEP meeting. The meeting had been requested by Ms. ____ to discuss having ____ in general education more. (Tr. at 286, ln. 1-19.) Ms. Hart testified the team discussed a lot of things related to his lack of academic progress. (*Id.* at 286, ln. 20-25.) The meeting lasted until sometime after 5:00. Ms. ____ was at the meeting, then left, and then came back. In addition, ____ was at the meeting and got angry. He walked the halls and had some issues in the lobby of the building. (Tr. at 287, ln. 1-17.)

71. Ms. ____ had stated during the meeting that she wanted to revoke special education services and then left the meeting. When she returned to the meeting, the team discussed that they could not support a decision to revoke special education services for ____ (Tr. at 288, ln. 4-16.) Ultimately, the team thought a more restrictive environment would be appropriate for ____ and they recommended that ____ be placed at TLC, the special day school. (*Id.* at 288, ln. 17-23.)

72. Ms. Hart testified that district did not predetermine that ___ should be placed at TLC. They did not meet prior to the October 12th IEP meeting to discuss placing ___ at TLC. (Tr. at 289, ln. 6-11.)

73. In her role as principal, Ms. Hart has seen students transition to TLC and then transition back out of TLC to the general education building. (Tr. at 289, ln. 12 -290, ln. 2.)

74. Ms. ___ was not in agreement with the recommendation to place ___ at TLC when she left the meeting the second time. (Tr. at 290, ln. 7.) Ms. Hart later learned that Ms. ___ had called Ms. Young and indicated that she had decided to give consent for ___ to attend TLC. Ms. Hart then told Ms. Young to contact Mr. P. to find out what needed to be done. (Tr. at 290, ln. 8-23.)

75. Ms. Hart testified that she does not have the power or authority to have ___ assigned to TLC by going around the rest of the administration. There is a process and she does not know of any shortcuts. (Tr. at 290, ln. 24 – 291, ln. 7.)

76. Ms. Hart also attended the October 29th IEP meeting. The purpose of that meeting was to amend the IEP to reflect the differences in the placement at TLC. (Tr. at 292, ln. 5-12.) However, the IEP was not actually amended as a result of that meeting. (*Id.* at 292, ln. 13-23.) Instead, Ms. ___ stated that she wanted to withdraw ___ from TLC, but the rest of the team was not in agreement with that. (*Id.* at 293, ln. 1-5.) District staff did not predetermine the response to Ms. ___'s request to remove ___ from TLC. They were not even aware that Ms. ___ would be making that request at the October 29th meeting. (*Id.* at 293, ln. 11-17.)

77. Ms. Hart also attended the December 3rd IEP meeting. Ms. ___ attended that meeting by phone because she was in jail at the time. Ms. ___ indicated in that meeting that she wanted to revoke consent for special education, that ___ was living with his grandmother in Missouri, and that he would no longer need special education. (Tr. at 293, ln. 21 – 294, ln. 6.) The purpose of this meeting was to try to amend the IEP to reflect the

differences at TLC. Ms. ____ used to participate. (*Id.* at 294, ln. 7-17.)

78. At the time of the December 3rd IEP meeting, Ms. ____ had not provided anything in writing to the district to revoke consent for special education services. Mr. P. explained that Ms. ____ would need to do so and that the district would continue with the IEP meeting whether she participated or not. The team did continue to amend the IEP without Ms. _____. (Tr. at 294, ln. 18 – 295, ln. 5.)

79. Ms. Hart testified that the least restrictive environment for ____ is the special day school because he has not shown academic progress, he struggles in large settings, and he needs one on one support. (Tr. at 295, ln. 6-15.) TLC has a greater staff to student ratio than they have at _____ and it would be a more intense academic environment for ____ (*Id.* at 295, ln. 16 – 296, ln. 3.)

80. Ms. Hart was an assistant principal at Hutchinson High School prior to becoming principal at _____. While at the high school, she saw many students who had no academic momentum and would drop out of high school at 16 as a result. Although ____ is very motivated by sports, Ms. Hart was concerned that he would never have the opportunity to participate in sports because he would not be academically eligible unless he could gain some academic momentum. She felt that seventh grade would be a tipping point for him if he were not able to participate in sports. (Tr. at 297, ln. 8 – 299, ln. 8.)

G. _____ Ramirez, Special Education Teacher

81. Ms. Ramirez is the behavior support teacher at _____ Elementary for grades 4 through 6. She has held that position for 4 years. She has a master's degree in adaptive special education and a bachelor's degree in elementary education. She is licensed to teach adaptive special education at the elementary level and general education for elementary. (Tr. at 300, ln. 10-24.) She has students who come in and out of her classroom during the course of the day for behavior support or academic support. They do a lot of work on social skills to work on their behavior and to work on the curriculum at the students' academic level. (*Id.* at 301, ln. 2-13.)

82. ___ was one of Ms. Ramirez's students from August to October 2015. ___ struggled with not wanting to complete his work and his afternoons were not successful. ___ also had attendance issues. (Tr. at 301, ln. 14-25.) His behaviors included: leaving the classroom, running up and down the hallways and upstairs, refusing to work, walking around the classroom, sleeping, or asking them to call his mother so that he could go home. (*Id.* at 302, ln. 1-10.)

83. Ms. Ramirez testified that they had a major behavioral incident with ___ in September. ___ attempted to harm another student during P.E. ___ hit the Horizons worker that was with him when she stepped between the two students. On the way back to the classroom, ___ was wandering the hallways and kicking trash cans over. After ___ was informed that he would not be able to go to recess at the same time as his peers, ___ became upset and started throwing things around the classroom. (Tr. at 302, ln. 11 – 303, ln. 4.) ___ started picking up all of the heavy objects he could and throwing them. At this point, Ms. Young asked Ms. Ramirez to find Ms. Hart. Ms. Ramirez was not in the classroom when ___ did the most damage, but she did see the aftermath of broken things in her classroom, including the clock, the VCR, the pencil sharpener, and the telephone. (Tr. at 303, ln. 8-23.)

84. It was not unusual for ___ to sleep until it was time for specials (such as music and P.E.). ___ wanted to be at school for specials, lunch and recess. When recess was over, ___ did not want to be at school anymore. (Tr. at 306, ln. 5-15; Dist. Ex. 27.)

85. ___ was in the 4th grade, but he functioned at a 1st grade level for reading and a 2nd grade level for math. (Tr. At ___, ln. 13-23.) Ms. Ramirez had ___ for his core academic classes. She did a lot of modifications for his assignments because he struggled to do his work. (*Id.* At ___, ln. 25 – 309, ln. 7.) ___ was not making academic progress in her class, and Ms. Ramirez was concerned about his lack of progress. (*Id.* at 309, ln. 8-12.)

86. Ms. Ramirez attended the October 12th IEP meeting, which was requested by Ms. _____. (Tr. at 309, ln. 13-18.) During that meeting, Ms. _____ stated that she wanted

___to have more time in the general education setting, but Ms. Ramirez did not believe that would be appropriate for ___because he couldn't function well in her special education classroom. He was below grade level academically and it would not have been good for him. (Tr. at 309, ln. 19 – 310, ln. 5.)

87. ___becomes frustrated if he is doing work that is above his academic level and, when he becomes frustrated, he would refuse to do work, leave the area, and sometimes the behaviors would escalate. (Tr. at 310, ln. 6-15.)

88. At the end of the October 12th IEP meeting, the team recommended that ___be placed at TLC, but Ms. ___ did not agree with that. Ms. ___ left the IEP meeting, stating that she wanted to revoke consent for special education, but later returned to the meeting. (Tr. at 311, ln. 15 – 312, ln. 15.) Ms. Ramirez later learned that Ms. ___ had changed her mind and agreed to place ___at TLC. (*Id.* at 312, ln. 16-20.)

89. Ms. Ramirez also attended the October 29th IEP meeting. The purpose of the meeting was to amend the IEP, but they were unable to do so during that meeting. Instead, Ms. ___ shared her concerns about TLC and left the meeting early again. (Tr. at 313, ln. 6-23.) Although Ms. ___ had wanted to withdraw ___from TLC, the rest of the team did not agree it would be appropriate to do so and that he should remain at TLC. (Tr. at 317, ln. 15 – 318, ln. 4.)

90. Ms. Ramirez also attended the December 3rd IEP meeting. Ms. ___ had to participate by phone because she was in jail; however, Ms. ___ did not participate in amending the IEP. Ms. ___ stated that she wanted to revoke consent for special education services, but she had not provided a written request to revoke consent to the district. (Tr. at 314, ln. 12 – 315, ln. 1.) Ms. ___ had previously made verbal statements that she wanted to revoke consent for special education services and then changed her mind. (*Id.* at 315, ln. 2-5.) Mr. P. explained to Ms. ___ that the revocation of consent had to be in writing and also informed her that the team would go ahead with the IEP meeting. Ms. ___ did not continue to attend and the team went forward with the

amendments to the IEP. (*Id.* at 315, ln. 6 – 316, ln. 1.)

91. Based upon her experience, Ms. Ramirez testified that the least restrictive environment for ___ was TLC because he needed a smaller environment outside of a comprehensive school and needed to really focus on his academics. TLC could offer him a smaller environment, more staff support, and a counselor or social worker. (Tr. at 316, ln. 2 – 317, ln. 5.) Sometimes special education students will experience an increase in behaviors when they start a new placement because they are testing the waters and want to see how far they can push things. (Tr. at 317, ln. 6-14.)

92. Ms. Ramirez testified that she never had any discussions about ___'s placement prior to the IEP meeting and never prearranged that ___ should attend TLC. (Tr. at 318, ln. 14 – 319, ln. 7.) Ms. Ramirez testified there is a process they have to go through to place a student at TLC and neither she nor her administrators would be able to circumvent that process. (*Id.* at 319, ln. 11-20.)

Additional Evidence

As discussed on the first day of the hearing, Ms. ___ did not give consent to return ___ to special education. (*See* Tr. at 8, ln. 13 – 18, ln. 16.) In addition, ___ was expelled from U.S.D. ___ as a result of a hearing held on March 30, 2016. (A true and correct copy of the expulsion decision is attached hereto and incorporated herein by reference as District Exhibit 35.)

III. Conclusions of Law and Decision

The District argues that this matter is moot due to ___ no longer being a special education student and has been expelled from the District. The District further argues that the District would not have any ability to provide services because the mother of ___ has refused consent for special education services and thereby no remedy could be ordered by the Hearing Officer in a Due Process hearing. The following Conclusions of Law are

presented by the District in support of their position:

A. Mootness

1. Both the federal and state courts require a live case or controversy and will not issue advisory opinions. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 395-96 (1980); *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 893-98 (2008). One of the conditions required in order to demonstrate a “live” case or controversy is that the issues cannot be moot. *Sebelius*, 285 Kan. at 896; *Powell v. McCormack*, 395 U.S. 486, 496 (1969). “That the dispute was very much alive when suit was filed . . . cannot substitute for the actual case or controversy that an exercise of this Court’s jurisdiction requires.” *Honig v. Doe*, 484 U.S. 305, 317 (1988).

2. In *Lillbask ex rel. Mauclair v. State of Conn. Dept. of Educ.*, 397 F.3d 77 (2d Cir. 2005), the parent had filed a due process complaint regarding the district’s proposal to remove the student from the district and place him in a special education program located in another town. *Id.* at 83. After four different due process hearings on various issues and seven (7) years had passed, the student had remained in stay put the entire time and the district no longer sought to change the student’s placement because the student was thriving. *Id.* As a result, the district asserted that the appeal of two issues by the student’s parent had become moot. *Id.* at 84. To the contrary, the parent claimed the issues were not moot because the challenged conduct was capable of repetition while evading review. *Id.*

3. The Court noted that the exception to the general rule regarding mootness is applied only in “exceptional circumstances” and that two conditions must be met: “(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.” *Id.* at 85. In considering these two factors, the Court found that its determination on the first issue was of little importance because the parent could not meet the second condition. *Id.* at 85-86. The Court noted that a

“reasonable expectation of repetition must be more than a mere physical or theoretical possibility.” *Id.* at 86 (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)). The Court found that there was no indication of that the change in placement would be proposed again and that the district now agreed the student was successful in the program provided at his regular school. *Id.* at 87-89. Accordingly, the court found the issues pertaining to the 1997-1998 IEP were moot, as was the parent’s claim pertaining to a statute which had been repealed. *Id.* at 91-92.

4. A similar result was reached in a 2009 case from the Western District of Texas. *M.L. v. El Paso Indep. Sch. Dist.*, 610 F. Supp. 2d 582 (W.D. Tex. 2009). In that case, the district had failed to provide speech services to a student for a period of time due to a staffing shortage and had stated it would provide compensatory education to make up for the lost time. *Id.* at 587-88. However, no compensatory services were provided to the student. *Id.* at 588. At the next IEP meeting, the district sought an evaluation to terminate speech services because the student was no longer eligible for them. *Id.* The parent filed a due process complaint seeking the compensatory speech services. *Id.* at 588-89.

5. The Court found that the evaluation demonstrated the student was no longer eligible for speech services. *Id.* at 596. As a result, the Court determined that the student was no longer speech impaired and, thus, the parent’s claim for compensatory services was moot. *Id.* The Court found that requiring the district to provide compensatory speech services the student no longer needed would be a waste of resources that could be used to serve children who were disabled and would serve only as a form of damages, which is not available under the IDEA. *Id.* at 596-97.

6. Likewise, a similar conclusion was reached by the Seventh Circuit Court of Appeals in 2006. *Brown v. Bartholomew Consolidated Sch. Corp.*, 442 F.3d 588 (7th Cir. 2006). In *Brown*, the parents appealed due process hearing decisions regarding their child to federal district court, which issued a ruling against the parents. Shortly after that decision was issued, the parents moved to another town and enrolled their child in another school

district. *Id.* at 596. The Seventh Circuit held that they no longer had the ability to alter the legal relationship of the parties with respect to the issues and that any opinion issued on the IEP from the prior school district would be the equivalent of an advisory opinion. *Id.* at 598-600. Accordingly, the Court held that the case was moot. *Id.* at 600.

7. In the present case, ___ is no longer in special education and has been expelled from U.S.D. ___. Even if the Hearing Officer were to find that the District had predetermined ___'s placement (a finding which is unsupported by the evidence) and ordered the provision of compensatory services (which Ms. ___ did not request), the District would not have any ability to provide such services because Ms. ___ has refused consent for special education. There is no remedy which could be ordered by the Hearing Officer. In fact, Ms. ___'s only proposed resolution for this issue was that she wanted a fair hearing, which she has now received. In accordance with the above-cited case law, this matter is moot.

B. Predetermination

8. IDEA requires that parents are members of the IEP team and that school districts must make efforts to ensure their participation. 20 U.S.C. §1414(d)(1)(B)(i) (requiring parents be members of IEP team); 20 U.S.C. §1414(e) (requiring that parents are part of any group that makes decisions regarding the educational placement of the child). Nonetheless, a placement decision may be made without the involvement of the parents if the school district is unable to obtain the parent's participation and can demonstrate a record of its attempt to ensure their involvement. 34 C.F.R. §300.501(c)(4). Likewise, a similar provision exists to allow the conduct of any IEP meeting without the parent. 34 C.F.R. §300.322(d). Parents simply must be "afforded the opportunity to participate." 34 C.F.R. §300.322(a). Parents do not control the outcome of IEP meetings. (*See Bd. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982))("The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to

state and local educational agencies in cooperation with the parents or guardian of the child.”))

9. School districts must obtain parental consent before taking any of the following actions: “(1) [c]onducting an initial evaluation or any reevaluation of an exceptional child; (2) initially providing special education and related services to an exceptional child; or (3) making a material change in services to, or a substantial change in the placement of, an exceptional child. . .” K.A.R. 91-40-27. A “substantial change in placement” means “the movement of an exceptional child, for more than 25 percent of the child's school day, from a less restrictive environment to a more restrictive environment or from a more restrictive environment to a less restrictive environment.” K.A.R. 91-40-1(sss).

10. As noted by the Tenth Circuit, “[c]ertainly, it is improper for an IEP team to predetermine a child’s placement, and then develop an IEP to justify that decision.” *T.W. v. U.S.D. 259*, 136 Fed. Appx. 122, **11 (10th Cir. June 6, 2005)(citing *Spielberg ex rel. Spielberg v. Henrico County Pub. Sch.*, 853 F.2d 256, 259 (4th Cir. 1988)). “This does not mean, however, that district personnel should arrive at the IEP meeting pretending to have no idea whatsoever of what an appropriate placement might be.” *T.W. v. U.S.D. 259*, 136 Fed. Appx. 122 at **11. “*Spielberg* makes clear that school officials must come to the IEP table with an open mind. But this does not mean they should come to the IEP table with a blank mind.” *Doyle v. Arlington Co. Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992), *aff’d* 39 F.3d 1176 (4th Cir. 1994).

11. In the present matter, all of the District staff members testified that they had not met or discussed the proposed placement at TLC in advance of the October 12, 2015, IEP meeting. (Tr. at 100, ln. 18 – 101,ln. 1; 218, ln. 8 – 219, ln. 3; 289, ln. 6-11; 318, ln. 14 – 319, ln. 7.) In fact, the District staff members testified that the October 12th meeting was scheduled at the request of Ms.____. (Tr. at 203, ln. 16-21; 286, ln. 1-19; 309, ln. 13-18.) Although____’s mother and grandmother testified that Ms. Hart and Ms. Young had told them that ____needed to be placed at TLC, their testimony was very confused and they

seemed to be mixing the various meetings and conversations regarding ___together. Accordingly, the Hearing Officer finds the testimony of the District staff members to be more credible.

12. In addition, all of the District staff members testified about the length of the October 12th meeting and the wide variety of options and issues that were discussed. The recordings of part one and part two of the October 12th IEP meeting found in District Exhibit 6 corroborate this testimony. The placement at TLC was not the only option that was discussed during the October 12th IEP meeting. The team also discussed Ms.____'s request to place ___half time in regular education and half time in special education and the possibility of leaving him in his placement in the behavior support classroom at _____ Elementary. Ultimately, *Ms. _____ signed consent for the placement at TLC*, even though she disagreed during the IEP meeting. (Dist. Ex. 5.) Accordingly, the Hearing Officer finds that the District did not predetermine the placement of ___at TLC.

13. Finally, the Hearing Officer notes that Ms.____'s requested remedy was that she wanted a fair hearing. The Hearing Officer finds that Ms. _____ has received a fair hearing.

DECISION

The Hearing Officer finds the evidence presented at the Due Process Hearing does not establish, by a preponderance of the evidence, that the School District, or any members of the staff or administration, pre-determined the educational placement of ___prior to any of the IEP meetings held by the parent and District. IDEA requires that parents are members of the IEP team and that the District made every effort to ensure Ms.____'s participation in the various IEP meetings for E.H.. Accordingly, the Hearing Officer finds for the District.

The issue of mootness, while established in the District's presentation and arguments, is not necessary for determination due to the finding that the District did all that the IDEA requires for a fair and impartial involvement of the parent and was without pre-determination.

IT IS SO ORDERED this 25th day of July, 2016.

Orig. signed/James G. Beasley

James G. Beasley

Hearing Officer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of July, 2016, a true and correct copy of the above and foregoing **Findings of Fact & Conclusions of Law** and decision was sent via e-mail, facsimile and properly addressed to:

Parent

Sarah J. Loquist, KS

Attorney for U.S.D. ____

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Orig. signed/ James G. Beasley

James G. Beasley

Hearing Officer