

BEFORE THE SPECIAL EDUCATION DUE PROCESS HEARING OFFICER

In the Matter of the Due Process,)
Hearing for)
)
U.S.D. __, _____)
)
and)
)
J.R.)
)
_____)

Case No. 17DP__-001

NOTICE OF HEARING OFFICER'S DECISION

NOW on this 7th day of September, 2017, this matter comes before the Special Education Due Process Hearing Officer for decision. The term "District" will be used to indicate USD __, _____.

I. PROCEDURAL BACKGROUND.

The following represents significant dates in the procedural history of this matter:

- (1) April 24, 2017.....District filed Request for Special Education Due Process Hearing.
- (2) May 12, 1017Due Process Hearing Officer notified of his selection.
- (3) June 16, 2017.....Due Process Hearing Officer issued Pre-Hearing Conference Scheduling Order.
- (4) June 22, 2017.....Due Process Hearing Officer issued Second Pre-Hearing Conference Scheduling Order
- (5) July 17, 2017Due Process Hearing Officer issued Third Pre-Hearing Conference Scheduling Order.
- (6) July 24, 2017Due Process Hearing, _____, Kansas

- (7) August 9, 2017District Requests Extension of Time for Filing of Findings of Fact and Conclusions of Law.
- (8) August 10, 2017.....Due Process Hearing Officer grants extension of time until August 21, 2017, for the District to file Findings of Facts and Conclusions of Law
- (9) August 22, 2017.....District requests additional extension of time to submit Findings of Facts and Conclusions of Law until August 28, 2017.
- (10) August 23, 2017.....Due Process Hearing Officer grants extension of time until August 28, 2017, for the District to submit Findings of Fact and Conclusions of Law.

II. ISSUES.

The following represents the legal issue established by the Due Process Officer in connection with the due process hearing held July 24, 2017:

The District has proposed a substantial change in placement of more than 25% and the Parent has refused consent twice on February 7, 2017, and April 7, 2017.

The District has proposed to increase the student's special education pull-out services from 300 minutes a week to 420 minutes, five days/week. This change in placement was proposed due to the student's significant behavioral needs.

The District is seeking an Order from the Hearing Officer allowing the change in placement for the increased amount of time in special education.

III. FINDINGS OF FACT:

A. K. L., Principal at _____ Elementary

1. Mr. L. is the principal at _____ Elementary. (Tr. at 15, ln. 1-2.) He has held that position for the past three and a half years. (*Id.* at 15, ln. 15-18.) He holds a bachelor's degree in education and a master's degree in leadership administration. (*Id.* at 15, ln. 3-4.) He is licensed as an administrator for grades K-12 and as a PE teacher for grades K-12. (*Id.* at 15, ln. 6-14.) He has been with the _____

school district for a total of 26 years, 13 of which have been as an administrator. (*Id.* at 15, ln. 19 – 16, ln. 6.)

2. _____ Elementary has approximately 581 students in the building. Of those students, they have 56 percent that are on free and reduced lunch. They have 57 percent of their students who are Caucasian, and 43 percent of their students are minority members. The elementary school is currently grades kindergarten through five. They have five sections of first and second grade and four sections of every other grade. (*Id.* at 16, ln. 12-22.)

3. J.R. started at _____ Elementary last school year as a first grade student, along with 105 other students. (Tr., at 17, ln. 1-13.) J.R. had already been at two other elementary schools prior to that. (*Id.* at 18, ln. 1-11.)

4. At the beginning of the 2016-2017 school year, J.R. was placed in Mrs. S.' first grade classroom with J. T. as his special education teacher. (*Id.* at 20, ln. 10- 16.) At that point in time, he was there for the very beginning of the day, the end of the day and then he would come down right before lunch and go with his class to lunch. (*Id.* at 20, ln. 17-22.) J.R. struggled being in a large classroom with that many children and also struggled with transition times. (*Id.* at 20, ln. 24 – 21, ln. 5.) J.R.'s parent had requested that he be placed in Mrs. Ss' classroom because Mrs. S.s attended the same church and already knew J.R. (*Id.* at 21, ln.6-17.)

5. Mrs. Ss' classroom had approximately 25 students in it. (*Id.* at 26, ln. 14-16.) Although they had initially increased J.R.'s time in Mrs. S.s' classroom (Ex. 60), between Thanksgiving and Christmas J.R. started having more anxiety and did not want to go into Mrs. S.s' classroom. As a result, the team decided to switch him to a different first grade classroom with M.F., a teacher who had a different classroom management style. (Tr., at 25, ln. 19 – 27, ln.6.) About the same time, they also increased J.R.'s time in the special education classroom to 310 minutes and made changes to his behavior plan. (*Id.* at 29, ln. 2-8; Ex. 56.) However, two days a week, J.R.s special education minutes were only 250 minutes because he received services from the Guidance Center while at school. (Tr. at 29, ln. 9 – 30, ln. 1.)

6. J.R.'s behaviors did not change much after he changed first grade classrooms. Loud noises and a lot of movement in the classroom seemed to raise his anxiety. Sometimes, J.R. would elope from the classroom. Other times, he would lay down on the desk or other people's spaces. J.R. would also knock over chairs in the classroom and rip things off the classroom walls when he became frustrated. (*Id.* at 30, ln. 7-24.)

7. J.R.'s behavior scared the other students at times. When he became aggressive, they would move away from him. Some of the other students would ask not to sit at his table because they felt intimidated. At recess and P.E., J.R. became physically aggressive with other students. In the special education classroom, J.R. would knock over dividers that he had previously built around himself into an office space. There were times they had to clear the entire classroom because J.R. had become physically aggressive and they needed to give him time to de-escalate. (*Id.* at 30, ln. 25 – 31, ln. 24.)

8. On December 8, 2016, another IEP for J.R. was held to reduce his time in special education from 250 minutes two days a week to 210 minutes and on the other three days from 310 minutes to 273 minutes. This change was made at the mother's request to add a P.E. class for J.R. Around this same point in time, the parent had done a "transfer of power" with the staff in which everyone who worked with J.R. lined up and his mother explained that when he was at school he needed to follow their instructions and do what they ask. It worked for a few days, but then J.R. fell back into the same routine. (*Id.* at 32, ln. 23 – 34, ln. 5. *See also* Ex. 54.)

9. On January 10, 2017, a manifestation determination hearing was held stemming from an incident in P.E. in which J.R. hit another student in the chest and refused to follow directions. J.R. was angry about something and chose to hit the other student. It was determined that this was not a manifestation of his disability because J.R. is only identified as OHI for ADHD. (Tr. at 34, ln. 15 – 35, ln. 14; Ex. 50.)

10. On January 26, 2017, Mr. L. and some of his staff held a meeting with J.R.'s mother regarding an incident in which a report had been made to DCF. A staff member had reported seeing J.R.'s mother hit J.R. in the hallway of the school. The mother was very angry and made threats toward some of the staff members. (Ex. 42; Tr. at 36, ln. 1

- 37, ln.15.) As a result of those threats, J.R.'s mother received a no trespass letter. (Ex. 41; Tr. at 37, ln. 20 - 38, ln. 6.)

11. On February 7, 2017, another IEP meeting was held for J.R. At that meeting, they addressed parent concerns regarding a change in medication and the need to provide snacks due to an increase in appetite. (Tr. at 38, ln. 10 - 39, ln. 13.) In addition, the District proposed a change in placement for J.R. to a day school, proposed adding transportation, made some changes to his accommodations, and denied a parent request for a specific paraprofessional to be assigned to J.R. (Ex. 36; Tr. at 40, ln. 1 - 41, ln. 11.) J.R.'s mother did not give consent for the special day school placement. (Tr. at 45, ln.2-5.)

12. The District was recommending the day school placement because J.R.'s behaviors had continued to increase. They were not seeing an improvement in either his behavior or his academics, and they had already tried two different classrooms. (Tr. at 41, ln. 12-20.) At this point, J.R. had had two different general education teachers and two different special education teachers (due to maternity leave). Each time he was going to be changed to a new teacher, the District scheduled a transition period to allow the new teacher to start building a relationship with J.R. prior to the change and they made sure the new teacher reviewed the behavior plan and IEP prior to the change. (Tr. at 42, ln. 2 - 43, ln. 12.) The District had determined that J.R. would not be successful with a substitute special education teacher during his teacher's maternity leave and instead assigned him to the other special education teacher in the building, Mrs.F., who has a great deal of experience working with behaviors and who serves on the autism intervention team for the building. (Tr. at 43, ln. 13 - 44, ln. 13.) Mrs. F. was familiar with J.R. even prior to working with him because she was part of the SPED team that met every Friday to discuss caseloads and brainstorm accommodations for students. (Tr. at 44, ln. 14-21.)

13. On March 14, 2017, another manifestation hearing was held for J.R. because he had hit a teacher as he walked out the classroom door. Again, this was determined not to be a manifestation of his disability. (Tr. at 45, ln. 6 - 46, ln. 11; Ex. 31.) For services beyond his tenth day of suspension, J.R. was provided services at _____ school,

which is where they served students who had received long-term suspensions. (Tr. at 47, ln. 1-24; Ex. 30.)

14. Another IEP meeting was held for J.R. on March 28, 2017. At this meeting, the District again proposed placement at a special day school for 420 minutes per day, 5 days per week. They continued to recommend this placement because they had no ability to provide a self-contained classroom for J.R. at _____ Elementary. Again, J.R.'s mother did not consent to that placement. (Tr. at 48, ln. 3 – 50, ln. 3; Ex. 25; Ex. 24.) However, there were some accommodations to which both the District and J.R.'s mother did agree. (Tr. at 50, ln. 4 – 51, ln. 7; Ex. 23.) In addition, the District agreed to conduct a sensory profile of J.R., and his mother gave consent for that evaluation to occur. (Tr. at 51, ln. 12-25; Ex. 22.)

15. On April 26, 2017, another manifestation determination hearing was held for J.R. due to an incident in which he looked himself in the assistant principal's office while Mrs. S. was serving as principal of the day. When Mrs. S. unlocked the door and attempted to open it, J.R. was pushing against the door. J.R. fell, hit his head, and then kicked Mrs. S. in the leg. Again, it was determined that this was not a manifestation of his disability. (Tr. at 55, ln. 6 – 57, ln. 5; Ex. 72.)

16. All of the various disciplinary issues for J.R. from the 2016-2017 school year are reflected in the discipline log, which was admitted as Exhibit 73. (Tr. at 57, ln. 11-18; Ex. 73.)

17. Another IEP meeting was held on May 4, 2017. At this meeting, they agreed to try a shortened school day for J.R. and also reviewed an evaluation report. Even though the District staff still believed that J.R. needed to be placed at a special day school, they agreed to try a shortened school day because the behavior data showed he was having a lot of difficulty in the afternoon. (Tr. at 58, ln. 4 – 60, ln. 3; Ex. 16; Ex. 17.) In addition, the District agreed to provide indirect occupational therapy services and other accommodations. (Tr. at 60, ln. 16 – 62, ln. 9; Ex. 15.)

18. Mr. L. did not believe the shortened day improved anything academically for J.R. and did not improve his behavior in the school setting because he was

spending so much time 1:1 with either Mr. L. or Mrs. S, the assistant principal, just to try to get him through the end of the school year. (Tr. at 62, ln. 25 – 64, ln. 20.)

19. Having tried the shortened school day, Mr. L. continues to believe that J.R. needs a special day school placement to be successful. Mr. L. testified that, at a special day school, J.R. would receive direct instruction in a small environment, less distractions, and less noise. At the day school, J.R. would have only four or five other students in his classroom, which would allow him to develop the social skills he needs to be successful and then return to a general education classroom setting. (Tr. at 64, ln. 21 – 65, ln. 21.)

20. J.R.'s mother and grandmother left the hearing following the completion of Mr.L.'s testimony, but their advocate remained at the hearing to listen. (Tr. at 93, ln. 10-17.)

B. S.F., BCBA/Autism and Behavior Consultant

21. S.F. is an autism and behavior consultant for the District and is also a behavior analyst. She holds a bachelor's degree in psychology in elementary education, a master's degree in autism and behavior disorders, and completed the coursework to become a board-certified behavior analyst ("BCBA"). She holds licensure as a BCBA and is licensed as a teacher for grades K-8 in the areas of regular education and autism and behavior disorders. (Tr. at 94, ln. 9 – 95, ln. 1.) She has held her position as an autism and behavior consultant with the District since 2003, and has been a BCBA for two years. (*Id.* at 97, ln. 21 – 98, ln. 4.) She has worked for the District for a total of 22 years between her current positions and a previous teaching position. (*Id.* at 98, ln. 5-16.)

22. Ms. F. does some direct observations of students, especially when she first starts working with them, but much of her job involves working with the team for data collection, developing the behavior plan and making adjustments to the plan, identifying the function of the behavior, looking at the trends of the behavior, looking at antecedent strategies, changes to the student's environment, looking at the schedules of reinforcement,

and trying to determine what types of reinforcers should be used with the student. (Tr. at 95, ln. 11 – 97, ln. 19.)

23. Ms. F. has been working with J.R.'s team since he was in kindergarten before he was ever identified as a special education student. (*Id.* at 98, ln. 21 – 99, ln. 2.) At the time she received his file, he was at David Brewer Elementary, but that same week he transferred to Anthony Elementary. (*Id.* at 99, ln. 3-7.)

24. Shortly after Ms. F. was asked to start working with J.R., the District asked for consent to conduct an initial evaluation. The prior written notice for this was dated October 30, 2015. (Ex. 78; Tr. at 99, ln. 11-25.) Ms. F. was part of the team that conducted the initial evaluation for J.R., which determined that he was eligible for services under OHI due to his ADHD diagnosis and that he required special education services in order to be successful. As a result, they developed an IEP and a behavior plan for J.R. The IEP meeting to discuss the evaluation and determine eligibility for J.R. was held on February 24, 2016. (Ex. 76; Tr. at 101, ln. 5-21.)

25. J.R.'s first IEP placed him in general education for 120 minutes of his day and then placed him in special education pull-out for the rest of his day. (Ex. 74; Tr. at 104, ln. 1 – 105, ln. 6.) That IEP also contained a behavior plan which was written by Ms. F. She explained that J.R. would often have a "meltdown" when presented with redirection or transitions. Some of his behaviors during a "meltdown" included, in ascending order: tearing up and throwing things away, leaving his seat, spinning and running around the room, banging furniture against the wall, hitting people, and eloping. (Tr. at 105, ln. 11-21.)

26. At that time, J.R. was spending a significant amount of time in the recovery room. The recovery room is a place in the building where any student can go to decompress in a setting where there aren't academic demands placed on them. It is meant to be a calming environment in which students can pull themselves together and then return to the classroom. There are staff members specifically assigned to that room to work with the students. (Tr. at 106, ln. 1 – 107, ln. 9.) J.R.'s family reported that he misbehaved because he wanted to go to the recovery room and rest, so they built breaks into his behavior plan. Ms. F. noted the function of his behavior was escape to avoid

the task or overstimulation from the classroom. Accordingly, part of the behavior plan was to give him ways that he could escape appropriately without the need for misbehavior. (Tr. at 107, ln. 14 – 108, ln. 12.)

27. As part of that initial behavior plan, Ms. F. built in several antecedent strategies, which included: giving directions to the entire class instead of direct instructions to J.R., using timers so that he knew how long he had to complete a task, avoiding repeated individual instruction, giving positive feedback whenever he completed a task, making the classroom teacher the source of snacks and breaks, providing movement and heavy work breaks at specified times not due to behavior, giving him a safe spot to which he could escape, using an alternative quiet location to end the day, pairing images of his family with expectations they had for him, giving him two rest breaks during the day, giving him his own clearly defined space in which to work, and giving him affirmation statements using the same language used at home. (Tr. at 108, ln. 16 – 110, ln. 14.)

28. Ms. F. testified that the initial IEP and behavior plan was not particularly effective for J.R. There would be some better days, but he would still have issues when there were demands placed upon him or whenever he was told no. (Tr. at 110, ln. 19-25.)

29. On February 9, 2016, a manifestation determination hearing was held for J.R. while he was at Anthony Elementary, which Ms. F. attended. The incident at issue was one in which J.R. had been throwing classroom items and, when the recovery room teacher came to escort him to the recovery room, he hit her and shoved her. Ms. F. testified that J.R. was not being successful in the general education setting at that time. (Ex. 70; Tr. at 111, ln. 19 – 113, ln. 12.)

30. On March 3, 2016, the District held an IEP meeting to draft provisions to allow for the continuation of his educational services in the event that J.R. continued to be suspended. J.R.'s behavior had not been improving at this point. In addition, they added an accommodation for read aloud because it seemed like that might be one of his triggers. J.R.'s mother did give consent for the amendment. (Ex. 69; Ex. 68; Ex. 67; Tr. at 113, ln. 13 – 114, ln. 9.)

31. On April 28, 2016, another IEP meeting was held for J.R. At that time, they significantly increased his time in special education from 150 minutes total to 330 minutes total. They also added an accommodation for preferential seating. The IEP team increased J.R.'s special education time so much because J.R. was not making gains in his academics and his behavior continued to be severe. They were continuing to see aggression toward students and adults, as well as eloping from the classroom frequently. (Ex. 63; Ex. 62; Tr. at 118, ln. 3 – 120, ln. 4.) His behavior caused them to need to clear a classroom on a repeated basis. (Tr. at 120, ln. 8-17.) J.R.'s behavior was interfering with the education of the other students at Anthony Elementary every time they had to stop instruction, clear the classroom, and take students elsewhere. In addition, many of the students were afraid of J.R. because he would hit or become aggressive with them and it was not predictable. Ms. F. thought many of the students would have liked to have been friends with J.R., but they were afraid of how he would react. (Tr. at 120, ln. 18 – 121, ln. 5.)

32. Ms. F. provided training on the behavior plan and how to keep data for the behavior plan to the staff at Anthony Elementary and the staff at _____ Elementary. She observed that the staff at both schools kept the data consistently with the training and that the staff at both school were implementing the behavior plan “to the degree possible in a public-school setting.” She explained that, although the behavior plan calls for them to ignore the behavior when J.R. tears up a classroom, they also have to be cognizant of the fact that this means the other students are not receiving their education during the time that they have to clear the classroom. Accordingly, they may have to invite J.R. to leave and go to another location, but that provides some attention to the behavior and can serve to reinforce it. (Tr. at 122, ln. 20 – 125, ln. 21.)

33. Ms. F. was also present for the IEP meeting on February 7, 2017, at which the District had proposed a special day school placement for J.R. Ms. F. testified that they were looking at making that change in placement because they were continuing to see significant levels of behavior that were disrupting his ability to learn and to maintain his behavior safely in the school environment. J.R. was not making progress educationally and they were seeing more instances of aggression. (Ex. 36; Tr. at 126, ln. 18 – 128, ln. 10.)

34. Ms. F. was in agreement with the recommendation for a special day school. She believes that all a school can do to help students change their behavior is to alter the environment and alter the reinforcement, both of which are very difficult to control in a large setting. In the day school, J.R. would receive more specialized instruction in social skills and self-regulation. It would be easier to control the reinforcement, and he would receive services he needs in a way that cannot be provided in a general education school. (Tr. at 129, ln. 20 – 130, ln. 13.)

35. At Anthony Elementary, J.R. had kicked a female teacher in the “private area” hard enough to cause her to bleed, require medical services, and kept her away from work for several days. Accordingly, when his special education teacher at _____ was pregnant, Ms. F. helped her arrange her classroom so that she could remove herself quickly while still monitoring J.R. (Tr. at 128, ln. 11 – 129, ln. 19.)

36. Ms. F. also attended the IEP meeting held on March 28, 2017, at which the District again proposed a change in placement to a special day school for J.R. At that point, J.R.’s behaviors still had not improved and were getting worse. J.R.’s mother did not consent to either proposal for a special day school. (Tr. at 130, ln. 18 – 131, ln. 22.)

37. Ms. F. was also in attendance for the IEP meeting held on May 8, 2017, at which the team proposed shortening J.R.’s school day. To Ms. F.’s recollection, J.R.’s family had asked for the shortened school day. The team decided to go ahead and try it to see if it improved anything because they didn’t have any data to say that they shouldn’t try it. The data did not indicate that the behaviors were a lot worse in the afternoon, but there was a change in staffing in the afternoon so that J.R. was not able to work with a preferred staff member in the afternoon. Ms. F. testified that the family had been very adamant that they did not want a special day school placement so the shortened school day was an attempt to continue educating him while trying to keep everyone else safe as well. However, the shortened school day did not really help, as they continued to see similar levels of behavior. (Ex. 15; Tr. at 132, ln. 2 – 134, ln. 3.)

38. After the May 8, 2017, IEP meeting, Ms. F. testified that the administration spent more time with J.R. personally in an effort to keep him in school and

keep his behavior from interfering with the education of the other students. (Tr. at 134, ln. 10 – 135, ln. 2.)

39. Ms. F. believes J.R. needs a placement where he can receive small group to individual instruction, where the emphasis is on social skills, behavioral self-regulation, learning to work with other people and accepting instruction, and actually working on academic instruction. This is what J.R. would receive at the day school, which would have only 4 students in his grade level. (Tr. at 135, ln. 3 – 136, ln. 10.)

C. J.T., Special Education Teacher

40. Mrs. T. is certified as an adaptive special education teacher for grades K-12. She holds a bachelor's degree in general education and a dual certification for elementary education. In addition, she holds a master's degree in curriculum and instruction. She has been an adaptive special education teacher with the District for five years. (Tr. at 137, ln. 23 – 138, ln. 21.)

41. Mrs. T. was J.R.'s special education teacher from August 2016 to Christmas break and then again from April 3, 2017, to the end of the school year due to maternity leave. During the time she was on maternity leave, J.R.'s special education teacher was R.F. (Tr. at 139, ln. 6 – 140, ln. 7.)

42. Mrs. T. reviewed J.R.'s progress report and noted there were multiple goals on which he was not making progress because his behavior was interfering with testing and instruction. Multiple IEP meetings were held throughout the year to make changes to the behavior plan and other parts of the IEP to try to address the concerns. (Ex. 4; Tr. at 141, ln. 20 – 147, ln. 17.)

43. Mrs. T. shared a classroom with an occupational therapist and another special education teacher. As a result, there were small groups of students working in the classroom most of the day. That was very districting for J.R. Mrs. T. tried to have him work in a couple of her groups, but he needed 1:1 instruction if he was going to do anything. Even though they had dividers in the classroom, there were times that J.R. would stand on the dividers and use them inappropriately. (Tr. at 147, ln. 18 – 148, ln. 23.)

44. Because she was pregnant at the beginning of the year, she set up her classroom so that she would be able to leave if necessary and so that J.R. would have his own space. J.R.'s behaviors in her classroom included shoving things at her, tearing things up, throwing things, knocking over dividers, and standing on the dividers which was unsafe. (Tr. at 150, ln. 4 – 151, ln. 7.) There were several times that groups of students, including those working with the other special education teacher and the occupational therapist, had to leave her classroom due to J.R.'s behaviors. If they didn't have to leave, his behaviors were still very distracting to the other students. (Tr. at 151, ln. 2 – 152, ln. 1.)

45. Mrs. T. provided graphs of J.R.'s behavior data, much of which was trending upward toward the end of the year. (Ex. 9; Tr. at 157, ln. 5 – 160, ln.16.)

46. Mrs. T. was familiar with J.R.'s behavior plan and so were her paras. The paras carried the behavior plan with them on a clipboard at all times. Mrs. T. testified that she and her paras all followed the behavior plan. (Tr. at 160, ln. 17 – 161, ln. 1.)

47. Mrs. T. described several major incidents J.R. had during the course of the school year. One specific incident occurred at recess when he was playing tag while his preferred para was monitoring him. The para started talking to another student and J.R. came over, sat down, and said, "I don't want to play tag, this is stupid." When the para encouraged him to go play, J.R. ran over, tackled two other students, and put his hands around the neck of one of the students as if to choke him. Another instance occurred during a special recess when he took some lunch boxes and whacked his friends in the head with them. Once during her classroom, she allowed him to go to the restroom without supervision and he tried to beat up a fifth-grade student in the restroom. Another incident occurred in the restroom in which the principal caught J.R. playing by hanging over the stalls. J.R. also tried to snip scissors at a para. Mrs. T. was also aware of the incident in which J.R. locked himself in the assistant principal's office and then kicked Mrs. S. in the leg, but she only heard the aftermath and some of the phone call to the parent about it. (Tr. at 161, ln. 15 – 165, ln. 5.)

48. In her professional opinion, Mrs. T. believes J.R. would be most successful in a special day school placement. The student to teacher ratio is much smaller, whereas Mrs. T. had 22 students. J.R. needs constant individualized attention to be successful, and the day school has much better behavioral resources than _____ Elementary. (Tr. at 165, ln. 6-20.)

49. Mrs. T. was in attendance at the IEP meeting in May at which they shortened J.R.'s school day. The team agreed to try the shortened day because the behavior seemed to be worse in the afternoons, but it did not make much difference in J.R.'s behavior. (Tr. at 165, ln. 21 – 166, ln. 10.)

50. Even after trying the shortened school day, Mrs. T. continues to believe the appropriate placement for J.R. is the special day school because he needed one hundred percent individualized academics and behavioral support. J.R. had also told her that he did not want to go to the general education classroom, but rather that he wanted to stay in the special education classroom. (Tr. at 166, ln. 11 – 167, ln. 4.)

D. R.F., Special Education Teacher

51. Mrs. F. holds a bachelor's degree in elementary education and a master's degree in special education. She is licensed to teach grades K-6 and functional special education K-12. Mrs. F. is a special education teacher at _____ Elementary and has held that position for 3 years. Prior to that she has _____ worked for the District as a behavior consultant and as a self-contained special education teacher. She has been employed by the District for a total of twelve years. (Tr. at 167, ln. 22 – 169, ln. 9.)

52. Mrs. F. received a certificate in autism along with her Master's degree and completed all of the coursework and clinical work for a BCBA but has not yet done the BCBA test. (*Id.* at 169, ln. 12 – 170, ln. 4.)

53. Mrs. F. was J.R.'s special education teacher while Jaclyn T. was on maternity leave. She was assigned to him instead of a substitute teacher because a substitute would not have been able to handle J.R. and because she had done extensive

work with behaviors. (*Id.* at 170, ln. 8 – 171, ln. 13.) Mrs. F. started building a relationship with J.R. around October because she knew that she would be taking over for Mrs.T. . (*Id.* at 171, ln. 14-24.) She also served on the special ed team that reviewed his behavior plan and gave input to Mrs. T. at the beginning of the year regarding her classroom setup and strategies to try to with J.R. (*Id.* at 171, ln. 25 – 172, ln. 16.) Around November or December, she had already started reviewing his IEP and behavior plan because she knew she would be taking over for Mrs. T. when she went on maternity leave. (*Id.* at 173, ln. 1-9.)

54. Mrs. F. was familiar with his behavior plan when she took over as his special education teacher in January and she and her paras followed the behavior plan. (Tr. at 173, ln. 6-15.) When Mrs. F. first took over, J.R. had a “honeymoon period” for a few days. Then, J.R. “began to throw objects in the classroom, refuse to do work, pace the classroom, maybe elope in the school.” (*Id.* at 173, ln. 16-24.) When J.R. eloped, he did not leave the building, but would elope into the hallways and the office area. (*Id.* at 173, ln. 24 – 174, ln. 1.)

55. When Mrs. F. took over for Mrs.T., she created the same setup for J.R. in her classroom that he had in Mrs.T.’s classroom. Just like Mrs.T.’s classroom, there were other groups going on at the same time as J.R. was receiving instruction. (*Id.* at 174, ln. 2-12.) If J.R. was presented with an unlimited or a non- preferred task that he did not want to do,

he would shut down, maybe put his head down, push the book away or the material that we were presented to him. If that didn't go away, then he would maybe push it off the -- he would push it off the floor -- onto the floor and then pace the room, and then we would follow the plan. And then if he didn't follow through with that or he got mad, he would leave the classroom and go to the office.

(*Id.* at 174, ln. 15-24.) J.R. also engaged in physical aggression which included pushing an adult, hitting an adult, throwing objects towards someone. J.R. had hit Mrs.F.. (Tr. at 175, ln. 3-11.)

56. The school held a manifestation determination meeting for J.R. on January 10, 2017, due to an incident in which he punched another student in the chest. J.R. had already received ten days of out of school suspension prior to that time. (*Id.* at 175, ln. 16 – 176, ln. 10.) The conduct was determined not to be a manifestation of the disability, and J.R.’s mother signed in agreement with the determination. (Ex. 50 at 4.) Mrs. F. prepared the prior written notice stemming from that manifestation determination which provided J.R. with an alternate location for his academics during his days of suspension. (Ex. 46; Tr. at 177, ln. 1-21.)

57. Mrs. F. was part of the IEP team for the February 7, 2017 meeting, at which the team proposed a special day school placement with a full day of 420 minutes of special education instruction. (Ex. 36; Tr. at 179, ln. 6 – 25.) Mrs. F. was in agreement with this proposed change in placement because J.R. “requires a very small group for his academic and behavioral needs, more so than [they] could . . . provide at -----.” (Tr. at 180, ln. 1-8.) In addition, they were not able to maintain the safety of students and staff with J.R. His behaviors caused students and staff members to be scared to work with him on a daily basis. (*Id.* at 180, ln. 9-16.) J.R.’s mother did not agree to the special day school placement. (*Id.* at 180, ln. 25 – 181, ln. 2.)

58. Another manifestation determination meeting for J.R. was held on March 14, 2017. It was originally scheduled for March 13, 2017, but J.R.’s mother did not show up. As a result, the school sent another notice for the next day. (Tr. at 181, ln. 3 – 182, ln. 17.) The incident at issue for this manifestation determination was that J.R. had hit Mrs. F in the arm while she was holding the door for him to leave the classroom and go to the recovery room. Once again, this was determined not to be a manifestation of his disability of ADHD, and J.R. was suspended with services to be provided at an alternate location. (Ex. 31; Tr. at 182, ln. 24 – 184, ln. 10.)

59. Mrs. F attended another IEP meeting for J.R. on March 28, 2017, at which time the team again recommended a special day school placement for 420 minutes of special education services. J.R.’s mother again refused consent for the change in placement. (Tr. at 184, ln. 25 – 185, ln. 10.) Mrs. F was still in agreement with the

recommendation for a special day school at this meeting. J.R.'s behavior had not improved and, in fact, had gotten worse. (*Id.* at 185, ln. 11-18.) Mrs. F. had continued to follow the behavior plan and was trying different strategies with him. (*Id.* at 185, ln. 19- 24.)

60. Based upon her experience, it was Mrs. F.'s professional opinion that J.R. should be placed at a special day school for all his academic and behavioral needs. (*Id.* at 185, ln. 25 – 186, ln. 6.) Mrs. F. held this opinion because J.R. requires very small group instruction for his academics and his behavioral needs. She testified that J.R. requires more social skills opportunities and instruction during the day which cannot be addressed in a general education setting because the focus is on academics. (*Id.* at 186, ln. 7-19.)

E. R.V., Principal at T.A.

61. Ms. V. holds a bachelor's degree in history and government with a minor in special education, a master's degree in special education, a master's degree in leadership, and is currently working toward her doctorate degree in leadership. She is licensed to teach grades preK-12 in special education, grades 6-12 in history and government, and has her building leadership license for grades preK-12. (Tr. at 187, ln. 16 – 188, ln. 13.)

62. Ms. V. is currently employed by the District as the principal for T.A. and Q. She just started this position in July 2017. Prior to that, she was a special education process coordinator at the high school and was a special education teacher. All of her experience has been with the District, and this is her seventh year with the District. (Tr. at 188, ln. 14 – 189, ln. 9.)

63. As the principal at T.A. and Q. she will have typical principal duties which will include managing staff and students, handling student discipline, and creating programs within the building to ensure student success. (*Id.* at 189, ln. 10-19.) Ms. V. described the T.A. program as follows:

T.A. is a special day school at _____ Education Center, and the purpose behind T.A. is it's a placement for students who are not successful in the

general education building due to behavior where they can come and we work on social skills, self-advocacy. We work on getting those skills up to par so that they can be transitioned back to their home building.

...

We have assigned curriculums, so we have a stop and think curriculum and we also have a curriculum called the access program and then we also have various other interventions that we have set in place. And so each day when we start the day, 35 minutes is dedicated towards social skills training for the students where they game and they practice skills and then they work on generalizing those skills amongst a variety of settings.

(Tr. at 189, ln. 22 – 190, ln. 16.)

64. Ms. V. described how they would work with a student like J.R. at T.A. as follows:

We would work on defining what -- defining what the social skills deficits are. We would then develop a program around those deficits so that we could get those skills where they need to be so that they can be successful. We offer small group individualized instruction and/or one-on-one support. Each classroom is staffed with a teacher, as well as a paraprofessional in the classroom to help that student.

Q. Okay. And so how is that different from what could be provided in a general education building?

A. So the big difference is we have a much smaller population to work with. The classrooms are looking between three to eight students typically as a class size. Like I said, we are staffed with a teacher and a para educator to work with those students, as well as we have related services available for the student. Within the day, we also have built the generalization opportunities that sometimes aren't available in general education buildings. We have community outings figured into the schedule so that students can go practice at a library or at a Walmart store or at various different settings throughout the community. We also have a lot of individualized small, small group practice for those kiddos. (Tr. at 191, ln. 1 – 192, ln. 2.)

If J.R. attended T.A., there would be four students in the second grade classroom. (*Id.* at 192, ln. 3-9.) The classroom would be staffed with a teacher and a paraprofessional for those four students. (*Id.* at 192, ln. 10-13.)

65. T.A. provides services that may be provided in a general education building, but provides them in a much smaller setting with more adults working on the students' needs and helping the students to generalize their social skills across different settings. (Tr. at 192, ln. 14 – 193, ln. 12.) T.A. is also a more therapeutic setting, meaning that they are focused more on the whole child and particularly the social emotional piece. Their building has a "Pioneer Den" in which the student can take a break and use exercise equipment, sensory equipment, or just go to a calming space. They also provide therapy sessions with a psychologist, either 1:1 or small group depending upon the student's needs. (Tr. at 193, ln. 13 – 194, ln. 11.) Their ultimate goal is to transition students back to the general education building. One of the first things they do when the student starts attending school at T.A. is to create a transition plan to describe what it will look like when the student starts to transition back to the general education school. Once the student starts transitioning back, they do it in small increments. (*Id.* at 194, ln. 12 – 195, ln. 4.)

66. To aid in the transition, a staff member who has a relationship with the student is encouraged to visit T.A. and continue contact with the student at least once or twice a month. Likewise, once the student starts to transition back to the general education building, the staff at T.A. works closely with the staff at the general education building to ensure that the transition is successful. (Tr. at 195, ln. 5 – 196, ln. 10.)

67. T.A. typically serves students who are labeled for educational purposes as emotional disturbance, other health impaired, or autism. Their students are generally those who have not been successful in the general education setting and need a more restrictive environment in which they can develop the social and emotional skills they need to be successful in the general education setting. (Tr. at 196, ln. 11-23.)

68. Ms. V. was aware that J.R. had disruptive behaviors which sometimes required the classroom to be cleared. J.R. would likely be a typical student at T.A.. (*Id.* at 197, ln. 2-13.)

We have several students that do have those disruptive behaviors where we have to clear the classroom. We also have students where the general ed setting of just having large classes of 30-plus kids is not successful for them, so we put them in a special day school until they gain the self-coping skills to be able to be successful in a larger setting, but it is not uncommon to have to clear a classroom. (Tr. at 197, ln. 13-22.)

F. M. S., First Grade Teacher

69. Mrs. S. holds a bachelor's degree in education and a master's degree in school leadership. She holds a school leadership license for preK-12 and a teaching license for grades K-9. She is currently a first-grade teacher with the District at _____ Elementary. (Tr. at 198, ln. 14 – 199, ln. 9.) Mrs. S. is also the acting principal when the principal and assistant principal are both out of the building. (*Id.* at 199, ln. 10-15.) She has been a classroom teacher in the District for 21 years and has served as the acting principal for _____ Elementary for seven years. (*Id.* at 199, ln. 16 – 200, ln. 7.)

70. J.R. was a student in Mrs. S.'s class at the beginning of the 2016-2017 school year. She was specifically requested by J.R.'s grandmother because they attended the same church and J.R. had been in a few of her Bible classes at church. (*Id.* at 200, ln. 19 – 202, ln. 2.)

71. Mrs. S. had 25 students in her class at the beginning of the year. Besides J.R., she had eight other students who had behavior issues. (*Id.* at 202, ln. 3-10.)

72. When J.R. started in her classroom, he had behaviors but they were not outside the realm of the other students. However, J.R. frequently did not come to her

classroom in the morning as scheduled because he was late to school. (*Id.* at 202, ln. 14 – 203, ln. 4.)

73. Mrs. S. uses the CHAMPS model in her classroom in which the students practice routines and procedures for every transition, every lesson, and every small group or whole group gathering. Out of the 30-minute time period for which J.R. was scheduled to be in her classroom in the mornings, he followed the rules about 30-35% of the time. The rest of the time J.R. was “being oppositional,” *i.e.*, doing the opposite of what Mrs. S. had asked the class to do. (Tr. at 203, ln. 5 – 204, ln. 12.)

74. When J.R. refused to do as he was asked, most of the time it was quiet. However, the longer his behavior was ignored, the more disruptive he became. Although the para was typically trying to address his behavior while Mrs. S. got the rest of the class started, by the time Mrs. S. could return to J.R., he was already to the point that he needed to be removed from the classroom. (Tr. at 204, ln. 13 – 205, ln. 9.)

75. Mrs. S. did attend an IEP meeting for J.R. on October 10, 2016, at which time they were increasing his time in general education so that he could return to Mrs. S.’s classroom at the end of the day. When J.R. did return to her classroom at the end of the day, he would usually comply with instructions to gather his things, but he would have problems with other students in the line – pushing, shoving, grabbing, or holding. When that happened, J.R. would have to come to the front of the line with Mrs. S.. (Tr. at 206, ln. 14 – 207, ln. 22.)

76. After J.R. was reassigned to Mrs.F., Mrs. S. had another disciplinary issue with him in her role as acting principal. J.R. had been brought to the recovery room because he would not follow the instructions of his para or Mrs.F.. After J.R. came to recovery, other students had to be removed because J.R. started banging, hitting, and moving furniture. Although Mrs. S. was able to get J.R. to sit down in a chair, she was not able to stay with him because she had other disciplinary issues to address. While she was dealing with one of those other issues, she was informed that J.R. had left the recovery room and locked himself in the assistant principal’s office, along with the personal effects of a consultant who was in the building. When she tried to unlock the door, J.R. was

pushing against the other side, so she pushed on the outside to get the door open. The next thing Mrs. S. knew was that J.R. was on the floor, then jumped up and yelled, "You hit me!" J.R. then proceeded to kick Mrs. S. in the leg, causing a bruise about 3 inches long and a couple of inches wide. (Tr. at 208, ln. 2 – 210, ln. 17.)

77. After J.R. kicked her in the leg, Mrs. S. informed him that he was going home and took him to Mr.L. 's office to call his mother. J.R.'s mother was informed that he had assaulted a staff member and she needed to come pick him up. They gathered the paperwork for him to go to the alternative location for him to receive services and that caused his mother to have to wait longer before leaving with J.R. His mother was agitated in the office and a school resource officer was called. His mother became even more agitated once she saw the school resource officer. His mother did not appear to be willing to leave the office, but she did so because the officer was there. (Tr. at 210, ln. 20 – 214, ln. 16.)

78. Based upon her teaching experience and her experience with J.R., Mrs. S. testified it was her professional opinion that J.R. should be placed at the special day school because he would be in a smaller, controlled environment, with fewer students, which would allow him to be more successful assimilating into the school environment. (Tr. at 215, ln. 1-19.)

G. M.F., First Grade Teacher

79. Mrs. F. holds a bachelor's degree in integrated studies, as well as licensure for elementary education for grades K-6. She is currently a first grade teacher at ----- Elementary and is starting her second year in that position. She had previously been a teacher in the Blue Valley school district for six or seven years. (Tr. at 216, ln. 18 – 217, ln. 17.)

80. J.R. was a student in her class during the 2016-2017 school year, but she did not have him the entire school year. He came to her classroom around the beginning of November. Once J.R. came to her classroom, he was inconsistent. Sometimes he came to school late so she didn't see him for most of the day and sometimes he did not stay for his entire time because he did not want to do a task. (Tr. at 217, ln. 18 – 218, ln. 22.)

Sometimes J.R. did not return to her classroom at the end of the day as scheduled due to a variety of reasons, including: being sent home due to behavior, finishing other assignments, not being able to handle coming back to her classroom. (Tr. at 219, ln. 6-15.)

81. Even when J.R. was in her classroom, his behavior was inconsistent. Mrs. F. never knew what his demeanor would be until he arrived in her classroom. In social settings, J.R. did fairly well. However, during academics, she could see the struggle between J.R. and his para even to get started or pick up his pencil if it was something he did not want to do. Most of the times when she saw challenges from him, it was during tasks that were hard, such as math or interactive notebook activities that involved cutting and pasting things in a certain order. (Tr. at 219, ln. 16 – 221, ln. 7.)

82. Mrs. F. had 28 students in her classroom during the 2016-2017 school year. (*Id.* at 221, ln. 8-11.)

83. Mrs. F. did not see as much in the way of physical behaviors in her classroom, but she did have pushback from J.R. on completing a task or following through with what was being asked. He was not compliant with academic tasks. Mrs. F. estimated that eight out of ten times J.R. would not do an academic task if he did not want to do it. (*Id.* at 221, ln. 12 – 222, ln. 6.)

84. Mrs. F. had a copy of his IEP and behavior plan and was familiar with both of them. She and the para both followed the behavior plan. (*Id.* at 222, ln. 7-17.)

85. Mrs. F. testified that there was one incident in which J.R. became physical with two other students while they were lining up to dismiss. One student stated that J.R. had punched him in the stomach and the other student stated that J.R. had kicked him. Mrs. F. called for Mrs. S. to take J.R. to the recovery room so that she could dismiss the other students, and Mrs. F. saw J.R.'s mother come around the corner as she was taking her students out of the building. J.R.'s mother then came into Mrs. F.'s classroom before school started and wanted to know who had made a DCF report against her and made some threats and other statements that Mrs. F. was not sure were true. (Tr. at 224, ln. 1 – 226, ln. 11; Ex. 48; Ex. 49.)

86. J.R. did not have many discipline referrals from her classroom because he usually left the room before she had to call. J.R. did have one incident during an indoor recess with another student which escalated but not to the point of being physical because staff intervened before that happened. Mrs. F. believes that J.R. had fewer behaviors in her classroom because he was there for such a short amount of time and sometimes he did not even stay there for the entire duration if he removed himself from the classroom. (Tr. at 226, ln. 20, - 227, ln. 23.)

87. Mrs. F. attended an IEP meeting for J.R. on February 7, 2017, at which time they were proposing to increase J.R.'s time in special education from 300 minutes to 420 minutes. Although the parent was not in agreement with the proposed placement, Mrs. F. was in agreement with the proposal because she did not believe J.R. was being very successful at school. Mrs. F. believes J.R. needs more 1:1 and small increments of learning time and academic demand. Mrs. F. believed the day school would be better able to meet J.R.'s needs in this regard. (Tr. at 227, ln.24 – 230, ln. 10.)

88. Mrs. F also attended an IEP meeting for J.R. on March 28, 2017. Again, the team proposed a special day school placement with an increase in special education minutes from 300 minutes to 420 minutes. Again, the parent refused consent. Mrs. F. continued to agree with the proposal to increase J.R.'s time in special education and change his placement to a special day school. (Tr. at 230, ln. 11 – 231, ln. 9.)

89. Mrs. F. attended another IEP meeting for J.R. on May 4, 2017. At this meeting, the team agreed to try shortening the school day for J.R. because the data showed that J.R.'s behaviors tended to increase around the time of specials. Mrs. F. does not believe the shortened school day helped J.R. because she still was seeing negative pushback against academic demands in her classroom. (Tr. at 231, ln. 10 – 232, ln. 22.)

90. Based upon her experience, Mrs. F.'s professional opinion is that J.R. needs an alternate setting in a day school where he can receive 1:1 and very small group instruction.

H. C.S., Building Aide

91. Mrs. S. is currently working toward her associate's degree in applied science to become a school nurse. Currently, she holds the position of building aide and works in the recovery room at _____ Elementary. She has held this position since November 7, 2016. (Tr. at 234, ln. 17 – 235, ln. 4.)

92. The recovery room is where students go who are not able to remain in their classrooms due to behaviors or who need extra help with their academics. (*Id.* at 235, ln. 9-15.)

93. Mrs. S. knows J.R. as a student who has come to the recovery room three or more times per week as part of his crisis plan. She testified that he is given two minutes in the classroom and then five minutes to comply. If J.R. does not comply within the five minutes, then he is sent to the recovery room until he is ready to comply. Mrs. S. is familiar with all the steps of his crisis plan and implements his behavior plan with him. (Tr. at 235, ln. 16 – 236, ln. 19.)

94. Mrs. S. was present for the incident when J.R. locked himself in the assistant principal's office. She testified that J.R. was behind the door when Mrs. S. tried to open it and he fell down. Then, J.R. jumped up, told Mrs. S. that she hit him and kicked her in the shin. Mrs. S. testified that Mrs. S. had a nice sized bruise on her shin where he kicked her. Mrs. S. looked at J.R.'s head and did not see any marks and he was not complaining that anything hurt. (Ex. 21; Tr. at 236, ln. 25 – 237, ln. 23.)

95. On January 18, 2017, Mrs. S. was called to Mrs. F.'s class because J.R. had kicked a student at the end of the school day. While taking him to the office, Mrs. S. ran into J.R.'s mother in the hallway and asked her to follow them to the office. Once they got to the office door, Mrs. S. told J.R.'s mother what had happened. While she was attempting to do so, J.R. kept screaming that he didn't do anything and his mother smacked him three times in the face with the open palm of her hand and told him to "shut the fuck up." On their way out of the building, Mrs. S. heard J.R.'s mother telling him that he was in an all white school and that "they don't want you here." Mrs. S. was very upset and reported the incident to Mr.L. (Tr. at 239, ln. 18 – 243, ln. 4.)

I. L.D.

96. Ms. D holds a bachelor's degree in occupational studies and a master's degree in occupational therapy. She has state licensure through the Kansas State Board of Healing Arts and is registered through the National Board of Certified Occupational Therapists. She is employed by the District as an occupational therapist and has held that position for a total of five years. (Tr. at 245, ln. 11 – 246, ln. 3.)

97. Ms. D performed an occupational therapy evaluation on J.R. to determine his sensory needs. She determined that he sometimes does not hear what is going on around him, he often fidgets, he seeks all kinds of movement, and he is sensitive to certain noises. As a result, she recommended that J.R. be provided indirect consult services to allow her to work with his teachers to develop strategies to help alleviate his issues. (Ex. 17; Tr. at 246, ln. 11 – 247, ln. 18.)

98. One way to address his issue with loud noises would be to place him in a smaller classroom. (Tr. at 247, ln. 19-23.)

99. If a person's sensory needs are not being met, Ms. D testified that they can become frustrated or they are constantly seeking that stimulation or sensory need to the point that it affects their behavior. (*Id.* at 247, ln. 24 – 248, ln. 3.)

100. Ms. D recommended 15 minutes per month of indirect services, as well as the following accommodations: wearing headphones or earplugs if he is overwhelmed during assemblies or other types of drills, that he be allowed to stand at his desk when completing independent work, to provide him with a fidget to hold in his hands, and to provide preferential seating in a quiet area. (*Id.* at 248, ln. 15 – 249, ln. 8.)

101. Ms. D shared a classroom with Mrs. T. during the 2016-2017 school year and had an opportunity to observe J.R. throughout the course of the school year. She observed that, if he did not want to participate or did not want to complete the work, he would become upset or just refuse to do the work. She also observed outbursts, physical aggression, and instances in which the entire classroom (including her own students) had to be cleared. (*Id.* at 250, ln. 6 – 251, ln. 4.)

102. Based upon her evaluation of J.R. and her observations of him throughout the school year, Ms.D's professional opinion was that J.R. should be served in a small location where he can get 1:1 attention. She testified that she believes a special day school would be a good fit for him because it would provide him with a small setting in which his sensory needs could be met without the distraction of loud noises and he could easily be provided with fidgets and preferential seating. Ms. D does not believe J.R.'s needs can be met in a resource room like Mrs.T's. (Tr. at 251, ln. 5 – 252, ln. 5.)

J. A.S., Assistant Principal

103. Mrs. S has a bachelor's degree in education, a master's degree in curriculum, and an administrative certificate. She is licensed to teach elementary education, highly qualified in middle school language arts, building administrator license for K-9, and a building leadership license for preK-12. She currently holds the position of assistant principal at _____ Elementary, and has held that position for two years. (Tr. at 252, ln. 22 – 253, ln. 21.)

104. Mrs. S has been employed by the District for 23 years. For 14 years, she was a middle school language arts teacher. From 2009 until 2015, she served in a variety of roles supporting curriculum and instruction prior to becoming the assistant principal at _____ Elementary. (Tr. at 253, ln. 22 – 254, ln. 8.)

105. Mrs. S knows J.R. from visits to her office for discipline. The types of incidents with which Mrs. S has dealt include all of the following: altercations with other students, aggressiveness toward staff members, eloping from the classroom, and clearing classrooms due to behavior outbursts. (Tr. at 255, ln. 5 – 256, ln. 22.)

106. Even though he was not in the regular education setting much, J.R. would react so impulsively and so quickly that it sometimes frightened the other students. If J.R. began to tip things over or kick things when they were in small groups, particularly in the special education room, they would have to clear the classroom and some students would not receive their services that day due to J.R.'s behaviors. (Tr. at 256, ln. 23 – 257, ln. 18.)

107. Mrs. S attended both of the IEP meetings at which the team proposed a special day school placement, and she was in agreement with the proposal. Mrs. S testified that J.R. could benefit from the smaller class sizes and more 1:1 attention to address some of the gaps in his academics and to address his behavior issues. She believes that some of the gaps in J.R.'s academics are fueling some of his behavior. (*Id.* at 257, ln. 19 – 258, ln. 25.)

108. Mrs. S also attended the IEP meeting in May 2017 at which they shortened the length of J.R.'s school day. She testified that the team agreed to do that because the parent would not agree to the day school placement, the data was showing an increase in behavior in the afternoon, and they were trying to find some way to compromise and keep him on task. Mrs. S testified that the shortened day did not work because the behaviors were still there. It simply shifted their focus to trying to keep him in school. The administrators ended up keeping him with them for a lot of the time because he would not remain in the classroom and his work still was not getting done. (*Id.* at 259, ln. 1 – 260, ln. 19.)

109. In Mrs.S's professional opinion, the appropriate placement for J.R. would be the day school program because he would be able to get caught up on his academics, get help with his behaviors, and receive instruction on social skills. (*Id.* at 261, ln. 14 – 262, ln. 18.)

K. Dr. C.R., Director of Special Education

110. Dr. R holds a bachelor's degree in special education, a master's degree in educational leadership, and a doctorate in educational leadership. She is licensed to teach adaptive special education for grades preK-12, leadership for grades K-16, building leadership, and district level leadership. Dr. R is currently the Director of Special Education for the District, and this is her seventh year in that position. (Tr. at 263, ln. 10 – 264, ln. 1.)

111. Dr. R has worked in other school districts as a special education teacher, an elementary special education coordinator, and an interim assistant director for

early childhood. She has worked in education for a total of twenty years. (*Id.* at 264, ln. 2-15.)

112. Dr. R reviewed the report from Dr. Karen Jordan, the independent evaluator requested by the parent and paid for by the District. Dr. Jordan did not find that J.R. had any additional diagnoses which had not already been considered by the District. (Ex. 12; Tr. at 266, ln. 2-21.)

113. Even Mrs. K, the parent's advocate, had privately shared her belief that J.R. should be in an alternative placement at a day school with Dr.R. Mrs. K indicated that she would share that opinion with the parent and that the parent likely would not appreciate it. (Ex. 28; Tr. at 270, ln. 14 – 271, ln. 21.)

114. Dr. R was aware of J.R. prior to his evaluation for special education because she was the one who assigned S.F. to assist District staff during J.R.'s kindergarten year. (Tr. at 274, ln. 12-22.) When she first became aware of J.R., he was attending David Brewer Elementary, but he left that school in mid to late October of 2015. (*Id.* at 276, ln. 19-25.) His mother had requested a different school, so J.R. was assigned to Anthony Elementary in October 2015, and he finished the 2015-2016 school year there. (*Id.* at 277, ln. 1-15.)

115. Dr. R was familiar with the history of J.R.'s special education placements. His initial placement at Anthony Elementary was primarily in general education. However, that placement was not successful and Anthony Elementary staff gradually increased his time in special education. In addition, S.F. frequently reviewed the behavior plan with the Anthony Elementary staff to see if changes should be made or if additional strategies should be implemented. (Tr. at 277, ln. 22 – 278, ln. 19.)

116. J.R. transferred to _____ Elementary for the 2016-2017 school year because his mother went to Dr. Roth's (the superintendent) house at 9:00 p.m. to complain about Anthony Elementary and requested Mrs. S. as a teacher. Mr.L., in particular, has worked very hard at building relationships with families and they believed J.R. would be welcomed with open arms at _____ Elementary. (Tr. at 279, ln. 4 – 280, ln. 3.)

117. While at Anthony Elementary, J.R. had kicked his special education classroom teacher between the legs, which caused some bleeding and caused her to miss a few days of work. This caused some concern when J.R. was assigned to a pregnant special education teacher for the 2016-2017 school year. (*Id.* at 280, ln. 4-19.)

118. At the beginning of the school year, the parent worked collaboratively with the staff; however, as the year progressed and J.R. experienced more consequences for his behaviors, the interaction with his parent also became more difficult. For example, the staff had tried to do a “transfer of power” with J.R.’s mother. They had learned that his mother was expressing her displeasure with the school in front of J.R., which was not helping staff implement his IEP and behavior plan. In an attempt to work with the parent without making accusations, they asked her to participate in a transfer of power in which all of the school staff lines up next to the mother and she tells J.R. that they are an extension of her and that he has to listen to them when he is at school. This worked for a little while, but J.R. got in trouble again and his behaviors, such as telling staff he did not have to listen to them, started to return. (Tr. at 280, ln. 20 – 282, ln. 9.)

119. Both J.R.’s parent and his grandmother have requested to observe in J.R.’s classroom at Anthony Elementary and _____ Elementary. Despite rules that they cannot interrupt the instructional process, both the grandmother and the parent were disruptive during every observation. Specifically, the grandmother would try to take over instruction and discipline from the classroom teacher. (Tr. at 282, ln. 10 – 283, ln. 1.)

120. Dr. R was in attendance at both meetings at which the recommendation was made for placement at a special day school. She was in agreement with the recommendation because J.R.’s academics have suffered due to his behavior interfering with instruction. J.R. requires a high level of staff attention for academics, as well as behavior. In addition, the day school can provide a therapeutic component, including time with a psychologist and specific social skills instruction, that J.R. would not receive in a general education building. At J.R.’s grade level, there would be only 4 students with 2 staff members which would provide the high level of staff attention that he needs. (Tr. at 283, ln. 2-25.)

IV. CONCLUSIONS OF LAW:

I. FAPE.

1. The burden of proof and the burden of persuasion lie with the party challenging the IEP. *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005); *Johnson v. Indep. Sch. Dist. No. 4 of Bixby, Tulsa County, Okla.*, 921 F.2d 1022, 1026 (10th Cir.1990). In this matter, the District is the party challenging the IEP.

2. “Free appropriate public education” (or “FAPE”) means:

special education and related services that-- (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program. 20 U.S.C. §1401(9).

3. The U.S. Supreme Court expanded this definition in the Rowley case, holding that a district:

satisfied this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203-04 (1982).

4. The U.S. Supreme Court went on to set forth a two-part test to determine whether the district has complied with federal special education law:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? *Id.* at 206-07.

In reviewing such cases to determine whether the above requirements have been met, the U.S. Supreme Court cautioned that:

courts must be careful to avoid imposing their view of preferable educational methods upon the States. 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. *Id.* at 207.

5. The U.S. Supreme Court recently reviewed the standard the Tenth Circuit Court of Appeals had applied to the second prong of the *Rowley* test and found the Tenth Circuit's *de minimis* benefit test lacking. Instead, the Supreme Court held that "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County Sch. Dist. RE-1*, U.S. , 137 S. Ct. 988, 999 (2017).

6. The Supreme Court went on to explain that:

The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. . . . The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians. . . . Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. *Id.* (internal citations omitted).

7. In *Endrew F.*, the Supreme Court reiterated *Rowley's* deference to school authorities with respect to educational policy, stating:

We will not attempt to elaborate on what "appropriate" progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however,

should not be mistaken for “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.” *Andrew F.*, 137 S. Ct. at 1001 (quoting *Rowley*, 458 U.S., at 206, 102 S. Ct. 3034).

8. In this matter, the District provided substantial testimony and evidence that J.R. cannot be adequately served in the general education building and requires a special day school placement. Several of the witnesses testified that J.R. did not want to go to the general education classroom and nearly all of the witnesses testified regarding his elopement, or removal of himself, from the general education classroom when things became too difficult for him.

9. However, in the special education classroom where more academic demands were placed upon him, there was more escalation of behaviors. This caused the special education teacher’s classroom to be cleared at times, disrupting services not only for her students but also for the occupational therapist and the other special education teacher who shared the classroom.

10. Likewise, there was substantial testimony about changes that were made to time in service and the behavior plan, accommodations that were added, and even changes to the length of his school day. None of these changes seemed to make an appreciable impact upon the level of J.R.’s behaviors.

11. Finally, there was substantial testimony about the impact J.R.’s behavior was having on his academics and his inability to accept instruction. It is clear that J.R. cannot receive a FAPE so long as his behavior continues at its current level. It is equally clear that J.R.’s behaviors are having a significant detrimental impact on the other students in his class due to the disruptions and the need to clear the classrooms. Mrs. S testified that there were times other students did not receive their special education services for the day due to J.R.’s behavior.

12. None of the testimony and evidence from the District was refuted, except through the parent’s unsworn statements prior to leaving the hearing.

13. I find the testimony of the witnesses to be credible, and I find that J.R. requires an increase in special education minutes from 300 minutes to 420 minutes per day, 5 days per week, in order to receive a FAPE.

B. LEAST RESTRICTIVE ENVIRONMENT.

14. The Tenth Circuit follows the *Daniel R.R.* test for determining whether a district has violated the least restrictive environment mandate. *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 977 (10th Cir. 2004). The *Daniel R.R.* test has two parts, in which the court: (1) determines whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; and (2) if not, determines if the school district has mainstreamed the child to the maximum extent appropriate. *Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

15. The first prong of the *Daniel R.R.* test relies upon the following four factors: (1) steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services; (2) comparison of the academic benefits the child will receive in the regular classroom with those she will receive in the special education classroom; (3) the child's overall educational experience in regular education, including non-academic benefits; and (4) the effect on the regular classroom of the disabled child's presence in that classroom. *Nebo*, at 976 (citing *Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036, 1048-50 (5th Cir. 1989)).

16. The first prong of the *Daniel R.R.* test requires consideration of the steps taken to accommodate the student in the general education classroom. As set forth above in the findings of fact and the documentary evidence introduced by the District, the District has attempted to accommodate J.R. in the general education classroom, even for short amounts of time, and it has not been successful. The District has reviewed and revised the behavior plan, provided additional accommodations, and even shortened J.R.'s school day – all to no avail.

17. The second factor of the first prong of the *Daniel R.R.* test involves comparison of the academic benefits the student will receive in the special education

classroom versus the general education classroom. Again, there was substantial testimony from all of the District witnesses that J.R. cannot receive what he needs in a general education building. The District witnesses testified that J.R. requires intensive 1:1 or very small group instruction on social skills, as well as his academics. In addition, there was testimony that the day school would provide a therapeutic component with services provided by a school psychologist, as well as access to a sensory room and an exercise area, that would not be available in a general education building. This is important due to J.R.'s sensory needs and his need for movement as discussed by Ms.D, as well as his need for intensive social skills instruction, as recognized by all of the District staff members.

18. The third factor of the first prong of the *Daniel R.R.* test is consideration of the child's overall educational experience in regular education, including non-academic benefits. Again, there was ample testimony from the District staff members, as set forth above, that J.R. was not being successful in the general education classroom or even in the special education classroom within the general education building. As noted in the occupational therapy evaluation, J.R. has difficulty with loud noises. Ms. D testified that one of the ways to accommodate that would be to place him in a smaller classroom. In the general education classrooms at _____, J.R. was in a classroom with either 25 or 28 students. At the special day school, there would be a total of 4 students in his class, including J.R. This change alone should immediately help with his sensory needs.

19. Additionally, at _____, J.R. spent much of his time wandering the halls or eloping to the recovery room or the office. While such behavior is preferable to violence, it is also indicative of a student who is struggling in his current environment. The testimony and evidence submitted by the District demonstrates that the only other change left to try with J.R. is the environment, *i.e.*, the special day school.

20. The fourth and final factor of the first prong of the *Daniel R.R.* test is the effect on the regular classroom of the disabled child's presence in that classroom. As discussed above, when J.R. was experiencing negative behaviors, he was extremely disruptive to the rest of the classroom. He tipped over furniture and partitions, he yelled, he hit and pushed and kicked at staff members, and he wandered around the classroom

until he eloped into the hallways. There was testimony that the other students were afraid of J.R. due to his volatility. J.R. had hit and kicked other students, as well as staff members. Such an environment is not conducive to learning for either J.R. or the other students.

21. Accordingly, based upon all of the above, I conclude that J.R. cannot be served in the regular education classroom satisfactorily.

22. The second prong of the *Daniel R.R.* test requires that I consider whether the District has mainstreamed the student to the maximum extent appropriate. As discussed above, the District has tried to include J.R. in the general education classroom for varying amounts of time over the past two school years – none of which have been successful. The testimony and evidence provided by the District, and unrefuted by the parent, clearly show the need for J.R. to be placed in special education for his entire school day in a different environment. Accordingly, I conclude that the District should be allowed to increase J.R.'s time in special education from 300 minutes to 420 minutes per day, 5 days per week, and serve him at a special day school where he can receive the services he needs to learn to gain control of his behaviors and start making academic gains.

V. CONCLUSION.

The Hearing Officer, following careful review of the testimony and exhibits, and after full consideration of the District's Proposed Findings of Facts and Conclusions of Law, determines that the District shall be allowed to increase the students' special education minutes from 300 minutes to 420 minutes, five days per week. The same to be provided in the Districts' Special Education Classroom in its special day school.

IT IS SO ORDERED.

September 7, 2017

Date



Larry Rute, Hearing Officer

CERTIFICATE OF SERVICE

I, Larry R. Rute, do hereby certify that I have provided a true and correct copy of the above and foregoing Notice of Hearing Officer's Decision upon the following parties:

Ms. _____
_____ Avenue
_____, KS _____

Ms. Sarah J. Loquist
Kansas Association of School Boards
1420 SW Arrowhead Road
Topeka, KS 66604

Mr. Mark Ward
Special Education Services
Kansas Department of Education
120 SE 10th Avenue
Topeka, KS 66612-1182

by mailing the same by U.S. mail, postage prepaid and by e-mailing a copy to both parties, this 9th day of September, 2017



Larry R. Rute, Hearing Officer