

BEFORE THE HEARING OFFICER

IN THE MATTER OF THE)
DUE PROCESS HEARING FOR)
) and) USD

#11DP

NOTICE OF HEARING OFFICER'S DECISION

NOW on this 31st day of January, 2011, this matter comes before the Special Education Due Process Hearing Officer for Decision.

I. PROCEDURAL BACKGROUND:

On November 5, 2010, Petitioner, USD , filed a Notice to Parents of Special Education Due Process Hearing. In its notice, Petitioner sought a determination that the IEP dated September g, 2010* and completed on September 22, 2010, will provide the student with a free and appropriate public education and that Petitioner's proposed placement in a self-contained classroom is the least-restrictive environment for the IEP to be carried out.

On December 1, 2010, a Prehearing Conference was conducted by telephone. Participating in the Prehearing Conference with the Hearing Officer was Tammy M. Somogye, Esq., for Petitioner, U.S.D. , and Respondent's attorney, Scott Wasserman, Esq., of Scott Wasserman & Associates, LLC. Also appearing were 's parents,

I. At the conclusion of the Prehearing Conference, it was determined that a due process hearing would be held on January 18 through January 21, 2011, from 8:30 a.m. to 4:30 p.m. each day. The hearing was scheduled to be heard at the

:Center in Kansas.

On December 3, 2010, a Supplemental Prehearing Conference Order was entered, resulting in extending the time of the written decision due date to January 31, 2011.

On January 6, 2011, a telephone conference hearing was held to consider Respondent's Motion to Dismiss and Motion for Continuance, and on Petitioner's Opposition to the Motions.

Following oral argument, the Hearing Officer denied Respondents' Motions.

On January 11, 2011, the Hearing Officer reviewed and approved Mr. Scott Wasserman's proposed Order Permitting Withdrawal. On the same date, the Hearing Officer received a student withdrawal notice executed by indicating that the parents intended to withdraw from the School District on January 11, 2011.

On January 12, 2011, 's parents submitted Respondent pro se Motion to Dismiss and Renewed Motion for Continuance. Once again, Petitioner opposed the Motions. On January 14, 2011, the Hearing Officer issued a written decision finding that the due process rights of both and the District would be prejudiced if the hearing was not conducted as scheduled. The Hearing Officer encouraged both parties to attend and fully participate in the hearing.

Evidentiary hearings were conducted on January 18 and 19, 2011, at the Center in , Kansas. Petitioner was represented by its legal counsel, Tammy M. Somogye. The parents for Respondent appeared pro se. Appearing as witnesses for Petitioner USD were Joan , Jennifer , Jo, Lee Stickle, and Robin.

At the conclusion of the hearing, both parties were authorized by the Hearing Officer to voluntarily submit oral arguments and/or findings of fact and conclusions of law by noon on Thursday, January 27, 2011. The decision of the Hearing Officer will issue no later than Monday, January 31, 2011.

II. FINDINGS OF FACT.

1. ("") attended Elementary School ("") and was in the fourth grade during the 2009-2010 school year. (Exhibit 1.)

2. The staff at has been trained to work with Autistic students, including how to work with specifically, (Jennifer, Tr. Vol. I, 172:20-174:12.) The training included Positive Behavioral Support, Functional Behavioral Assessment, Data Collection, Autism Spectrum Disorder, Effective Visual Strategies, Autism and Safe Bus Transportation, Bus Personnel, Communication/Behavior Disorders Program. (Jennifer, Tr. Vol. I, 172:20-

173:13).

3. Near the beginning of his fourth grade school year, parents consented to an Individual Education Plan ("IEP") dated September 8, 2009. (Exhibits 1-2.) This IEP contained goals relating to reading comprehension, math computation, receptive language (questions and following directions), pragmatic language, independent work habits, and written language. (Id.; Joan, Tr. vol. I, 36:17-22; 37:12-38:11; 47:12-10.)

4. The September 8, 2009 IEP also called for to be assessed using the Kansas Alternate Assessment, as he had been for third grade, which is based on functional curriculum. (Exhibit 1; Joan, Tr. Vol. I, 39:16-20; 40:15-41)

5. The September 8, 2009 IEP also contained a Behavior Intervention Plan ("BIP"), which addressed the challenging behaviors of elopement and aggression. (Exhibit 1.)

6. A BIP outlines, among other things, behavioral supports and strategies to increase the likelihood of appropriate behavior and decrease the likelihood of inappropriate behavior and the replacement behaviors staff are going to teach the student. (Jennifer, Tr. Vol. I, 191:12.) The BIP identifies what the target behaviors are that are observable and measurable, including frequency, duration, intensity, and measurable data in regard to the specific target behavior. The BIP also identifies what are the predictors, when is the behavior most likely to occur and under what circumstances is it least likely to occur. The BIP also looks at what positive behavioral supports need to be put in place to increase the likelihood of appropriate behavior and decrease the likelihood of inappropriate behavior. (Jennifer

, Tr. Vol. I, 190:11-1

7, on November of 2009, as part of a review process to ensure students' IEPs meet the criteria for the Kansas Alternate Assessment, assessment was changed from the Kansas Alternate Assessment to the Kansas Assessment with Modified Measures ("KAAM"). The KAAM is modeled after the general education assessment, but there are certain indicators that are not included and there are less answer choices for the student to choose from. parents signed consent for that change. (Exhibit 6; Joan, Tr. Vol. 41:12-22; 42:10-21; 43:3-44:6.)

8. During the course of the school year, engaged in aggressive behavior with school staff. (Exhibit 12; Joan, Tr. Vol. I, 56:9-13; 57:1-16.) For instance, on August 18, he pinched staff. (Exhibit 12 at []0015880.) On August 25, 2009, he hit a paraprofessional in the face. (Exhibit 12 at []001586.) On August 26, 2009, he kicked a paraprofessional. (Exhibit 12 at D 001586.) On August 27 and 28, 2009 he hit a paraprofessional. (Exhibit 12 at D001586, D001585,) on September 8, 2009, hit a paraprofessional on the arm and in the face. (Exhibit 12 at D001583.) On September 9, hit a paraprofessional. (Exhibit 12 at 0001583.) On a day between September 11 and September 22, pinched and hit a paraprofessional. (Exhibit 12, D0001583.) on September 28 and 30, .. pinched a paraprofessional. (Exhibit 12, .D001582.) on September 30, tried to hit a teacher twice. (Exhibit 12, ,D001582.) on October 1, 6, and 7 pinched a paraprofessional. (Exhibit 12, 10001580, 0001579, D0001577.) On October 8, . 0001578.) On October 14, neck and pushed her. (Exhibit 12,

pinched and hit a [redacted] a paraprofessional and also put his arms around her paraprofessional. (Exhibit 12, hit "D001577.) On October 22, he tried to hit a [redacted] paraprofessional. (Exhibit 12, 'D001575.) On November 23, December 7 and December 9, he hit a paraprofessional. (Exhibit 12, 0001566, D001564.) On December 9, he head butted a paraprofessional's arm, (Exhibit 12, D001564.) On December 10 and 11 he hit a paraprofessional, (Exhibit 12, 0001561.) On January 29, 2010, he threw a ruler and it hit the teacher. (Exhibit 12, 0001556). On February 15, he hit a paraprofessional. (Exhibit 12, DOU 557.) On February 19, he hit and pinched a paraprofessional. (Exhibit 12, D001555.) On February 26, he licked his fingers and hit a paraprofessional with them. (Exhibit 12, 01554.) On March 3, tried to pinch and then head butted a paraprofessional, (Exhibit 12, 01554.) On March 4, continued to try to pinch a paraprofessional and patted her on the bottom. (Exhibit 12, D001554.) on March 9, hit school staff. (Exhibit 12, ,D001551.)

9. [redacted] physical aggression increased dramatically from March 10 to May of 2010,

The data collected identifies multiple acts of aggression towards others, which is defined as hitting, kicking, slapping, etc. as follows:

Date	<u>Number of Acts</u>	<u>Exhibit 12 at</u>
3/10	4	0001551
3/11	6)'D001551
3/16	12	D001547
3/24	4	0001547
3/25	13	ID001547
3/26	9	D001547

3/29	6	D001547
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3/30	9	'D001547
3/31	7	iD001547
	22	D001547
4/5	16	D001541
	7	<u>D001541</u>
	15	0001541
4/8	14	D001541
	13)001541
4/12	7	D001538
4/13	12	D001538
4/14	9	<u>D001538</u>
4/15	4	;D001538
4/19	27	D001534
4/20	1	D001534

4/21	20	0001534
4/22	3	iD001534
4/23	13	D001534
4/27	14	-D001530
4/28	6	hD001530
4/29	9	0001530
4/30	14	<u>D001530</u>
5/3	1	D001528
5/6	10	<u>001528</u>

5/18	8	0001524
5/19	1)001523
5/20	4	0001522
5/21	5	D001521
5/24	2	
5/25	20	D001520 åD001519-1520

10. During the course of the school year, also hit or shoved other students. This occurred on September 11, September 30, October 22, and December 14. (Exhibit 12 at 10001583, D001581, D001562.)

11. s' three-year re-evaluation, which was scheduled to take place in the Fall of 2010, was moved up to the Spring of 2010 because of how concerned school staff was about his behavior. (Exhibit 8; Joan, Tr. Vol. 1, 50:13-51:8.) , parents consented to the proposed evaluation, (Exhibit 9; Joan, Tr. Vol. 1, 51:24-52

12. During the evaluation period, had several aggressions towards staff. He was not cooperating and following directions, he was running out of the classroom and being disruptive and not learning. (Joan, Tr. Vol. 1, 54:3-6). During the same evaluation period, received three days of Out-of-School Suspension. He was suspended from May 7 to May 10 for throwing a desk (which hit another studentb hitting staff members, urinating in public, and leaving the building without permission. (Exhibit 10; Joan, Tr. Vol. 1, 53:22-55:3.) He was also suspended on May 11 for exposing himself in the hallway. (Exhibit 11; Joan , Tr. vol. 1, 55:7-19,)

13. The School District generated a Re-Evaluation Report, which is dated May 21, 2010

and which was reviewed at a meeting with Mr. and Mrs. (Exhibit 14; Joan, Tr. vol. I, 58:4-8; 58:18-59:3; 59:15-65:14.) It indicates that. inappropriate behaviors were at a very high rate. In addition to the 306 incidents of physical aggression (averaging 9 incidents per day over the course of 34 data days), he engaged in 546 incidents of disruptive behaviors, which is defined as yelling, falling to the floor, verbal outbursts, throwing items, knocking items over, opening doors and flipping lights off (averaging 16 incidents per day over the course of 34 data days), and 223 incidents of elopement, which is defined as leaving the assigned area without adult permission (averaging 7 incidents per day over the course of 34 data days). (Id.)

14. This data suggests that. was not under instructional control. (Jennifer, Tr. vol. I, 201:8-202:25; Lee Stickle, Tr. vol. I, 222:16-2

15, To address behaviors, the School District proposed a new IEP for him, (Exhibit 15; Joan, Tr. Vol. I, 70:1-4; 70:19-71:11.) The CEP contained a behavior goal in addition to goals addressing language (responding to questions), communication (expressive language and social), independent work habits, reading comprehension and Math. (Exhibit 15; Joan, Tr. vol. I; 69:2-14; 70:19-71

16. The goals in the June 7, 2010 IEP are more functional in nature than the previous IEP. (Exhibit 15; Joan, Tr. Vol. 69:2-14.)

17. Because the goals were more functional in nature and performed much worse on the KAMM (as compared to the Alternate Assessment he took his third grade school year), the IEP called for to be given the Alternate Assessment, (Exhibit 13; Joan, Tr.

vol. I, 41:4-11;46:15-47

18, The June 7, 2010 IEP also contained a BIP, which was tied to the behavior goal aimed at reducing the physical aggression he had exhibited since March. (Exhibit 15; Joan, Tr.

vol. I,70:19-71

19. The School District recommended a change in placement for ; at the June 7, 2010 IEP meeting because the least restrictive environment in which the tEP and BIP could be implemented was a self-contained communication behavior disorder classroom which was needed to increase services for him to make better progress. (Joan, Tr. Vol. I, 65:2066:18; Jennifer, Tr. Vol. t,181:18-182:1; 191:16-192:15.)

20. A self-contained communication behavior disorder classroom is a unique setting designed for students with Autism. There are a small number of students assigned to the classroom and they are taught by highly skilled and highly trained teachers who have experience in working with students with Autism, along with several paraprofessionals who are under the teacher's direct supervision, (Robyn, Tr. Vol. II, 279:5-282:6.) The teacher supervising the classroom can make immediate changes in strategies and instruction to minimize students' inappropriate behaviors and to de-escalate behaviors should they occur. (Robyn, Tr. Vol. I', 281:24-285:9.) Moreover, students in a communication behavior disorder classroom have 1:1 instruction and opportunities to practice their skiits in a community setting. (Robynéltner, Tr. Vol. II, 286:11-287:4; 288:4-7.)

21. The data in the re-evaluation report dated May 21* 2010 indicated that has significant needs and supported the recommended change of placement to a self-contained . communication disorder classroom, (Robyn, Tr. Vol. II, 292:20-293:6; Jo,

Tr. Vol. I,208;15-2

22. parents would not consent to the IEP. (Exhibit 16; Joan, Tr. Vol. I, 72:25-73:5.)

23. attended Extended School Year ("ESY") during the summer of 2009. His ESY services were delivered four times per week for two hours per day in a self-contained communication behavior disorder classroom setting at Elementary School* (Joan, Tr. vol. I, 73:6-24; 71:6-15; 77:6-12.)

24. The communication behavior disorder classroom setting was chosen because it would provide , with the structure and highly supervised setting he needed to receive instruction to maintain his skills, there were limited transitions, and the staff working with would be under the supervision of one teacher. (Jennifer, Tr. Vol. I, 182:10-183:9.)

25. During four-day per week ESY services, his disruptive behaviors dropped dramatically. (Exhibit 17; Joan, Tr. vol. I, 77:13-7)

26, seemed happy in the communication behavior disorder classroom setting during ESY and he was able to demonstrate some behavioral changes. Staff were beginning to gain instructional control of and he was more compliant with adult directions. (Jennifer , Tr. vol. I, 183:16-186:2; 188:4-9.)

27. returned to for the 2010-2011 school year. in an attempt to support at , the School District had a certified special education (resource room) teacher work with him nearly all day, instead of paraprofessionals, had the Autism Specialist increase her observations and interactions with service providers, and increased the number of team meetings to analyze the data regarding behavior to determine what changes were necessary to address behaviors. (Joan, Tr. Vol. I, 2-84:13; Jo, Tr. Vol. I, 209:4-2)

28. It is unusual to have a Resource Room Teacher work with only one student, Typically

she is responsible for serving many more students, but the team wanted to try to have one consistent person at _____ who had more education and training. (Joan, Tr. Vol. I, 2-84:12; Jo, Tr. Vol. I, 210:4-2)

29. Within the first couple of weeks of school, _____ was suspended for hitting two staff members. (Exhibit 19; Joan, Tr. Vol. I, 85:2-17.) Nonetheless, staff was not prepared to give up on the attempt to keep _____ in general education. (Joan, Tr. Vol. I, 85:13-17).

30. The School District held an IEP meeting on September 3, 2010 to try to _____ with Mr. and Mrs. _____ (Exhibit 18; Joan, Tr. vol. I. 84:17-19; 85:13-20.)

31. The team came to consensus on goals, with a positive comment from the _____ that these goals seemed to be addressing _____ problems. (Joan, Tr. Vol. I, 85:21-87:5.)

32. The goals are more functional because the re-evaluation data showed that is what he needed; he needs to be able to learn skills to help him be independent as he gets older. (Joan _____, Tr. Vol. I, 39:23-91:10. See also, Jo, Tr. Vol. I, 207:21-208:14 (discussing

_____ poor performance on the MAP test on the areas of reading and math; Exhibit 13).)

33. The team did not finish reviewing the IEP that was proposed on September 3, 2010 and another meeting was scheduled for September 22, 2010. (Exhibit 22; Joan, Tr. Vol. I, 91:17-92:2.)

34. The interventions and supports put in place at the beginning of the school year were not effective, (Jo, Tr. Vol. I, 209:16-211:16.) After the September 3, LEP meeting, _____' behavior escalated in frequency and intensity. (Exhibit 25; Joan, Tr. Vol. I, 95:17-96:2; 99:14-100:7.) For instance, on September 8, he hit his special education teacher and exposed

himself to her. (Exhibit 23; Joan, Tr. Vol. I, 96:8-15,) And, on September 7, ran out of the building multiple times and also hit a student in front of him in line.

(Exhibit 24; Joan, Tr. Vol. I, 97:12-

35. is rigid and does not have flexible thinking. remains anxious to control the environment, to have certain people respond in certain ways. He is time oriented, expecting events to happen at a certain time and/or with certain people and when his expectations are not met, he has extreme behaviors. For example, will refuse to do what is asked of him to move, to go on to the next event. (Joan, Tr. Vol. I, 35:7-22; 81:2-25; Jennifer, Tr. Vol. I, 178:13-23.)

36. Over the course of nine data days (from September 4 to September 21), he engaged in 392 instances of disruptive behavior (averaging to 43.5 acts per day) and 15 acts of physical aggression (averaging to 1.7 acts per day), and he eloped 21 times (averaging to 2.3 times per day). (Exhibit 25; Joan, Tr. Vol. I, 98:6-99:13; 124:2-10. See also, Joan, Tr.

Vol. I, 211:17-214:12 (describing observations of ' disruptive behaviors).)

37. The changes made to the September 3, 2010 IEP draft were included in an IEP draft presented to the at the September 22 meeting. (Exhibit 26; Joan, Tr. Vol. I, 92:22-25.) The final proposed IEP was sent to the parents for consideration. (Exhibit 27; Joan, Tr. Vol. I, 693:103.) The school members of the IEP team recommended that the least restrictive environment that the IEP could be implemented in was a self-contained setting, (Joan, vol. I, 93:7-94:19; 100:21-101:8; Jennifer, Tr. Vol. I, 193:1-3; 200:3201:3. See also, Robyn, Tr. Vol. I, 293:16-294:18 (testifying that the IEP/BEP could be implemented in a communication behavior disorder classroom, but not a general education or resource room setting) and (testifying that a communication behavior disorder classroom is the appropriate educational setting for).)

38. The did not consent. (Joan, Tr. Vol. I, 106:2-5.)

9. . . . behavior did not improve after the September 22, 2010 IEP meeting. On October 22, he bit both a paraprofessional and a teacher as he tried to elope from the classroom, (Exhibit 31; Joan, Tr. VOIL I, 107:9-20.) He was placed in In-School-Suspension and tried to eEope from that location three til¥les. (Id.). On October 26, received an Out-of-School Suspension for disruptive behaviors and pushing a staff member as she blocked his path during an attempted elopement. (Exhibit 32; Joan, Tr. Vol. I, 107:25-108:12.)

40. On November 4, 2010, received another Out-of-Schoot Suspension for hitting his special education teacher in the face. (Exhibit 114; Joan, Tr. Vol. I, 114:9-24,) Because ' parents did not pick him up right away and staff were having difficulties, Ms. Joan, Special Education Coordinator, went to to help.

During the time that Ms. was in the principal's office with . although he was being asked to engage in a preferred activity, he laid on the floor, tried to run from the office, refused to work and would not stay where he needed to be. At one time, Ms. took a break and the Principal took over . supervision. Upon returning a few minutes later, Ms.

saw running out to the playground. Ms. used compliance trajning (short directions that had a high probability of being followed) for 20 to 30 minutes (with prompts every 20 seconds) to get to cease dropping on the ground and to return to the building. (Joan, Tr. vol. I, 115:3-118:16; 164:6-165:15.)

41 The staff, including paraprofessionals and the Resource Teacher, cannot provide the intense instruction - like compliance training - on a daily basis. (Joan, Tr. vol. I, 118:17-

42. The School District filed for due process on November 5, 2010 to seek an appropriate

place for so he would be in a safe environment and could make educational progress.

(Joan, Tr. Vol. I, 119:4-8.)

43. The School District met with the on November 18, 2010 and shared the most recent data concerning ' behavior, From August 16 to November 17, 2010 (except 10 days on which no data was taken for a variety of reasons), the frequency count totals and averages for his various behaviors were as follows:

Disruptive behavior: 1710 total incidents, 28 average per day

Touching others: 309 total incidents, 5.5 average per day

Elopement: 188 total incidents, 3.1 average per day

Physical Aggression: 111 total incidents, 1.8 average per day.

. (Exhibits 35, 36, 38; Joan, Tr. Vol. I, 119:19-122:11; 123:2-10. See also, Jennifer , Tr. vol. I, 178:4-15.)

44. In addition, from data collected from November 1 to November 17, 2010 (with the exception of one day that no data was taken due to Out-of-School Suspension), the duration of time that ; was noncompliant (disruptive, physical aggression, elopement) averaged 60 minutes per day. (Exhibits 36 and 37; Joan, Tr. Vol. I, 122:12-123:19.)

45. Another IEP meeting was held on December 2, 2010. Another proposed was shared with the This IEP updated the present levels of performance. (Exhibit 39; Joan , Tr. vol.I, 124:22

46. Data collected in the month of December of 2010 is consistent with the data from earlier in the 2010-2011 school year, (Exhibits 39 and 40; Joan, Tr. Vol. I, 124:22-125:25; 126:6-18.)

47. The School District is also concerned about safety at school. He runs out of

the building despite being asked to stop; he has run onto 79th Street to get into his mother's car

at dismissal; he barricades himself in the bathroom, where he could have a seizure or otherwise hurt himself outside of adult supervision; and he runs up and down stairs to get outside very

quickly and could fall or run into someone, and could fall or run into someone, including smaller

students. (Joan, Tr. Vol. I, 108:17-111:6; Jennifer, Tr. Vol. I, 193:5-1

48. A comparison of data collected during the first and second quarter Of the 2010-2011 school year shows a dramatic difference; ' behavior is more frequent. Disruptive behaviors increased from 24.5 to 37.4 per day; elopements increased from an average of 2.5 to 3.3 per day; and touching increased from an average of 3.4 to 11.3 per day. Aggressive behaviors did decrease from an average of 2.0 to per day. (Exhibits 40 and 41; Joan , Tr. vol. I, 126:1-1

9. ' behavior has interfered with his ability to make progress on his IEP goals, particularly the reading, math and independent work habits and language goals, (Joan, Tr. vol. I, 128:18-132:16.)

50. The IEP dated September 3, 2010/completed on September 22, 2010, addresses : needs in reading, math, independent work habits, language, learning to follow directions and behavior. (Joan, Tr. Vol. I, 133:8-135:25.)

51. On January 7, 2011, 's parents, through their attorney, first gave notice of their intent to withdraw him from school effective January 21, 2011. (Exhibit 43; Joan, Tr. Vol. I, 142:21-143:4.) They also communicated directly with the School District about their intent to withdraw s, completing paperwork necessary to accomplish that action. (Joan

, Tr. vol. I, 144:2-9.)

52. Lee Stickle, a former communication behavior disorder classroom teacher and the current director of the Kansas Instructional Support Network, observed on January 7, 2010, at Mr. and Mrs. request. (Joan, Tr. Vol. I, 136:1-18; Lee Stickle, Tr. Vol. f, 219:8-221:23; 225:21-226:6.) She observed him in the general education classroom, the resource room, the recess area/playground and the hallways for a total of two hours, (Lee Stickle, Tr. vol. t, 226:12-21.)

53. Ms. Stickle saw behaviors that typically displays during school days — laying on the floor in the hallway, refusals to comply with adult direction, work avoidance and aggression. (Lee Stickle, Tr. Vol. I, 226:22-231:1; 232:9-24; Exhibit 47; Joan, Tr. Vol. I, 136:1-15; 137:24-138:4; 138:23-139:2; Jennifer, Tr. Vol. 194:17-24.) Moreover,

has "chained" behaviors together that consistently recur, making it particularly difficult to change them. (Lee Stickle, Tr. Vol I, 238:4-241:2.)

54. In addition to her discussion about problematic behaviors, Ms. Stickle expressed concern about _____, lack of ability to interact with the fifth grade curriculum. (Lee Stickle, Tr. Vol. I, 241:16-244:9.) Ms. Stickle learned that _____ consistently has trouble transitioning to the General Ed classroom. (Lee Stickle, Tr. Vol. I, 232:9Q4).

55. Ms. Stickle opined that _____ current program is not meeting his needs. (Lee Stickle, Tr. Vol. I, 262:1-16.)

56. Ms. Stickle recommended that _____ receive 1:1 intense direct instruction, that he have limited transitions until he is under instructional control, that his rate of positive reinforcement is dramatically increased, and drastic changes occur to establish a new chain of behaviors. (Exhibit 47; Lee Stickle, Tr. vol. I, 244:13)

57. School staff concur with Ms. Stickle's recommendations. (Joan, Tr. Vol. I, 142:6-9; Robyn, Tr. Vol. II, 298:22-3)

58. Ms. Stickle's recommendations cannot be implemented in a general education setting. (Robyn, Tr. vol. II, 296:9-22; 299:11-302:14. see also, Lee Stickle, Tr. vol. I, 236:8-19; 246:19-2)

59. Ms. Stickle's recommendations can be implemented in a communication behavior disorder classroom setting* (Robyn, Tr. Vol. II, 280:4-281:23; 299:11-302:14. See also, Lee Stickle, Tr. vol. I, 236:8-237:16; 246:19-253:1.)

60. A communication behavior disorder classroom is designed to address the kinds of behavior described in Ms. Stickle's report, (Robyn Fefnerp Tr. Vol. I, 298:22-2)

61. A self-contained setting will suit _____ needs better than the general education

setting because the teacher is specifically trained to help students with behavioral needs. If there is additional adult support in the classroom, there is a smaller class size and the setting provides the opportunity to gain and maintain instructional control over the student so that learning of replacement behaviors and educational curriculum can take place. (Joan, Tr. Vol. I, 118:17-119:3; 161:20-162:9; Jennifer, Tr. vol. I, 179:24-181:13; 186:21-187:21; 188:4189: 7; Robyn, Tr. Vol. II, 280:4-285:9.) Moreover, the staff working with the student in a self-contained setting will be able to teach him flexibility and to suspend time — allowing them to work through the disruptive behavior and return back to the task that caused the disruptive behavior so that the student's inappropriate behavior will not be reinforced by avoiding the task. (Ida; Joan, Tr. Vol. I, 79:16-82:21; 161:24-162:9; Jo, Tr. Vol. I, 215:3-

62. It provides a safer environment for the student in a variety of ways. (Joan, Tr. Vol. I, 145:6-24; Robyn, Tr. vol. I, 296:23-2

63. There is nothing that could be tried in the general education setting that would enable staff to gain instructional control and decrease the student's inappropriate behavior and enable the student to make progress on his goals and learn appropriate curriculum, (Joan, Tr. vol. I, 142:10-20; 157:14-23; Jennifer, Tr. vol. I, 194:25-195:7; Jo, Tr. vol. I, 214:13-

64. Changing the staff who work with the student at school will not teach the student how to behave differently. (Joan, Tr. Vol. I, 160:12-161:19; Jennifer, Tr. Vol. I, 192:16-25.)

65. The general education setting cannot be flexible to meet the student's needs, cannot provide the level of one-on-one instruction that he needs and cannot limit transitions. (Joan

, Tr. Vol. I, 142:10-20.) It cannot provide with a free and appropriate public education. (Jennifer, Tr. Vol. I, 181:18-182:1; 200:18-201:3.)

66. Also, the nature of an elementary school without the self-contained setting is not

conducive to stopping time and returning to the event that caused the disruptive behavior*

Considering that at times it can take 20 to 30 minutes to get to demonstrate blips of

compliance, more often than not the rest of regular education class has already moved on to another task. (Joan, Tr. vol. I, 79:16-82:21; 145:25-147:16; 161:20-162:9;

Jennifer, Tr. Vol. I, 170:25-171:7; 179:3-23; 184:11-

67. Because is very time oriented and is so tied to the routines at,

expecting certain events to happen at exactly a certain time, increasing time in the resource room for instruction would cause him to be so concerned about what typically occurs at that time, he could not attend to the tasks presented to him. (Joan, Tr. Vol. 5, 79:16-8

145:25-147:16; 161:20-162:9; Jennifer, Tr. vol. I, 170:25-171:7; 179:3-23; 184:11-186:2)

68. inability to adjust to a new routine at was made clear when, nt the request of parents, school staff attempted to have him ride the bus home instead of

with his mother. (Joan, Tr. Vol. I, 111:19-114:8; Jennifer, Tr. Vol. t, 184:11-

186:2; 193:16-

69. Every witness that testified about the 'EP dated September 3, 2010/compteted September 22, 2010 opined that it will provide . with a free and appropriate public

education and will positively impact ' behavior and academic growth* (Joan, Tr.

vol. I, 144:10-148:22; 157•5-13•, Jennifer, Tr. Vol. I, 195:8-196:12; Jo, Tr.

Vol. I, 215:3-21

70. These witnesses have significant experience and education regarding working with Autistic students and are qualified to offer such an opinion. (Joan, Tr. Vol. E, 29:11-33:15; Jennifer, Tr. vol. I, 167:7-170:11; Jo, Tr. vol. I, 206:17-2 Robyn r-eltner, Tr. vol. II, 277:13-279:4; Exhibits 44, 45, 46,)

71. The IEP dated September 3, 2010/completed September 22, 2010 contains goals that are more appropriate to [redacted] level of functioning and has him receiving services in an alternate instruction program to minimize transitions, work on behavior and where the BtP can be implemented. (Joan, Tr. Vol. I, 144:10-25. See also, Robyn, Tr. Vol. II,

6-294:18(testifying that the IEP/BIP could be implemented in a communication behavior disorder classroom, but not a general education or resource room setting))

72. Moreover, the communication behavior disorder classroom has been a successful placement, historically, for students educated there, (Lee Stickle, Tr. Vol. I, 262:7-263:14; Robyn, Tr. vol. II, 288:11-290:14; 298:25-299:10; 310:3-8; 310:21-311:9.) For example, if a positive behavioral reinforcement, such as swinging, is given to [redacted] in a regular education classroom, he would miss the instructions to complete the next assignment. In a behavior disorder classroom, [redacted] would be afforded one-on-one instruction which would essentially stop time for the positive reinforce to permit the instruction to be ongoing. (Lee Stickle, Tr. Vol. I, 246:21-248:11).

III. CONCLUSIONS OF LAW.

1. That the Hearing Officer has jurisdiction to consider the Petitioner's Due Process Request pursuant to K.S.A* 72-972a.
2. That the due process hearing was held in accordance with K.S.A. 72-973(b).

3. That the IEP Team considered the items enumerated in K.S.A. 72-987(d) in developing the IEP and the Behavioral Intervention Plan (BIP) dated September 3, 2010, and completed on September 22, 2010.

4. That the IEP dated September 3, 2010 and completed on September 22, 2010, placing [redacted] in a self-contained educational setting will provide him with a fair and appropriate public education in the least-restrictive environment in compliance with K.S.A. 72-987(c).

5. That the Behavioral Intervention Plan that is part of the IEP dated September 3, 2010, and completed on September 22, 2010, is appropriate for and that the same IEP and Behavioral Intervention Plan will be in effect immediately and for the entire 2011/2012 school year unless modifications are needed to provide with a free and appropriate public education.

6. That anyone seeking to change the IEP or Behavioral Intervention Plan, request an IEP meeting and follow the procedures called for in the IDEA and the Kansas Special Education Act.

7. That the IEP and Behavioral Intervention Plan dated September 3, 2010, and completed on September 22, 2010, will be in effect immediately upon any final ruling in this matter. After a final ruling, [redacted] will be educated in a self-contained classroom if he is still enrolled in the School District or if he re-enrolls in the School District in the future.

IV. DECISION

Following the review of the testimony and exhibits and having set out about extensive Findings of Fact and Conclusions of Law, the Hearing Officer has determined that the IEP dated September 3, 2010* and completed on September 22, 2010, will provide with a free and appropriate public education and that the school district's proposed placement in a self-contained classroom is the least restrictive environment in which to carry out the IEP.

[redacted] parents attended the due process hearing and, with the exception of opening and closing arguments, did not testify or offer any witnesses or exhibits. While it was stated to the Hearing Officer that Mr. and Mrs. [redacted] were not satisfied with current educational placement, they provided only a general response when requested whether they had a

recommendation. Mr. : stated that "the Team could be changed out and approaches could be changed [and] outside expertise could be brought in...." "I think the Team should be challenged with cleaning up its' own mess and taking this little boy as far as he can go." In marked contrast to the oral statements proffered during the hearing, Mr. and Mrs. in a letter addressed to the Hearing Officer dated January 27* 2011, suggested several potential placements:

1. Intense 1:1 academic instruction at Elementary for the acquisition of new skills and to close the educational gap between him and his non disabled peers. Molly Pomeroy, BCBA or someone with comparable skills and experience to develop, implement a Behavior Intervention Plan (BIP), oversee the plan and train staff at Elementary.
2. Private placement at with support from BCBA and supplemental services and transportation if necessary.
3. A program that is researched based and proven successful in providing services to children with Autism.
4. A Home-based ABA program of approximately 25-30 hours per week overseen by a BCBA, with an educational curriculum and supplemented with related services.

Unfortunately, absolutely no testimony was elicited during the due process hearing that would support any of the four suggestions contained in Mr. and Mrs. s letter.* The testimony is clear that the District made educational recommendations/decisions based upon the individual needs of . The District's recommendation of a placement in a self-contained classroom is further supported by the progress that achieved when placed in a

similar classroom situation during his extended school-year placement last summer. There is a high probability that the placement recommended by the District will greatly enhance [redacted] ability to learn, reduce negative behaviors and to improve his socialization skills with his fellow students.

It is also clear from the testimony in this case that simply changing the staff who are working with [redacted] at [redacted] will not allow him to progress educationally or behaviorally. Under the IDEA, a school district is not required to duplicate a highly specialized program for a student merely because there exists a base school which is closer to the student's home or one that parents would prefer their child to attend. See, e.g., *Urban by Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 728 (10th Cir. Colo. 1996) [redacted] that neither the IDEA nor Section 504 requires school districts to modify a school program for a single child in order to ensure neighborhood placements, especially if that child is already receiving educational benefits in another environment); *R.K. v. Bd. of Educ.*, No. 5:09-344-JMH, 2010 U.S. Dist. LEXIS 132930, at *18-19 (E.D. Ky. Dec. 14* 2010) (concluding that neither the ADA nor the Rehabilitation Act require "school districts to modify school programs in order to ensure neighborhood placements when necessary services and a free and appropriate education are available at another site within the district"); *Barnett v. Fairfax County School Board*, 927 F.2d 146, 151-152 (4th Cir. 1991) (affirming administrative hearing officer and district court's ruling that placed a child at a speech program centrally located at a particular high school •within the district, pointing out the educational, financial and resource advantages of centralizing such a program and emphasizing that the law simply mandates an education that is responsive to the child's needs and then leaves the substance and details of that education to state and local school officials: "[w]hether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination that state and local school officials are far better qualified and situated than are we to make"). See *T. W. vs. Unified School District No. 259*, 136 F.3d 122 (10th Cir. 2005) (allowing a self-contained placement for a student with down syndrome).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the findings and decision made herein should be and shall become the Order of the Due Process Hearing Officer.

IT so ORDERED.

January 31, 2011.

Date



Larry R. Rute, Hearing Officer

CERTIFICATE OF MAILING

I, Larry Rute, hereby certify that I have served a true and correct copy of the foregoing Notice of Decision of Hearing Officer dated January 31, 2011, upon the following:

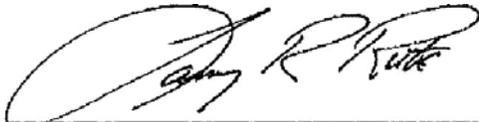
Ms. Tannmy Somogye

Lathrop & Gage LC

Via e-mail to: tsomogye@athropgage.com

Via e-mail to: _____

this 31st day of January, 2011.



Larry R. Rute