

BEFORE THE HEARING OFFICER

In the Matter of  
The Special Education Due Process Hearing for A.M. and USD \_\_\_ and  
\_\_\_\_\_Kansas Area Coop. District \_\_\_

File No.: 19 DP \_\_\_-001

NOTICE OF DECISION

CHILD'S NAME: A.M.

ADDRESS: \_\_\_\_\_, KANSAS

PARENTS: N and P M.

PARENT REPRESENTATIVE:  
KARI COULTIS  
COULTIS LAW, LLC

LOCAL SCHOOL DISTRICT:  
U.S.D. \_\_\_ & \_\_\_\_\_ AREA  
COOP. DISTRICT \_\_\_

DISTRICT REPRESENTATIVE: JESSICA SKLADZIEN  
ALAN RUPE  
JOSEPH DEMPLOWOLF  
LEWIS, BRISBOIS, BISGAARD & SMITH,  
LLP

HEARING OFFICER:  
JONI J. FRANKLIN, ATTORNEY  
FRANKLIN LAW OFFICE, PA

DATE: MARCH 28<sup>th</sup>, 2019

1. Procedural History

1. On or about July 10, 2018, Parents in this case filed a pro se due process complaint (the "Original Complaint") notice alleging violations of the Individuals with Disabilities Education Act ("IDEA"). (Ex. B.) The Parents alleged they were paying for certain parts of A.M.'s education. (Tr. Vol., 4 at 8:3-10).
2. \_\_\_\_\_ Area Cooperative District #\_\_\_ ("District") subsequently filed a response (the "Original Response"). (Ex. C.)
3. Parents filed a motion for leave to amend their original complaint on August 27, 2018, and the District objected. After full briefing by the parties on this Motion, the Hearing Officer granted the Parents motion to amend their original complaint.
4. Parents subsequently amended their complaint on or around September 25, 2018 (the "Amended Complaint"). (Ex. D).
5. The District subsequently filed a response to the Amended Complaint on or around October 5, 2018 (the "Second Response"). (Ex. E).
6. Various pretrial motions were filed by the parties, including requests to issue business records subpoenas, objections to the scope of various subpoenas, motions regarding how expert testimony would be taken, and various extensions of deadlines, all orders regarding said motions were issued after both parties had provided written responses to the same.
7. The District filed a dispositive motion for summary judgment on all issues of the complaint on December 14, 2018, with supporting memorandum and affidavits.
8. Parents filed a response to the District's summary judgment motion, with supporting memorandum and affidavits on December 28, 2018.
9. The District in turn filed a reply brief to the Parents' response on January 3, 2019.
10. The Hearing Officer issued a decision denying the summary judgment motion on January 4, 2019.

11. The District filed a motion to limit the scope of the issues to be heard at the Due Process Hearing on January 11, 2019, and the Parents filed a response to the same on January 20, 2019.
12. The Hearing Officer issued an order regarding the motion to limit the scope of the issues to be heard at the Due Process Hearing on January 21, 2019.
13. Parents submitted the following issues for consideration during the prehearing conference held on January 7, 2019:
  - a. Is the 2017 Amendment IEP reasonably calculated to provide A.M. with a FAPE?
  - b. Are the draft IEPs since the 2017 Amendment IEP reasonably calculated to provide A.M. with a FAPE?
  - c. Were Parents denied the opportunity to be meaningful participants in the IEP process?
  - d. What amount of reimbursement are Parents entitled to?
14. The District submitted the following issues for consideration during the prehearing conference held on January 7, 2019:
  - a. Parents attempt to raise issues that were not raised in the First Amended Complaint. Can they use this due process hearing as a vehicle for challenging issues not raised in their First Amended Complaint?
  - b. The July 2017 Amendment IEP, as written, provides reimbursement for transportation of A.M. to and from KSSB. Does this comport with IDEA's requirement that A.M. receive a free appropriate public education? Can  
  
Parents demonstrate that, by way of the July 2017 Amendment IEP,  
  
Respondents have not complied with their duties and obligations under IDEA?

- c. Respondents have offered to reimburse Parents consistent with the July 2017 Amendment IEP. Are Parents entitled to reimbursement in excess of the \$3,275.64 provided for in the July 2017 Amendment IEP? Related, are Parents are entitled to reimbursement related to their unilateral decision to rent an apartment in Lenexa?
  - d. Parents and the IEP team have met several times and agreed to all goals and provisions for A.M. 's IEP, with the exception of the appropriate mechanisms for reimbursing Parents for transportation. Have Parents been denied the opportunity to participate in developing an IEP because Respondents will not agree to a subsequent IEP that provides them reimbursement for out-of-pocket expenses incurred by their unilateral decision to rent an apartment in Lenexa?
15. This matter was heard over a period of five days on January 22, 2019, January 23, 2019, January 24, 2019, February 11, 2019, and February 18, 2019.
  16. The parties stipulated and agreed to a briefing schedule at the close of testimony, and both parties filed proposed findings of fact and conclusions of law on March 18, 2019, and the matter now comes on for decision.

11. ISSUES TO BE DETERMINED:

1. Is the 2017 Amendment IEP reasonably calculated to provide A.M. with a FAPE?
2. Are the draft IEPs since the 2017 Amendment IEP reasonably calculated to provide A.M. with a FAPE?
3. Were Parents denied the opportunity to be meaningful participants in the IEP process?
4. Have the Parents raised issues that are outside the issues raised in the First Amended Complaint, and thus improper for consideration at the Due Process Hearing under Kansas law?

5. Nature and extent of reimbursement that the Parents entitled to regarding transportation issues raised in the first amended complaint, and whether the District's value of reimbursement due and owing to the Parents of \$3,275.64 appropriately complies with the requirements of the 2017

Amendment IEP, and their duties under the IDEA?

#### 111. FINDINGS OF FACT:

1. A.M. is a 13-year-old boy who has been diagnosed with a rare genetic disorder – Malignant Infantile Osteoporosis — which causes abnormal hardening of bones that constrict and put pressure on nerve endings, resulting in a variety of issues, including vision and hearing loss. Specifically, a vision assessment conducted on September 19, 2016 by St. Jude Children's Research Hospital concluded that both of A.M.'s eyes show optic nerve damage. His uncorrected distance vision was reported as 20/400, and uncorrected near vision was reported as 20/400 for each eye. Bilateral acuity with correction was reported as 20/200. A hearing test completed at St. Jude in 2009 indicated that A.M. has normal hearing in his right ear and a moderate to severe loss in his left ear.

As a result, A.M. uses a bilateral FM system and CROS system for his unilateral loss.

A.M. has a history of eating problems and has been seen for extended inpatient stays at the Kennedy Krieger Institute in Baltimore, Maryland. A.M. has diagnoses of anxiety, depression, ADHD, and was recently diagnosed with autism spectrum disorder. (Ex. D at 0013).

2. A.M. first received special education services from the District at age three, while enrolled in a private preschool program. During kindergarten (2010-2011 school year), special education services were delivered by special

arrangement, and A.M. was home schooled following inpatient treatment for eating problems. A.M. was enrolled in a private school setting at the beginning of first grade (2011-2012 school year), but he was expelled from the school in December, following a significant behavioral event. (Ex. D at 0013-0014).

3. The District subsequently proposed an IEP for services in the public school setting, which Parents declined said services in writing to the District. A.M. was home schooled by his mother and his aunt for the remainder of his first grade year and for his entire second grade year (2012-2013). (Ex. D at 0013-0014).
4. The District issued a Prior Written Notice (PWN) on April 26, 2013, regarding A.M.'s third grade year, as A.M. was going to be re-integrated, part time, back into his private school setting. (Ex. P at 0281-0283).
5. During his third grade year (2013-2014), in addition to being home schooled, A.M. attended a private parochial school for one hour each day, which increased to three hours each day by the end of the school year. (Ex. D at 0013-0014). This resulted in the April 26, 2013 IEP, and the April 26, 2013 amendment IEP (8/21/13), which also included ESY services at the Kansas State School for the Blind (KSSB), the continuation of emotional supports, and supports for A.M.'s visual disabilities. (Ex. Q and R).
6. In fourth and fifth grades (2014-2015 school year and 2015-2016 school year, respectively), A.M. started each school day at the private parochial school, leaving before lunch to return home to be home schooled for the remainder of the day. For sixth grade (2016-2017 school year), A.M. attended the parochial school for the entire school day.

(Ex. D at 0013-0014).

7. A.M. first attended KSSB as part of an Extended School Year CESY") program the summer before his kindergarten year (summer 2010). He attended this ESY program again for six years from 2013-2018. (Ex. D, at 0014).
8. A.M. lived in the KSSB dorms in 2013 and 2014, but A.M.'s father stayed in the dorms with him in order to address A.M.'s medical, behavioral, and feeding concerns, serving as the primary support person to facilitate A.M.'s behavior plan. (Ex. D at 0014).
9. In 2015 and 2016, A.M. lived in the dorms independently during his ESY at KSSB with few problems. (Ex. D, at 0014).
10. During the sixth grade, A.M. attended a local parochial school, and was to receive assistive technology services from the District, which included CCTV, BrailleNote, Braille writer, and brailled school materials for A.M. in accordance with the November 18, 2016 IEP. (Ex. T, at 0338).
11. Problems arose during the sixth grade year with the assistive technology and the timely provision of brailled materials to A.M., the quality of the translated braille materials was also an issue to the Parents. Additionally, the CCTV was also nonfunctioning for a period of time, which was an assistive technology required by A.M.'s IEP. (Id. •, Tr. vol., IV at33:10•, 35:4; 39:6-8).
12. These issued caused the Parents to file a formal complaint with the state on or around February 2, 2017, pursuant to which they proposed consideration of one year of compensatory education placement at KSSB for A.M. (Id.; Tr. Vol., IV at 33:4 and1035; Id at 39:6-8).
13. On March 3, 2017, Diana Durkin, a Complaint Investigator for the Kansas State Department of Education ("KSDE"), issued a "written report of findings" concerning a formal complaint filed by Parents. (Exhibit WW). The investigation substantiated violations of special education laws and regulations. (Id. at 0838 and 0839). Ms. Durkin's report addressed two issues: (1) whether the district failed to provide braille

material called for in A.M.'s IEP and (2) whether the district failed to provide A.M. access to CCTV as called for in his IEP. ( See generally Ex. WW).

14.

15. [Cooperative's] attempted to handle the issues, however they admitted there were issues with access to certain materials and the CCTV. The <sup>1</sup>ATitten report substantiated violations of special education laws and regulations for two reasons: (1) the district did not provide brailled materials consistently between January 5, 2017 and the date of the report (March 5, 2017), as required by the IEP consented to on January 5, 2017; and (2) the district's CCTV did not operate properly during the first quarter of the 2016-17 school year. (Ex. WW, at 00838, 00839). These specific violations were admitted by Mr. Maples at the hearing. (Tr. vol., II at 11:10-14; vol., 11 at 12:3-6; vol., 11 at 13:1-5).

16. During the course of the complaint process, the Parents proposed placing A.M. at the KSSB. (Tr. Vol., II at 13:6-8). [Cooperative and Parents both agreed on the placement. (Id.,Tr. Vol., II at 13:9-14). Mr. Maples testified that he agreed to Parents' proposed resolution of one year of compensatory education at KSSB because that is what Parents proposed, and because the District has a good relationship with KSSB. (Tr. Vol., I at 45:3-19; Tr. vol., IV at 38:5 and 21 - 39).

17. Parents testified they suggested KSSB as their proposed remedy because they believed KSSB had resources that could help A.M. Specifically, they were hopeful that time at KSSB would allow A.M. to become proficient in the braille notetaker, that he would have ready access to books, and that he could benefit socially by being around like peers. (Tr.V01., 11 at 109:1-25•, Tr. vol., IV at 51:4-53).

18. As noted in Ms. Durkin's report, [Cooperative] agreed to send A.M. to KSSB for compensatory services. (Ex. WW, at 00839, Ex. R; Ex. SSS; see also Tr. Vol., I at 21:1116; and vol., 11 at 13:6-14).

19. Ms. Durkin incorporated the placement at KSSB into her report, directing the district to take certain alternative actions, one of which was to obtain parent

consent for and to implement the KSSB Action Plan. (Ex. WW, at 00840). Alternatively, the district was required to provide assurances that braille material would be provided at the home district in a timely and appropriate manner. (Id).

20. The KSSB Action Plan "called for [A.M.] to go to [KSSB] for the 17-18 school year." (Ex. XX•, Tr. vol., I at 22:9-12).
21. On March 22, 2017, Mr. Maples sent Ms. M a consent form "to help implement that action plan." (Tr. Vol., I at 22:21-25; Ex, UUU).
22. Additionally that day, Mr. Maples sent Parents a prior written notice to consent to the placement at KSSB. (Tr. Vol., I at 22:6 and 21 - 23; Ex. UUU; Ex. U). The language in the prior written notice stated "An IEP meeting will be held in May with KSSB to facilitate this change. [Cooperative] #\_\_\_ will pay parents mileage from \_\_\_\_\_ to KSSB." (Ex. U).
23. Parents disagreed with the language proposed for the mileage reimbursement because providing testimony, that it was not specific enough in that it did not even specify a rate of reimbursement. (Tr., Vol., II at 112:5 and 20; 1 13:5; Tr. Vol., IV at 39:13 and 1840). They, therefore, requested a more specific language alternative of "[Cooperative] will pay parents roundtrip mileage (674 miles) twice weekly at the current IRS standard business mileage rate. For the calendar year 2017, this rate is 53.5# per mile."  
(Tr. vol., IV at 40:5-20•, Ex. UUU).
24. Mr. Maples modified the language requested by Parents, indicating he had concerns regarding time periods when school was not in session. (Ex. UUU). Accordingly, Mr. Maples revised the language, and sent Parents a revised prior written notice to consent

to the placement at KSSB. (Tr. Vol., I at 23:16-23; Tr. Vol., IV at 41:812; Ex. V). The language in the revised prior notice stated "[Cooperative] will pay parents roundtrip mileage (674 miles) at the IRS standard mileage business rate each time that [A.M.] has to be transported to KSSB for school and each time [A.M.] has to be transported home from school. For the calendar year 2017 this rate is 53.5¢ per mile." (Ex. V),

25. Parents testified they subsequently had multiple telephone conversations with Mr. Maples to further explore different options with respect to the transportation language, and to ask questions about different scenarios that could arise, such as how A.M. would get to medical appointments, and whether an overnight stipend would be available on days when they had to transport him to appointments. (Tr. Vol., II at 1 15:14 ; 1 16:15; Tr. vol., IV at 42:15 and 21-44).
26. Ms. M testified, that Mr. Maples told her that he would have to check regarding their specific inquiries, and ultimately he told her that he could not consider medical transportation. Parents requested that he summarize his position in an email to them. (Tr. vol., 11 at 117:13-25; Tr. vol., IV at 44:13 - 24).
27. On March 27, 2017, Mr. Maples informed the M' that he would not use the transportation reimbursement language that they requested. (Ex. VVV).
28. Mr. Maples' sent an email to Parents on March 24, 2017 which stated, "We are only able to claim transportation from trips transporting [A.M.] to KSSB and home from KSSB...Another option for this is if you want us to provide the transportation." (Ex. 1.8).
29. A.M.'s mother provided testimony that she had called Michael Murphy, an auditor at the Kansas State Department of Education, and inquired of him

regarding the mileage reimbursement language. She testified the information she received from him indicated that the IEP team could write into the IEP whatever travel arrangements fit best for the student. (Tr. vol., IV at 45:25; 46:18; Id. at 269:25; 270:5•, Ex. VVV). Mr. Murphy did not testify at the due process hearing.

30. On March 27, 2017, the Parents again requested a change to the reimbursement language by proposing [Cooperative] will reimburse mileage to parents at a flat rate of 1,348 miles per week that school is in session", to which Mr. Maples responded that he understood what Parents were requesting but respectfully disagreed, and would let KSDE know that Parents had not consented. (Tr. Vol., I at 29:15; 30:3; Tr.Vol., IV at 46: 19; 47:4; Ex. VVV).

31. Mr. Maples testified that he was concerned with the Parents' proposed language because [Cooperative] can only be reimbursed for trips that were actually made for the purpose of transporting A.M., and that based upon his understanding of Special Education Reimbursement Guide For State Categorical Aide, Medicaid replacement, transportation reimbursement, and special teacher reimbursement that, specifically in accordance with the "Pupil Transportation" section, that only the miles that were actually traveled, actually transporting the student, are reimbursable as special education travel expenses.

(Tr. vol., 11 at 16:19-25; vol., 11 at 17:1-23; vol., V at 214:4-7•, 215:21-25; 216:1-24).

32. On March 27, 2017, Mr. Maples responded to the Parents' mileage language request, and informed the Ms that he would not use the transportation reimbursement language that they requested in their March 27, 2017 email. (Ex. VVV).

33. On March 28, 2017, Ms. M consented to the modified Prior Written Notice. (Exhibit V, at 00349). That PWN states, "[Cooperative] # \_\_\_ will pay parents roundtrip mileage (674 miles) at the IRS standard mileage business rate each time that [A.M.] has to be transported to KSSB for school and each time [A.M.] has to be transported home from school. For the calendar year 2017 this rate is 53.5¢ per mile." (Ex. V, at 00348).
34. Parents testified they interpreted the language in the prior written notice literally with the phrase "has to be", meaning they felt that at a minimum, he would have to be transported to KSSB on Sunday afternoons and he would have to be transported to \_\_\_\_\_ on Friday afternoons since KSSB does not allow students to stay in the dorms over the weekend. They felt that "has to be transported" was different than "is transported", so they felt that the language created a minimum reimbursement amount (or budget) from which they could operate to make A.M.'s placement at KSSB work, regardless of actual travel. (Tr. Vol., II at 121: 3-24; Tr. Vol., III at 200:8, 202:20).
35. On April 24, 2017, Mr. Maples sent a Notice of Meeting to Ms. M via email. (Ex. W, at 00352). It indicated that a meeting would take place on April 28, 2017, at 1 p.m., at KSSB. (Id at 350). The purpose was to discuss possible changes to A.M.'s IEP, conduct an annual review of his IEP, and to "[c]onsider [the] change to KSSB." (Id., at 351).
36. Prior to the April 28 meeting, a draft IEP was drafted and printed for Parents' consideration and review. (Ex. X; see also Tr. Vol., II, at 230: 14-18).
37. The draft IEP stated, "[A.M.] will receive room/board (as well as training in Expanded Core Curriculum skills) Sunday night through Friday morning through KSSB's Extended Day Program." (Ex. X, at 00360).

38. On April 28, 2017, Parents signed the Notice of Meeting, indicating, "I consent to waive my right to a 10-day prior written notice of the meeting to develop, review or revise the IEP for my child." (Ex. W, at 00352).
39. Parents reviewed the changes to the draft JEP after the IEP meeting, including modifications to the transportation language. (Ex. 6-e-mail exchange between P.M. , Cheryl Thompson, and John Maples).
40. KSSB staff, Cheryl Thomson, indicated via e-mail regarding the draft of the April IEP, that she didn't know whether he would be staying in the dorm, so she just wrote it as if he was. (Ex. T8 and Ex. X, at 00360). The same draft IEP also stated that "Transportation is provided by the District Friday and Sunday afternoons. (Ex. X, at 00360). There is no indication that such transportation was ever planned for or arranged by the District.
- 40• Parents testified they expressed their concerns about A.M.'s ability to be successful in the dorms given his increased thoughts of self-harm, his feeding issues, and his increasing medical appointments, the language regarding room/board was removed from the final version of the IEP. (Tr. Vol., II, at 132:22; 133:17; Id at 224:24 ;228:4; Ex. Y at 0374).
41. The finalized April 2017 IEP did not contain any language indicating that A.M. would receive room and/or board. (See generally Ex. Y). It did not give any indication as to where A.M. would reside during the school year while attending KSSB at all, a placement over three hundred miles away from his home in \_\_\_\_\_, Kansas. (See generally "d).
42. The District, in its Original Response, stated that "The district always understood that students such as [A.M.], who lived more than one hour away from KSSB would

attend there by staying in the dorms and the district was responsible for transportation of that student." (Tr. vol., 1, at 80: 3-7; Ex. C at 0011).

43. The District in its Second Response, the District stated that "KSSB students who live outside Kansas City metro area live in the dorms." (Tr. Vol., I at 82:13-14; Ex. E at 0031).

44. Parents did not request that the language stating that A.M. would receive room/board be removed. (Tr. vol., 11 at 226:1-3, 226:24; 227: 12; vol., 111 at 191:22-24). Parents did not raise concerns regarding the removal of the room/board language with the IEP team. (See generally Ex. 6).

45. After Parents expressed their concerns about A.M.'s ability to be successful in the dorms, there was an apparent agreement that A.M.'s would not be in the dorms full time. There was additionally discussion of possibly starting him in the dorms one day per week, and there was also discussion of seeing how the summer of 2017 session went with

A.M. staying in the dorms. (Tr. Vol., IV at 56:20; 57:10).

46. Parents never specifically stated in the April 28, 2017 IEP team meeting that they refused to place A.M. in the dorms, or that they weren't interested in or willing to listen to and consider other options. (Tr. Vol., II at 134:1; 135:8; Tr. Vol., IV at 56:2; 57:18). Likewise, the District admitted that the dorms were a related service, and that they contend the Parents "refused," such service, however the District never discussed the refusal during an IEP meeting, or obtained or even offered the Parents a refusal of services form for the removal of A.M.'s dormitory living in a compensatory placement more than 300 miles away from his home District. (Tr. Vol., V at 259:6-25; 260:1-4).

47. However, Parents did consent to the April 2017 IEP. On May 9, 2017, Parents signed the Conference Summary and Parent Consent, indicating "I give consent . . ."
- (Ex. Z). That document indicates, in part:

[A.M.]'s compensatory services at KSSB were discussed in conjunction with development of the new IEP. Parents are thinking he will not stay in the dorm; they are working on other arrangements . . . Parents and districts verbally with IEP as developed. Parents will sign after revised copy is presented.

(Ex. Z, at 00379).

48. The "other arrangements" Parents were working on for A.M.'s housing during the KSSB school year was renting an apartment in Lenexa, Kansas. Parents did not consult with the IEP Team regarding their decision to rent an apartment at the April 2017 IEP meeting. (Tr. Vol., II at 27: 19-22). Mr. M testified that Parents never consulted with Mr. Maples or any member of the IEP team about the appropriate cost for renting an apartment. (Tr. Vol., III at 28:4-8). The Parents rented said apartment prior to the July 2017 IEP Team meeting. (Exhibit 26, at 00875; Tr. vol., 111 at 83:6-18)
49. The KSSB Action Plan stated that Parents and KSSB staff would determine before August 14, 2017 if/when A.M. would stay in the dorms once he began attending there full time. (Ex. XX).
50. Prior to the August 14, 2017 deadline, A.M. attended the KSSB ESY program in 2017 (the summer after sixth grade), and again lived in the dorms independently. That program ended abruptly when the KSSB principal expelled A.M. from the program due to aggressive and unsafe behaviors in June of 2017. (Tr. Vol., II at 140:9; 141:1; Ex. D at 0015).
51. Mr. Harding sent an email communication to Parents around the time A.M. was released from the summer program stating that KSSB would undoubtedly need

- outside help in order for A.M. to feel safe and be safe at KSSB. (Tr. Vol., I at 100:17-24; Ex. DDDD).
52. Prior to the July 2017 IEP Team meeting, the Ms rented an apartment in Lenexa, Kansas. (Exhibit 26, at 00875; Tr. Vol., Ill at 183:6; 184:15). Mr. M testified they were renting the apartment "dorms or no dorms" because of the issue related to getting A.M. to his medical appointments. (Tr. Vol., Ill at 189:14-20; Vol. Ill at 195:18-23). The Ms' rent is not in any way affected with regard to whether A.M. resides at the apartment or in the dorms. (Tr. Vol., Ill at 196:3-8).
53. Parents did not consult with the IEP Team with regard to the decision to rent the apartment; with regard to the location/cost of the apartment; with regard to whether they would be reimbursed for the apartment or the expenses associated with the apartment; or with regard to any aspect of their decision to rent an apartment. (Tr. Vol., II at 17:2418:23).
54. The Parents testified the main purpose of renting the apartment was to ensure that they had access to A.M. for purposes of transporting him to and from medical appointments. (Tr. vol., 111 at 28:20-29)
55. Ms. M testified that it was likely that even if A.M. resided in the dorms at any time between the 2017-18 school year and now, that they still would be renting the Lenexa apartment for the purpose of having access to A.M. for medical appointments. (Tr. vol., IV at 204:22-2)
56. A.M.'s IEP Team met on July 19, 2017. (Ex. NN Signed Conference Summary and Parent Consent Form). The purpose of the meeting was to address concerns regarding A.M.'s inability to complete the summer of 2017 ESY session, and to discuss any necessary changes to the behavioral plan. (See Ex. GGGG).
57. Mr. Harding testified that given the incident at the end of the 2017 summer ESY session, he would not have felt comfortable with A.M. living in the dorms because his first job is to assure safety of students, and KSSB is not equipped to

deal with elopement in the dorm at night. (Tr. Vol., I at 107: 23 — 108: 7). Mr. Wilson testified that there was a consensus among the IEP team for the 2017-2018 school year that the dorms would not be appropriate for A.M. due to his serious emotional difficulties. (Tr. Vol., III at 77:1578:22). A.M.'s mother's recollection of the discussion was similar to that of Mr. Maples and Mr. Wilson. (Tr., vol. Iv at 80: 9-18).

58. Parents testified they never stated in the July 2017 IEP team meeting that they refused to place A.M. in the dorms, or that they weren't interested in, or willing to listen to and consider other options. (Tr. Vol., IV at 82: 24 — 83: 16).

59. The Amendment IEP from this meeting (the "2017 Amendment IEP<sup>j</sup>") places A.M. at KSSB, which is 337 miles away from home, is silent regarding where A.M. will stay in the evenings during the week while he attends school at KSSB, is silent regarding whether A.M. will stay in the KSSB dorms during the school year, and is silent on how

A.M. would be transported on a daily basis to and from KSSB. (Ex. LL).

60. Regardless of the above, the Parents signed and consented to the July 2017 Amendment IEP. (Ex. NN).

61. The July 2017 Amendment IEP, is the last IEP to which Parents have consented, and is the IEP challenged in the First Amended Complaint. (Ex. LL); see also (Tr. Vol., I, at 40:9-15 (testifying that Ex. LL is "the amendment IEP that was written in July of

62. As the last consented-to IEP, the July 2017 Amendment IEP cannot be changed or altered absent consent by the Parents. (Tr. Vol., II at 23:19-22).

63. The July 2017 Amendment IEP includes the following language regarding reimbursement for transportation:

Transportation is provided by the district as delineated in the Prior Written Notice ("[Cooperative] #\_\_\_ will pay parents round trip mileage (674 miles) at the IRS standard mileage rate each time that [A.M.] has to be transported to KSSB for school and each time that [A.M.] has to be transported home from school. For the calendar year 2017 this rate is 53.5 cents per mile.")

This is the same language from the PWN, and substantially the same language that Parents requested by included in the April 2017 IEP. *Supra*; see also (Tr. Vol., II at 28:519).

64. Parents consented to the July 2017 Amendment IEP, in its entirety, including the transportation reimbursement language. (Tr. Vol., I at 28:5-29:5; Ex. NN, at 00467). At the time that Parents consented to the July 2017 Amendment IEP (1) they had already rented an apartment in Lenexa, *supra* FOF ¶40; and (2) they had already informed the IEP team that A.M. would not reside in the dorms, *supra* FOF ¶¶ 35-36; see also (Tr. vol., 11 at 29:6-1 1).

65. Parents did not express any concern that A.M.'s feeding issues, their concerns about his safety, or any other concerns would impair his ability to live in the dorms at the time of the July 2017 IEP team meeting. In fact, no one recalls any discussion of the dorms being raised at the July 2017 IEP team meeting. Mr. Harding testified, "I can't say specifically that I remember specific conversation about [whether A.M. would stay in the dorms] at that meeting." (Tr. Vol., I at 107:10-15); see also (Tr. Vol. III at 10:3-14).

66. However, KSSB staff did communicate safety concerns regarding A.M. residing in the dorms after been expelled from the 2017 ESY session at the end of June,

2017. Mr. Harding testified that given the incident at the end of the 2017 summer ESY session, he would not have felt comfortable with A.M. living in the dorms because his first job is to assure safety of students, and KSSB is not equipped to deal with elopement in the dorm at night. (Tr., Vol. I at 107:23; 108:7). Mr. Wilson testified that there was a consensus among the IEP team for the 2017-2018 school year that the dorms would not be appropriate for A.M. due to his serious emotional difficulties. (Tr. Vol., III at 77:15; 78: 22). A.M.'s mother's recollection of the discussion was similar to that of Mr. Maples and Mr. Wilson. (Tr. Vol., IV at 80:9-18). The Behavioral Plan/IEP meeting summary notes clearly indicate the concerns were clear, "#1 is safety but we also need to address how we go to the final point where safety is compromised." (Ex. MM, at 00455).

67. In August of 2017, KSSB did express concerns related to A.M.'s elopement issues, anxieties, and emotional state. Mr. Harding testified that there could have been supports put into place to address the concerns, if it was determined that it was appropriate for A.M. to live in the dorms. "So I — I suppose there could have been something proposed, but I — if you're asking me to list that, I don't— I can't list it off the top of my head." (Tr. Vol., I at 134: 10-25).
68. Mr. M testified that he believed that the IEP team made a decision that A.M. would not reside in the dorms during the 2017-18 school year at the April 28, 2017 IEP team meeting. (Tr. Vol., III at 9:19-24).
69. Mr. Harding testified, "My impression always was that they [A.M.'s parents] did not want [A.M.] to reside in the dorms." (Tr. Vol., I at 160:9-14); see also (Tr. Vol., II at 29:6-11).



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75. Parents appealed that decision on November 3, 2017. (Ex. AAA).
76. On November 21, 2017, the Kansas State Department of Education Appeal Committee upheld Ms. Durkin's finding. (Ex. BBB-Letter from Mark Ward to John

Maples and Parents regarding Appeals Committee's findings).

77. Subsequent to the July 2017 Amendment IEP, the Parents have made multiple requests for changes to the reimbursement language, and requests for proposals of alternatives to the existing arrangement. On December 5, 2017, Parents emailed Mr. Maples stating "since no other specific alternatives were presented by the district, please provide us with a specific, written proposal for how the district would transport [A.M.] to and from KSSB daily, given the current IEP. Please address in your proposal the behavioral, emotional, and health considerations that were raised at the meeting in July, at the IEP in April, and in March with the Prior Written Notice was signed." (Ex.

RRRR).

78. They followed up with another email communication on December 13, 2017 after receiving no response to their request. (Id.) Mr. Maples' response was then that he had no proposal since their agreement through the IEP was to pay for the round trips from \_\_\_\_\_, and that if Parents had something to share that would cause that to change, he would be glad to consider their responsibilities. (Id.).

79. After another response from Parents, Mr. Maples said he could offer trying to coordinate daily transportation by a Kansas City school district, or alternatively offered to pay daily mileage to and from the Lenexa apartment. (Id.).
80. Parents then requested one weekly round trip from \_\_\_\_\_, plus daily transportation to and from the Lenexa apartment to KSSB, as well as a stipend for overnight expenses at the IRS current rate any night A.M. was expected to be in school the next day. (Ids).
81. This email exchange continued through January 9, 2018 when Mr. Maples stated that they continued to disagree on the issue, and that the District would follow the IEP as written. He further stated that any additional discussion should take place in an IEP meeting. (Id).
82. On January 22, 2018, a Notice of Meeting was hand-delivered to Ms.M. (Exhibit AA, at 00283). The Notice indicated that a meeting would take place by conference call, and that the purpose was "Transportation clarification." (Id at 284).
83. A meeting was held on January 22, 2018. The Summary Notes from that meeting indicate that, "Parents indicated they are at a point of impasse on the reimbursement issue." (Ex. BB, at 00385). Mr. Maples testified that \_\_\_\_\_'s position remained the same and that "we would pay the mileage from \_\_\_\_\_ to KC, round trip for whenever they transported [A.M]." (Tr. Vol., II at 22:5-23). It has always been Mr. Maples' position that he could only include reimbursements to the Ms if they could "actually show [him] that they made the trip or at least represent to [him] that they had actually made the trip." (Id at 22:24-23:4).

84. Mr. Maples testified that he did not agree to change the reimbursement language because it was his belief that the language included in the July 2017 Amendment IEP comports with, and is appropriate under special education laws. (Tr. Vol., II at 30:14-22). That belief is based on: (1) state guidelines regarding what \_\_\_\_\_ can be reimbursed for; (2) the findings of Ms. Durkin, who agreed that the language included in the July 2017 Amendment IEP was appropriate; and (3) the fact that the appeals committee upheld Ms. Durkin's findings and found in favor of [Cooperative]. (Id at 30:23-32:6).
85. Mr. Maples did admit that he found no prohibition to reimbursements of flat rate mileage within the State guidelines, nor did he ever provide a copy of the reimbursement guideline provisions to the Parents at any time. (Tr. Vol., V at 268:18-24; 269:10-13). Mr. Maples also confirmed that he did not communicate directly with the State auditors of the Kansas Board of Education regarding transportation reimbursements to the Parents, nor did he communicate to the Parents that their position violated the State reimbursement guidelines, only that he would "only pay for what we could be reimbursed for." (Tr. vol., V at 266:7-14•, 269:4-9).
86. A.M.'s mother testified she spoke with Michael Murphy, an auditor at the Kansas State Department of Education, and inquired of him regarding the reimbursement language. The information she received from him indicated, that the IEP team could write into the IEP whatever travel arrangements fit best for the student and did not prohibit flat rates. (Tr. vol., IV at 45:25•, 46:18; Id. at 269:25•, 270:5•, Ex. VVV). This communication, as testified to, did not address whether the District would be prohibited from getting reimbursement for mileage calculated in this manner. Again, Mr. Murphy did not appear or provide testimony at the due process hearing.

87. The Summary Notes from the January 22, 2018 IEP team meeting confirm that KSSB declined to participate in any discussion regarding reimbursement for transportation, as it was an issue between the District and Parents. (Ex. BB). This essentially left only the Parents and Mr. Maples in the discussion of transportation.
88. The Summary Notes reflect that Mr. Maples indicated the District would reimburse based on mileage, traveled from \_\_\_\_\_ to Kansas City twice a week. No other discussion or proposals are reflected in the Summary Notes. (Id). Parents' supplement to the Summary Notes indicates that Mr. Harding reviewed with the team that it had previously had extensive conversation about whether A.M. should stay in the dorm, and consensually arrived at the decision that he should not. Parents expressed concern about moving to a dorm stay too quickly, but they were willing to continue discussions once all factors had been accounted for, such as A.M.'s ability to handle stressful situations, his food intolerances, refusal to eat unfamiliar foods, and frequent medication changes. Likewise, the Parents "expressed concern that the district has not been able to offer any alternative options for the parents to consider in transporting A.M. to KSSB on a daily basis. (Ex. CC. at 00390).
89. An IEP team meeting was again convened on February 6, 2018. The Notice of Meeting stated the purpose of the meeting was to address questions about transportation on the IEP. (Ex. EE). The Summary Notes from this meeting reflect no discussion about transportation or reimbursement, however the notes do indicate that the possibility of transitioning A.M. back to his home district and/or a Kansas City public school in slow increments of time. (Ex. FF at 00398).

90. Mr. Maples further indicated in a January 8, 2018 email to the Parents, "We believe there should be a transition to a more traditional school setting where comprehensive supports are in place during that transition time and where materials are guaranteed to be available when needed. We will not tolerate anything less on the materials..." Additionally, Mr. Maples stated, "We believe it is important that we meet and discuss A.M.'s transition next year as soon as possible, regardless of our difference over [the] reimbursement. This meeting should include KSSB and Sacred Heart. We agree there should be supports in place to help A.M. make that successful transition. In addition, we need to get started on brailled materials as soon as possible to avoid past issues. Please let us know of dates that we can meet in the near future to start making plans for next year." (Ex. RRRR at 00653). Similar discussions occurred on December

15, 2017 as well. (Id at 00655).

91. The District admits that although they had knowledge that such a transition plan would be necessary as of December 15, 2017, and even though multiple IEP meetings were held after that date, that no transition plans were discussed or formalized regarding these services for A.M. based upon the disagreement regarding the transportation reimbursement issue. (Tr. Vol., V at 261:4-25; 262:1-19).

92. Mr. Maples also admitted, that regardless of the transportation reimbursement issue, the District still had the ability, and legal duty, to provide a continuum of services and supports for A.M. after the 2017-2018 school year at KSSB, upon his return to the home district, but did not. He testified that the District had not retained anyone to provide braille services, or knew whether the CCTV was operational since the last time

A.M. had used it before going to KSSB. His testimony when asked why such a continuum of services was not explored or provided to A.M. for his transition back to

\_\_\_\_\_ City, Mr. Maples answered, "I don't have a good answer for that." (Tr. Vol., V at 263:20-25; 263:1-25; 264:1-25).

93. Prior to the February 6, 2018 IEP meeting, a draft IEP was submitted to Parents for review. (Exhibit HH). The draft IEP noted the following concern of A.M.'s social worker, Mr. Ron Wilson:

"Based on [A.M.]'s ongoing success . there was discussion regarding the possibility of his being enrolled into a local public school for one to two hours per day next year. Once [A.M.] became aware of the actions being considered there was a noticeable shift in his behavior. When confronted with the possibility of having to engage in a new experience or returning to a similar environment in which he experience discomfort, [A.M.] began to ruminate and set himself up for failure.

Although [A.M.] has made significant progress his recent actions have made it clear that he is not ready for what seems to be a major change."

(Ex. HH, at 00404). The possibility of A.M. attending a local public school was never effectuated, and there is no indication that the Parents ever refused the same.

94. IEP team meetings were convened on April 23, 2018 and May 21, 2018. The Summary Notes from each meeting reflect that the District and Parents were not in agreement with the proposed IEPs, which contained the same transportation/reimbursement arrangement as the 2017 Amendment IEP. (Ex. KK; Ex.

95. Parents never signed and/or consented to either version of the April 2018 IEP (Ex. HH and Ex. II ; see also Exhibit JJ).

96. Mr. Harding's understanding is that Parents "refused to sign the[ subsequent IEPs] until the transportation issue had been resolved." (Tr. Vol., I at 166:1-5). However, Mr.

Harding also testified that, "the question of— of transition back to a least restrictive environment would need to be resolved" as well. (Id. at 166:11-13).

97. An additional IEP team meeting took place on May 21, 2018. (Exhibit PP).

During that meeting:

ESY was discussed and is recommended to be provided at KSSB. It was reported that [A.M.] would not be eligible for dorm stay during ESY but would be eligible for dorm stay this fall. The criteria for ESY dorm stay was reviewed. Parents and the school district are not in agreement with IEP as developed.

(Ex. PP, at 00473). Parents did not submit their own summary notes or any written response to the May 21 summary notes as previously done (Ex. PP).

98. KSSB did not offer the dorm to A.M. for the 2018 summer ESY session because it was over capacity. (Ex. EEEEE).

99. Parents did request alternate reimbursement language for the 2018 summer ESY session due to A.M. not being permitted to reside in the dorms. (Ex. L9). Mr. Maples declined, saying that if they had not lived in the metropolitan area the past school year,

A.M. would have been able to reside in the dorm for the summer session. (Ex. M9).

100. KSSB representative, Ms. Shermer testified that priority was given to those students who were enrolled in certain programs, specifically KSSB's prep or vocational programs, because those programs required students to live in the dorms. She also testified that consideration was given to students who did not attend KSSB year-round because students who attended KSSB year-round had other opportunities to live in the dorms. Finally, she testified that consideration was given to where a student lived when determining whether a student was

invited to live in the dorms for the summer 2018 session. (Tr., vol., 1 at 180:21; 181:14, Id at 186: 6-9; Id at 188:9-14).

101. Ms. Shermer also testified that she used the Lenexa address when determining that A.M. would not be allowed to reside in the dorm, however also admitted that there were Kansas City, Kansas students who lived closer than A.M. who were permitted to reside in the dorm. (Id at 186:15-21; Id. at 187:9; 188:14.)

102. Ms. Shermer testified that she used the Lenexa address despite A.M.'s IEPs reflecting a \_\_\_\_\_ address, and that she would have gone by the address on the application. (Id at 203:19; 204:10). A.M.'s mother testified that she used the \_\_\_\_\_ address on the application for the ESY program and that she almost never uses the Lenexa address for any purpose. (Tr. Vol., IV at 94: 19; 95:4). Mr. Maples acknowledged in his testimony that based on Ms. Shermer's testimony, the Lenexa apartment was not the sole determining factor resulting in A.M. not being permitted to reside in the dorms for the summer 2018 session. (Tr. Vol., II at 75: 8-19).

103. On July 2, 2018, Parents initially requested a due process hearing. (Ex. B). At that time, they sought the following relief:

We believe that we should be reimbursed, at a minimum, the equivalent of two round trips per week, 1348 miles per week that school is in session, especially since this is what the district verbally indicated and led us to believe they intended to reimburse.

(Ex. B, at 00005, 00006, 00009).

104. In December of 2018, the IEP team met twice; each meeting lasted approximately 4 hours. (Tr. vol., 1 at 67:13-1

105. A.M.'s Parents were present for both meetings in December. (Tr. Vol., I at 168:48.)

106. Mr. Maples testified that he is unaware "of any issues that might have excluded [A.M.] from staying in the dorms[.]" (Tr. Vol., I at 41:22-42:1). Although, it is documented that A.M. was expelled from dormitory residency during his 2017 ESY stay, and had extensive medical issues, as well as behavior and emotional issues (such as elopement, anxiety, and communicated ideations of self-harm), as well as Mr. Harding's testimony that he did not have any particular supports in place that would be available to accommodate these issues if A.M. resided in the dorms — although they could look at the same if it was deemed appropriate for A.M. to reside in the dorms. (Ex. LL, at 00450; Tr. vol., 1 at 134:10-25).

107. At the December 3, 2018 meeting, a significant portion of the meeting time was taken up by the draft IEP being read and discussed. Towards the end, Parents raised the issue of dorms, and it was decided by the IEP team that there was not enough time for the discussion, and an additional IEP meeting was then scheduled for December 17, 2018. Parents raised the issue of dorms again at approximately 2-2.5 hours into this second meeting. Mr. Harding summarized the Parents' three concerns of safety, feeding, and appointments/transportation. Mr. Harding and Mr. Maples both indicated that their respective entities would not provide transportation for medical appointments, and Mr. Maples indicated that if the transportation for medical appointments makes this not appropriate, then A.M. needs to come back to \_\_\_\_\_. (Tr. Vol., 2 at 186: 4; 192: 10; Ex. SS; Ex. W9; Ex. X9). The discussion was cut off, and the IEP meeting concluded without this discussion occurring regarding any transition services back to \_\_\_\_\_.

108. On September 6, 2017, Parents sent Mr. Maples an e-mail providing the dates that

A.M. had attended school at KSSB. (Ex. 11- e-mail string between P M, John Maples, and Danis Sprague). The e-mail did not provide the miles that Parents had traveled to transport A.M. to KSSB. (Tr. Vol., V at 72:15-73:7, 76:1-16).

109. [Cooperative] responded to Parents asking Parents to provide a list of dates that they actually transported A.M. from \_\_\_\_\_ to school. (Id at 73:14-22).

1 10. Parents next requested reimbursement on January 8, 2018. (Ex. RRRR- email exchange between Parents and John Maples). Mr. Maples testified that he informed the Parents again, that he believed that they still had not provided him with sufficient information to reimburse them according to the IEP. (Ex. RRRR). "Please clear this up. Did you transport [A.M.] between \_\_\_\_\_ and Kansas City on each of the dates that you turned in for a 674 mile round trip?" (Id; Tr. Vol., V, at 154:3-21).

I I 1. Parents did not provide Mr. Maples with the above requested information to reimburse them until after the Due Process proceedings had begun. (Ex. 26 Parents' expense documentation); see also (Tr. Vol., V at 197:5-16; 225:6-17).

1 12. Parents to date have not submitted information to Mr. Maples regarding the actual dates of transport of A.M. to and from KSSB for the entire time of his placement at KSSB. (Tr. vol., V at 11:21- 12:1-12).

113. As of the hearing, Parents are unaware of the current amount of reimbursement they are seeking in this due process hearing; Exhibit 26 reflects the last time that Parents have attempted to calculate that information. (Tr. Vol., V at 11:21;12:1-12; Ex. 26). Parents agree that Exhibit 26 is not an up to date representation of what expenses would need to be reimbursed under the language of the July 2017 Amendment IEP. (Tr. Vol., III at 185:11-24).

#### IV. CONCLUSIONS OF LAW:

1. The Hearing Officer has jurisdiction to decide the issues before her pursuant to K.S.A. 72-9720.

2. That the issues set forth herein are ripe for determination, and that the due process hearing was held in accordance with the law. K.S.A. 72-973(b).

3. 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).

4. The party seeking relief bears the burden of proving the appropriateness or inappropriateness of the education. *LE v. Ramsey Bd. of Educ.*, 435 F.3d 384, 391 (3rd Cir. 2006).

5. In this matter, the Parents are the party challenging the IEP, and the burden of proof for this due process complaint belongs to and must be proven by the Parents.

4. "The IDEA is a comprehensive statute enacted to ensure that all children with disabilities have access to a free and appropriate public education designed to meet their unique needs." *LB. v. Nebo Sch. Dist.*, 379 F.3d 966, 968 (10th Cir. 2004).

5. The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., (the "Act")<sup>1</sup> establishes a substantive right to a "free appropriate public education" ("FAPE")

Please note that references herein to the "Act" shall include predecessor versions to the Individuals with Disabilities Education Act.  
for certain children with disabilities. *Board of Ed. of Hendrick Hudson Central School Dist., Westchesteray. v. Rowley*, 458 U.S. 176 (1982).

7. The Act offers states federal funds to assist in educating children with disabilities. See *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291 (2006). In exchange for the funds, a state pledges to comply with a number of statutory conditions. Among them, the state must provide a FAPE to all eligible children. 20 U.S.C. § 1412(a)(1).

8. "A free appropriate public education ('FAPE') is one provided at public expense, under public supervision and direction, and in conformity with an individualized education program ('IEP') developed for the child." *Johnson v. Olathe Dist. Schs. Unified sch Dist. No. 233*, 316 F. supp. 2d 960, 962 (citing 20 U.S.C. § 1401(8)), see also 20 U.S.C. § 1401(9).

9. A FAPE includes both "special education" and "related services". 20 U.S.C. § 1401 (9). "Special education" is "specially designed instruction...to meet the unique needs of a child with a disability." 20 U.S.C. § 1401 (29). "Related services" include transportation, and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. 20 U.S.C. § 1401 (26)(A)7.

10. The term IEP means a written statement for each child with a disability that is developed, reviewed and revised in accordance with the Act (emphasis added). 20 U.S.C. §1414(d)(1)

11. A court is to apply a two-step analysis based on the Act's dual emphasis on substance and procedure. First, the court determines whether the IEP development process complied with the Act's procedures. *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1312 (10th Cir. 2008) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982)).

Second, the court evaluates whether the IEP's substance provided the student with a FAPE. (Id). If the IEP satisfies both steps, then the school district has complied with the Act. (Id).

12. The IEP "is a snapshot, not a retrospective." *Roland M v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990). As a result, "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at

some later date." *O'Toole v. Olathe Dist. Schs. Unifed Sch. Dist. No. 233*, 144 F.3d 692, 701 (10th Cir.

1998).

13. "Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." *Id* at 702 (citing *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 534 (3d Cir. 1995)). The question is not whether A.M.'s IEP provided an educational benefit, but whether it was reasonably calculated to do so. see *Thompson R2-,J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1 149 (10th Cir. 2008) (explaining that the adequacy of an IEP is not determined through hindsight "because the question before us is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so"); *Andrew F. v. Douglas Cty. Sch. Dist. Re-I*, 798 F.3d 1329, 1341 (10th Cir. 2015) (citing *O'Toole* and *Thompson* for the proposition that "the measure is whether the IEP is reasonably calculated to guarantee some educational benefit, not whether it will do so"); *LG. v. Fair Lawn Bd. ofEduc.*, 486 F. App'x 967, 973 (3d Cir. 2012) ("Courts deciding whether this requirement has been met must avoid "Monday Morning Quarterbacking" and must evaluate the reasonableness of a school district's decision at the time that it was made."); *J.R. ex rel. S.R. v. Bd. ofEduc.*, 345 F. Supp. 2d 386, 395 (S.D.N.Y. 2004) ("[W]e . . . must not engage in Mondaymorning quarterbacking guided by our knowledge of [the studentJ's subsequent progress at [a particular school], but rather [must] consider the propriety of the IEP with respect to the likelihood that it would benefit [the student] at the time it was devised.").

14. The Tenth Circuit has recognized the Ninth Circuit's refusal to incorporate as part of the court's substantive evaluation of an IEP, a placement offer not included in the IEP itself. See *Sytsema* at 1315-1316 (citing *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 15251526 (9th Cir. 1994)). The court had rejected the district's argument that the placement offer was not included in the IEP itself because the parents had refused to consider that placement. The court held that

it must restrict its analysis to the written document because doing so would eliminate difficult factual disputes about the specifics of an oral offer. (Id).

15. The Tenth Circuit has also recognized the Sixth Circuit approach in this regard when it agreed with the decision in *Union*, and explained that substantive analysis of an IEP should be confined to the written document. See *Sytsema* at 1316 (citing *Knable ex rel. Knable v. Bexley Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001)). The parents had refused to agree to the district's proposed placement, and thereafter, the district never finalized the draft IEP. The court held that it would consider only the draft IEP as written to decide whether the district substantively complied with the Act, stating "ITlhc Knables' refusal to agree on a proposed placement for [the disabled child] does not justify Ithe school district's] noncompliance with the IDEA. Thus, the only offer of placement that was appropriately before the district court was that specified in (the school district's) draft IEP...". (Id.[Emphasis added]).

16. The Tenth Circuit has also recognized the Fourth Circuit approach in this regard. See *Sytsema* at 1316 (citing *A.K. ex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 676 (4th Cir. 2007)). There, the school district offered the parents an IEP that did not specify a placement for the student. The court held that it could not consider placement offers not included in the written IEP because "lelxpanding the scope of a district's offer to include a comment made during an IEP development process would undermine the important policies served by the requirement of a formal written offer..." (Id at 682[Emphasis added]).

17. The Tenth Circuit went on to state that given its own hesitancy to analyze the substantive deficiencies of an oral offer, it is reluctant to require parents to make a similar judgment regarding a proposed IEP without a final written offer.

Therefore, it concluded that when analyzing the substantive compliance of an IEP, the court should restrict its examination to the written document. Sytsema at 1316.

18. The July 2017 Amendment IEP was not developed unilaterally or without the ultimate consent of the Parents; it was developed by A.M.'s IEP team, including Parents, and the District. *McGovern v. Howard County Pub. Sch.*, No. AMD 01-527, 2001 U.S. Dist. LEXIS 13910 at \*55-56 (D. Md. Sept. 6, 2001) ("when a parent's suggestions pertaining to a child's placement are not accepted and incorporated into the IEP that does not necessarily constitute an IDEA violation.").
19. Multiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not. *RE. v. New York City Dep't of Educ.*, 694 F.3d 167, 190-191 (2nd Cir. 2012).
20. Only procedural inadequacies that (i) impeded the child's right to a FAPE, (ii) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the child, or (iii) caused a deprivation of educational benefits may be found to result in the denial of FAPE. 20 U.S.C. 1415 § 3)(E)(ii); *L.M v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 909 (9th Cir. 2008) (citing *W.G. v. Bd. of Trs. of Target Range Sch. Dist. No. 23*, 960 F.2d 1484, 1483 (9th Cir. 1992), superseded by statute on other grounds by the Act); see also *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 707 (10th Cir. 1998) (citing *Roland M v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1<sup>st</sup> Cir. 1990)).
21. An IEP team is required to consist of the following individuals: (i) the parents of the child; (ii) not less than one regular education teacher of such child if the child is, or may be, participating in the regular education environment; (iii) not less than one special education teacher of such child; (iv) a representative of the local educational agency who is qualified to provide or supervise the provision of specially designed instruction to meet the unique needs of children with

disabilities, is knowledgeable about the general education curriculum, and is knowledgeable about the availability of resources of the local educational agency; and (v) an individual who can interpret the instructional implications of evaluation results. 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a);

K.S.A. 72-962(u) [emphasis added].

22. Transportation is a related service required by the IDEA. 20 U.S.C. § 140126)(A).

23. "Transportation includes -- (i) Travel to and from school and between schools; (ii) Travel in and around school buildings; and (iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability." 34 C.F.R. § 300.34(c)(16)(i)-(iii).

24. Within the context of "related services," The IDEA defines related medical services as those that are "for diagnostic and evaluation purposes only." 20 U.S.C. § 1401 (17). "Medical services" are defined in the regulations to include "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 C.F.R. § 300.34(c)(5) [emphasis added]. Medical services "does not include treatment, and especially not medical treatment rendered over lengthy periods of time[.]" *McKenzie v. Jefferson*, 566

F. supp. 404, 411 (D.D.C. 1983) .

25. Medical services and transportation to medical services are not a related service. *Macomb cnty. Intermediate Sch. Dist. v. Joshua S*, 715 F. supp. 824, 827 (ED. Mich. 1989) (School district "may not be obligated to provide [transportation] if it necessitates the provision of 'medical services.'"); see also *Irving Indep Sch. Dist. v. Tatro*, 468 U.S. 883, 891, 104 S. Ct. 3371, 3376 (1984) ("The [IDEA] makes specific provision for services, like transportation, for example, that do no more than enable a child to be

physically present in class[.]") (Also holding federal law "defines 'related services' to include 'supportive services' (including . . . medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education.") (alterations in original); Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearings, 903 F.2d 635, 64344 (9th Cir. 1990) (internal quotations omitted); Butler v. Evans, 225 F.3d 887, 893 (7th Cir. 2000) ("analysis must focus on whether [the disabled child's] placement may be considered necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process.").

26. The parties agree that KSSB declined to participate in such discussions, as they were not the ultimate party responsible for A.M.'s transportation needs. Mr. Maples acknowledged in his testimony that he has the ultimate responsibility for ensuring the IEP complies with the law. He also agreed that issues about transportation and meeting A.M.'s needs should be made by an IEP team- He confirmed in his testimony that he did not encourage KSSB staff to participate in the discussions regarding reimbursement even though they were members of the IEP team. (Tr. Vol. 5 at 251:1 1 and 253:5). However, there is also no dispute between the parties that the District is the responsible party regarding transportation services, and payment and/or reimbursement for the same. The duty to offer a FAPE, and to issue an IEP, resides with a child's home school district, or "local educational agency." 20 U.S.C. § 1414(b) (imposing obligations to create and administer IEP on local educational agencies); Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 451 (2d Cir. 2015) ("the duty to offer a FAPE remains with the agency where the child resides; and a FAPE cannot be offered unless an IEP is issued"). "Generally, a 'local educational agency' is synonymous with the local school district. Timothy O. v.

Paso Robles UnifiedSch. Dist., 822 F.3d 1105, 1110 n.7 (9th Cir. 2016) (citing 20 USC.

§ 1401 (19)). Furthermore, the Kansas State Plan for Special Education provides that "local education agency" is defined in relevant part as "the unified school district in which the student lives . with his or her parents." Joshua W. v. Bd. ofEduc., No. 971042-JTM, 1997 U.s. Dist. LEXIS 9457, at \*7 (D. Kan. June 10, 1997). KSSB is not a unified school district, much less the district in which A.M. lived at any relevant time with his parents.

27. KSSB has no responsibility to reimburse Parents for placement in its program.

28. KSSB has no responsibility to accept students seeking placement at its facility.

29. A District cannot per se limit reimbursement for transportation services in subsequent school years to the amount set forth in an agreed IEP for a defined one year compensatory placement. Contract interpretation begins by looking at the terms of the contract. In order to determine the meaning of the terms of an agreement, the terms must be given their "plain and ordinary meaning." Kaufman v. Provident Life and Cas. Ins.

co., 828 F. supp. 275, 282 (D.N.J. 1992), afd, 993 F.2d 877 (3d Cir. 1993). "The court makes the determination whether a contractual term is clear or ambiguous." Schor v. FMS Fin. corp., 814 A.2d 1108, 1112 (N.J. super. ct. App. Div. 2002). "If the terms of the contract are susceptible to at least two reasonable alternative interpretations, an ambiguity exists. In that case, a court may look to extrinsic evidence as an aid to interpretation." Chubb Custom Ins. co. v. Prudential Ins. co. ofAm., 195 N.J. 231, 238, 948 A.2d 1285 (2008) (citation omitted). "In the quest for the common intention of the parties to a contract, the court must consider the relations of the parties, the attendant

circumstances, and the objects they were trying to attain." *Nester v. O'Donnell*, 693 A.2d 1214, 1220

(N.J. Super. Ct. App. Div. 1997) (citation omitted), A.D.L. by Lindstrom v. Cinnaminson Twp. Bd. of Educ. 62 IDELR 7, 975 F. supp. 2d 459 (NJ 2013).

30. Under the basic precepts of contract construction, a document "should not be interpreted to render one of its terms meaningless." *Cumberland County Improv. Auth. v.*

*GSP Recycling Co.*, 818 A.2d 431, 438 (N.J. Super. Ct. App. Div.), cert. denied, 827 A.2d 289 (N.J. 2003). Even though that precept does not require every phrase in a contract to be given its literal meaning, the contract must be read as a whole, and with common sense. See *Id.*; see also A.D. L. by Lindstrom v. Cinnaminson . Bd. or Educ. 62 IDELR 7, 975 F. supp. 2d 459 (NJ 2013).

31. No specific guidance on the appropriate number of trips home from a residential facility can be found directly in the IDEA. For students who live at residential schools and other "round-the-clock" educational facilities, districts generally have been expected to provide reasonable transportation expenses associated with the students' travel between these facilities and the home. At a minimum, students placed in residential facilities for educational purposes should be provided transportation as a related service to and from the school at the beginning and end of the school term, and for scheduled school holidays and recesses. See *Hinsdale Twp. High Sch. Dist. 86*, 35 IDELR 75 (SEA IL 2001) [emphasis added]. Beyond these minimum requirements, state and/or local school policies should allow for individual determinations, on a case-by-case basis, regarding how often a student needs to go home. [emphasis added] Letter to Dorman, 21 1 IDELR 70 (OSEP 1978); Letter to Anonymous, 213 IDELR 164 (OSEP 1988); and *Minnechaug Reg? Sch. Dist.*, 401 IDELR 365 (SEA MA 1989).

32. Practical considerations should be taken into account in setting the parameters for required transportation (or reimbursement for transportation) to and from the residential facility. First, there is room for cost considerations in this analysis. The schedule of operations at the residential facility is another important factor that further influences these determinations. There is authority for the position that schools must provide transportation to and from a residential facility when the school is closed on weekends. see Cobb County Bd. of Educ., 505 IDELR 232 (SEA GA 1983); and Richmond county (GA) Sch. Dist., 352 IDELR 240 (OCR 1986). Finally, any individual rules and policies of residential facilities regarding student travel and visitation must be respected. Some residential schools place restrictions on a student's contact with families. See Reed v.

Lincoln-Way cnty. High Sch. Dist. No. 210, 32 IDELR 197 (N.D. Ill. 2000).

33. Given the unique "around-the-clock" nature of residential placements, transportation expenses can encompass parental and family visitations to the residential facility, in addition to sending the student on trips home. If a state policy on the number of trips exists, it must allow for a case-by-case determination of how much visitation is necessary, given the student's unique needs. Trips by parents to the residential facility may be for dual purposes, such as attending school conferences, and other school-related meetings. See Los Angeles Unified Sch. Dist., 521 IDELR 144 (SEA CA 2009).

34. Any travel claims that can be attributed to entertainment expenses or are considered luxury items are usually struck down when placed in dispute. See Niskayuna Cent. Sch. Dist., 30 IDELR 913 (SEA NY 1999).

35. Reimbursement for trips back and forth to the residential facility is for the purpose of picking up or dropping off the student for visitation should be reimbursed

or otherwise provided for within the student's IEP. See *New Prairie United Sch. Corp.*, 30 1 DELR 346 (SEA IN 1999) (where parental visitation at a residential facility enabled

parents to participate in a program of family therapy and training, the district was obligated to fund either 12 parent visits to the school annually or 12 student visits home annually in lieu of parent visits to the facility); *Aaron M v. Yomtoob*, 38 IDELR 122

(N.D. Ill. 2003) (parents authorized to take six trips per year to son's out-of-state residential placement; such trips designed to teach parents skills and strategies to work with their son); and *Aaron v. Yomtoob*, 40 1 DELR 65 (N.D. Ill. 2003) (District Court would not require the parents of a child with autism placed in an out-of-state residential facility to reimburse the district for trips in excess of the six yearly trips the court determined was a reasonable number of publicly funded parental visits).

36. Parental visits for therapeutic purposes can be reimbursable, if said visits are educationally appropriate and part of the student's IEP. A father's visit to meet with the student's therapist at the student's out-of-state residential facility was educationally appropriate, and reimbursement was mentioned in the IEP and supported by the district's travel policy. Thus, the district was obligated to pay his travel expenses related to the visit. *Los Angeles Unified Sch Dist.*, 52 1 DELR 144 (SEA CA 2009).

37. The violation of a substantive requirement of the IDEA results, of necessity, in the denial of a FAPE. See, e.g., *A.K. ex rel. J.K v. Alexandria City Sch. Bd.*, 484 17.3d 672.684 (4th Cir. 2007).

38. A District's failure to provide transportation to enable Student to attend his compensatory educational placement is a substantive violation of the IDEA. Unlike a procedural violation of the IDEA, a substantive violation is not subject to a

harmlessness analysis. A.K ex rel. J.K. v. Alexandria City Sch. Bd., 484 F.3d 672, 679 (4th Cir. 2007). (Procedural violations are subject to "harmlessness analysis," while substantive violations of the IDEA are not.)

39. Although the "harmlessness" of a substantive violation is not considered in determining whether or not a denial of FAPE has occurred, the degree of harm is an important factor to be considered in the remedy analysis. A hearing officer may only grant a remedy that is appropriate based upon the evidence at the hearing. Cf. 20 U.S.C. § 1415(i)(2)(C)(iii) (Court to grant such relief as it determines is appropriate); *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002 (1985) (IDEA does not specify the type of relief, except that it must be "appropriate. ").

40. The District could not unilaterally implement any of the draft IEPs presented to Parents after the July 2017 IEP. see U.S.C. § 1415(j).

41. The District responded to each request by Parents to convene an IEP team meeting.

42. While the purpose of this statutory stay-put provision is to prevent school districts from "effecting unilateral change in a child's educational program," *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 83 (3d Cir. 1996), nothing prevents a schools district and parents from agreeing to changes in an IEP pending administrative review. (lcf).

43. Whether Parents were meaningful participants in the IEP process is a procedural inquiry. *J.L. v. Mercer*, 592 F.3d 938, 953 (9th Cir. 2009). However, "not all procedural violations by a school district in implementing the IDEA will necessarily result in the denial of a FAPE. Procedural error constitutes the denial of a FAPE only when it results in lost educational opportunity for the child, or when it significantly restricts parental participation in the IEP formation." *ML. v. Federal Way Sch. Dist.*, 394

F.3d 634, 653 (9th Cir. 2004) (collecting cases). KSSB's refusal to weigh in regarding the District's reimbursement of transportation did not deny Parents the opportunity to be meaningful participants. See *Lemon Grove Sch. Dist.*, 2017 U.S. Dist. LEXIS 26449, at \*31 (holding that a district's failure to include a representative from the placement school was not a procedural violation of the IDEA); see also *Student R.A. v. West Contra Cost Unified Sch. Dist.*, 14-cv-0931-PJH, 2015 U.S. Dist. LEXIS 109122, 2015 WL 4914795, at \*19 (N.D. Cal. Aug. 17, 2015). KSSB had no authority to commit district resources to the IEP regarding transportation or transportation reimbursement issues.

44. The District representative (in this case, Director Mr. Maples) has the responsibility to commit resources to the IEP. See *Kansas Special Education Process Handbook*, KSDE, available at <https://www.ksde.org/Portals/0/SES/PH/PH-Ch04.pdf?ver=2015-01-30-144653-897> ("The primary responsibility of the school representative or designee must be to commit school resources and ensure that services written in the IEP will be provided.").

45. While federal regulations require that parents be given the opportunity to meaningfully participate in the IEP process, see 34 C.F.R. § 300.345, those regulations do not require a school district to relinquish to parents all control over the substance of the IEP or what constitutes a FAPE. See *White v. Ascension Parish School Bd.*, 343 F.3d 373, 377 (5th Cir. 2003) ("we reject the assertion that parents are denied input into a decision if their position is not adopted"). As one court noted, requiring an IEP team "to adopt an IEP as drafted by the students' parents . . . essentially nullify the whole IDEA framework." *T. ex rel. C. T. v. Lewiston Sch. Comm.*, No. 99-202-P-H, 2000 U.S. Dist. LEXIS 10674, at \*53 (D. Me. July 27, 2000).

46. "School officials must come to the IEP table with an open mind, but they need not come with a blank mind." *Bd. of Educ. v. Michael R.*, No. 02 C 6098, 2005 U.S. Dist. LEXIS 17450, at \*45 (N.D. Ill. Aug. 15, 2005). Courts routinely find that parents are

afforded the opportunity to participate in the IEP process, despite the fact that the parents' desires are rejected. See, e.g., *Ms. S. ex rel. G v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1133 (9th Cir. 2003) (finding, despite the fact "the parent and the school district are in disagreement about aspects of the proposed plan," a school district complied with 34 C.F.R. § 300.345 where it provided "a meaningful opportunity for [a parent] to participate in the IEP process, developed an IEP plan to the best of its ability after [the district and parent] could not come to a consensus about an IEP, and afforded [the parent] two due process hearings to establish the validity of its proposed plan"); *L.P.*

*v. Longmeadow Pub. schs*, No. 10-40190-FDS, 2012 U.S. Dist. LEXIS 115277, at \*53 (D. Mass. Feb. 24, 2012) ("Her objection, then and now, to the opinion of others on the IEP team concerns the substance of the resulting proposal, not the procedure. This Court agrees that the record reveals no evidence that any procedural defects 'significantly impeded' plaintiffs' ability to participate in the IEP formation process.").

## V. DISCUSSION:

### A. Overview:

There is no doubt by the hearing officer, or the parties, that A.M. has complex medical, as well as psychological, needs that affect his ability to receive a FAPE. This has been true since he first received special education services at age five in Kindergarten, and will continue throughout A.M.'s high school, and possibly beyond in transition placements. It is also apparent to the Hearing Officer, that A.M.'s medical, psychological, and/or behavior needs are not static in nature, and instead have been, and will continue to operate, on a continuum that will require his IEP team to routinely, and frequently assess his educational needs and placements.

B. Issues:

- r. The 2017 Amendment IEP (July 2017) was not reasonably calculated to provide A.M. with a FAPE.

The parties agreed that A.M.'s placement at KSSB was in his best interests, and believe that said placement would provide A.M. with a FAPE, especially regarding his unique educational needs regarding his visual disability. Part of the basis of this agreement between the parties for the placement of A.M. for a year of compensatory education at KSSB was based upon the failures, all be it unintentional, of the District to provide A.M. with working adaptive technology (i.e. working CCTV), and timely providing accurate braille materials.

Likewise, the Parents had substantiated findings regarding unreimbursed travel expenses to the same compensatory educational location, KSSB, for ESY services provided to A.M. in 2013, in which the District was found to have violated special education laws by failing to provide transportation to A.M. for his ESY program at KSSB as required by his IEP. Unfortunately, this extensive history between the parties has contributed to an ongoing and continuous impact on the parties ability to effectively communicate regarding A.M.'s educational needs, and the development of an IEP that provides A.M. with a FAPE.

Once the decision from Ms. Durkin was handed down on March 3, 2017, and the parties had agreed to the compensatory placement of A.M. at KSSB, it is the hearing officer's belief that both parties entered into the April 2017 IEP meeting, and the KSSB action plan meeting, with open minds, and the best interests of A.M. in mind. At that point, A.M. had participated in a successful ESY program at KSSB in the summer of 2016, where he independently lived in the dorms without any significant issues.

Based upon that, the parties had every reason in April of 2017 to believe that a full time placement for A.M. at KSSB would be similar, and everyone one had reasonable expectations that A.M. could be successful living in the KSSB dorms full time. However, this all changed when the summer session for A.M. in 2017 for ESY at

KSSB did not go as planned. A.M. was dismissed from the dormitory due to safety concerns, specifically elopement and threats of self-harm. He had to be picked up immediately by his parent on June 27, 2017 due to the same.

KSSB representatives informed the parents, as well as the IEP team that there were definite and significant safety concerns present for A.M. in the KSSB dorms at that time, and there was no evidence or testimony given regarding any specific plan or supports in place in the dorm after the June 27, 2017 ESY expulsion that were calculated or appropriate to handle A.M.'s present emotional and behavior conditions, nor were any every calculated by the IEP team at any point after that. Even though IEP meetings were held after the June 27, 2017 ESY dorm expulsion, there is never any mention in the draft IEPs or the July 2017 Amendment IEP regarding what supports, services, or accommodations to be utilized to address A.M.'s unique needs while residing in the dorms, such as his elopement issues, assistance with eating, or any type of safety plan ifhe expressed thoughts of self-harm.

The services of room/board Sunday night through Friday afternoon were clearly indicated as services to be provided to A.M., as was "transportation is provided by the district Friday & Sunday afternoon," in the April 28, 2017 draft IEP. The amendment IEP from the July IEP meeting has these services removed, again this was after A.M. attempted to jump out a window while staying at the dorm, and was expelled from the dorm on June 27, 2017. The Behavioral Plan/IEP meeting summary notes clearly indicate the concerns were clear, "#1 is safety but we also need to address how we go to the final point where safety is compromised." (Ex. MM, 00455). Yet when KSSB's Mr. Harding was asked what supports were in place, he testified that there could have been supports put into place to address the concerns, if it was determined that it was appropriate for A.M. to live in the dorms. "So I — I suppose there could have been

something proposed, but I — if you're asking me to list that, I don't I can't list it off the top of my head." (Tr. Vol., I at 134: 10-25).

Both of the aforementioned services, room/board and the wording that the district would provide the transportation Friday and Sunday afternoons were completely removed from the next draft IEP printed May 5, 2017 (Ex. Y). It is important to note that there were no additional IEP meetings between April 28, 2017 IEP meeting where the draft IEP printed April 25, 2017 (Ex. X) was discussed— which included room/board and district provided transportation as a related service, and the draft IEP printed May 5, 2017. Likewise, there is not one single refusal of services signed by the Parent(s) at any point in time relevant to this due process hearing complaint (2017 through the present) - ever.

Conference summary notes and parental consent from the April 28, 2017 IEP meeting clearly indicate the Parents "are thinking he [A.M.] will not stay in the dorms; they are working on other arrangements." (Ex. Z, at 00379). However, there is no indication that the Parents refused these services, specifically the room/board or district provided transportation. There are also indications of A.M.'s behavioral issues were becoming a greater concern in the past year, with his threats of self-harm and impulsiveness. (Id). There was no mention of where A.M. would live during the school week while attending KSSB whatsoever. This meeting occurred approximately two months prior to the Parents signing the lease and renting the apartment in Lenexa.

The draft IEP printed May 5, 2017 completely removed all mention to housing for A.M. for the compensatory placement at KSSB, a placement more than three hundred miles away from his home in \_\_\_\_\_. The only transportation language included in this draft is for reimbursement of mileage of "674 miles roundtrip" for each time that "A.M. has to be transported to KSSB for school and each time A.M. has to be transported home from school." (Ex. Y, 00374). Again, this is still approximately two

months prior to the Parents obtaining the Lenexa apartment, so it is unclear to the hearing officer how an IEP placement over three hundred miles from A.M.'s home, a placement that the services of room and board had been completely removed, exactly how such a placement was reasonably calculated to provide a FAPE to A.M. at his KSSB placement.

Again, at this point in time, May of 2017, it may very well have been that the IEP team was still considering placement in the dorms, as the KSSB action plan indicated that "if/when A.M. stays in the dorm will be determined before Aug. 2017," and they may have wanted to see how A.M.'s ESY 2017 summer session went in the dorm, or even to explore other arrangements as expressed by the Parents in the April 28, 2017 IEP meeting. The problem is, none of this was ever documented, and the IEP failed to address how and where A.M. would reside during his compensatory placement at KSSB, and thus the July 19, 2017 Amendment IEP was not reasonably calculated to provide

A.M. a FAPE due to the lack of addressing A.M.'s housing situation for his residential placement at all, again for a placement located more than three hours from his home in \_\_\_\_\_.

The District argues that by the time of the July 19, 2017 IEP meeting, the Parents had signed a lease, and rented the Lenexa apartment, and done so without the District's knowledge. (Ex. 26, at 00875). Again, at this point it is understandable that the District may think the transportation reimbursement language in the IEP would need to be adjusted based upon the Parents' obtainment of the local area apartment, but that is not referenced in the July 19, 2017 IEP, summary notes, or parental consent. Simply put, the apartment was not reasonably calculated as a housing alternative by the IEP team, it was not discussed, nor agreed to by the team as an adequate replacement to the

room/board service that had been removed from the draft IEP. It is clear, at the time of the consent to the July 19, 2017 IEP was signed by the Parents that neither the housing situation for

A.M. for the KSSB residential placement, or the transportation reimbursement for the KSSB placement, had been reasonably calculated to provide A.M. a FAPE.

2. The draft IEPs since the 2017 Amendment IEP are not reasonably calculated to provide A.M. with a FAPE.

The language in the draft IEPs after July 19, 2017 never substantially changed regarding the housing or transportation reimbursement issues. The District and KSSB clearly had knowledge of the Parents' Lenexa apartment, as it was discussed at length in both email communications, as well as subsequent IEP meetings in January, February, April, May, and twice in December of 2018 regarding the transportation reimbursement, and the appropriateness of A.M. residing in the dorms at KSSB.

The District admits that they received multiple requests from the Parents to alter the transportation reimbursement language in A.M.'s IEP, which included a request as to how the District would provide daily transportation for A.M. to and from KSSB, as well as requests for overnight stipends. Mr. Maples indicates that other than responding in an email that the District "could" provide transportation for transportation for A.M, that he made no inquiries into how that service would be provided by the District, nor did he take any steps to investigate the same.

The Parents however also did not respond to the District's requests for specific information regarding the actual travel by the Parents to transport A.M., which also frustrated the reasonable calculation of the related service of transportation for A.M. to and from KSSB. The hearing officer has to think that if the Parents would have been more forthright in their responses to the District's requests for information regarding their actual travel to transport A.M. for educational purposes, the matter may have allowed for a more agreeable transportation plan for A.M. as a related service for his placement at KSSB.

Regardless, once the Parents put the District on notice that they could not afford, or no longer had the intention to continue to rent the Lenexa apartment, and they wanted

the IEP transportation services to be re-evaluated based upon the same, the IEP team should have addressed a continuum of services that could have provided the related service of transportation to A.M.'s residential (or potential lack of residential) placement over three hundred miles from his home in \_\_\_\_\_. This did not occur, instead the District choose to stick with the original language from the July 19, 2017 consented IEP, and refused to address the change in circumstances that were affecting A.M.'s need for services in order to receive a free and public education at his compensatory placement at KSSB.

Most striking to the hearing officer was the lack of transition planning for A.M. after the July 19, 2017 consented to IEP, frankly by all parties. A.M.'s placement at KSSB was originally a one year school placement, the parties agreed that it was not a permanent placement for A.M., merely a chance for him to improve his blind skills, and hopefully gain social benefit from being around students with like disabilities, an option that was far harder to recreate in his home district of \_\_\_\_\_. Email communications between the parties clearly indicate that they anticipated A.M. returning to his home district after the year-long compensatory placement, and that there was a need to plan for his transition back to the home district, even if on a part-time basis at first, whether he would be going to back to Sacred Heart, and even just obtaining braille service provider for A.M. when he returned. None of this was ever addressed in the subsequent draft IEPs, even though the return of A.M. to his home district after the year placement was acknowledged by the IEP team as necessary, and Mr. Maples even emailed the Parents the need to do such things, "sooner than later," the District still failed to plan for, or address any of these issues.

Although A.M. remained at KSSB under his "stay put" IEP, it is obvious that A.M.'s placement at KSSB has definitely had its ups and downs — with a major decline at many times during the 2018-2019 school year in his psychological status, with

multiple incidents resulting in inpatient hospitalizations for his own safety. The hearing officer agrees with Ms.M, in that the uncertainty for A.M. is causing him distress, decline, and impacting his ability to learn and receive a FAPE. It is apparent to the hearing officer that neither the District nor the Parents really know if KSSB is the appropriate placement for A.M. anymore, especially with his additional diagnosis of autism, as well as his existing issues including his feeding problems, elopement issues, and threats of self-harm. It is clear that the draft IEPs presented since the July 19, 2017 consented IEP are not reasonably calculated to provide A.M. a FAPE, as they do not include any transition plans, services clearly indicated in his IEP to be provided to A.M. back in his home district, any reference to housing for any remaining time for A.M. at his KSSB placement, or the request for modifications in transporting A.M. to from KSSB, and are clearly not tailored to his unique needs.

3. The Parents were not denied the opportunity to be meaningful participants in the IEP process.

The Parents clearly underwent a frustrating journey in the IEP process for their child, which ultimately resulted in this due process complaint. It is understandable based upon the history between the parties dating as far back as 2010, that each side is leery in their future pursuits of tailoring a reasonable and appropriate IEP for A.M. However, frustration and disagreement by the parties does not necessarily constitute a denial to meaningfully participate in the IEP process.

Although the parties continued to disagree, came to quite a stalemate regarding the transportation reimbursement issue, and failed to achieve an agreed IEP after July of 2017, it does not mean that the Parents did not meaningfully participate in A.M.'s IEP process. The District respected, and scheduled, IEP meetings each time the Parents requested the same sometimes multiple times a month, and for as much as four hours per meeting. The Parents were never denied the opportunity to engage in a discussion

regarding A.M.'s educational process, including all of the issues set forth in this due process hearing. If there is a legitimate disagreement between the parties, and the same are discussed, considered, and even if no resolution is reached, it is not tantamount to the Parents being denied meaningful participation. It just means that the parties came to an impasse, and the Parents exercised their rights to continue to participate in A.M.'s IEP process through the litigation of this due process complaint. The District extended access to the Parents at all times during the IEP meetings, and allowed them a chance to express their concerns, recommendations, and to even supplement educational records with their own summary notes, and did not deny the Parents meaningful participation in the IEP process.

4. The Parents did not raise issues that are outside the issues raised in the First Amended Complaint or the pre-hearing conference, and thus all issues addressed are proper for consideration at the Due Process Hearing under Kansas law.

The District has continuously argued, through pre-hearing motion, as well as in post hearing briefs, that the Parents have included issues that are outside of the First Amended Complaint (FAC). The hearing officer finds this argument unpersuasive, and without merit. As indicated in her January 21<sup>st</sup>, 2019 Order, all issues set forth in this decision were included in the FAC or were clearly conveyed and approved at the prehearing conference.

In said order, the hearing officer did exclude Parents' request to add issues involving retaliation, a new issue, and those issues were not allowed and dismissed from the cause of action. However, K.S.A. 72-3416(b)(6) vests statutory authority in the hearing officer to allow issues to be added in a pre-hearing conference, held prior to the due process hearing. The remaining issues, although more detailed in the email

sent by Parents' counsel during the pre-hearing conference, were not new or unexpected issues regarding the FAC, or the due process hearing request. The District had awareness and understanding of the issues forming the basis of the complaint in compliance with the

KSDE form, which include issues revolving around A.M.'s attendance to medical appointments if and while residing in the KSSB dorms and as indicated in Sen. Tep. No. 108-185 at 34 (108 Cong. 2003). All issues objected to by the District were supplied either in the FAC or in the pre-hearing conference, and permissible under Kansas law.

5. Nature and extent of reimbursement that the Parents entitled to regarding transportation issues raised in the first amended complaint, and whether the District's value of reimbursement due and owing to the Parents of \$3,275.64 is inadequate, and does not comply with the requirements of the 2017 Amendment IEP, or their duties under the IDEA.

The District's value of \$3,275.64, which is the same value they continued to hold out as the appropriate value for the related services throughout the due process proceedings including post hearing briefing, is not adequate to reimburse the Parents actual mileage in transporting A.M. to and from KSSB. The hearing officer is cognizant of the need for additional information to be provided by the Parents regarding the actual mileage incurred to transport A.M. to and from his compensatory placement, but it is clear that the \$3,275.64 is not sufficient nor adequate, even by the District's own Mr. Maples testimony.

The hearing officer further finds a lack of authority, or rational to allow the awarding of much of the requested relief for reimbursement by the Parents including: rent, utilities, late fees, renters insurance, and/or any other costs associated with the Lenexa apartment. Although the hearing officer can understand that Parents attempted to negotiate a "minimum" monthly reimbursement of mileage to cover such costs, the decision to rent the Lenexa apartment and to incur all the costs associated with the residence lies solely with the Parents.

The Parents did not attempt to inform, or even request such expenses from the District prior to incurring these costs. The testimony of the Parents indicate there was ample opportunity to discuss the same with the District, but they chose not to do so, and to create their own unilateral answer to A.M.'s housing issue with the KSSB placement. This is especially distressing considering that the Parents probably had legitimate concerns with safe transport of A.M. for the extended distance to \_\_\_\_\_, as well as housing issues at KSSB regarding this placement- but the Parents choice of remedy, getting the Lenexa apartment, was their unilateral choice- and never discussed with the IEP team, or included as part of A.M. 's IEP or related services.

Instead the Parents offered testimony that the Lenexa apartment was for the primary purpose of having access to A.M. for his medical appointments, and that they would have likely obtained said apartment even if A.M. was residing in the dorms at KSSB. Therefore, the apartment, and all costs associated with the same are not a related service or subject to reimbursement under Kansas special education law.

## VI. DECISION:

1. Is the 2017 Amendment IEP reasonably calculated to provide A.M. with a FAPE?

Based upon the preceding findings of fact and conclusions of law, and as described in the discussion section, the impartial hearing officer finds the Parents have met their burden of proof showing that the 2017 Amendment IEP (consented to on July 17, 2017) was not reasonably calculated to provide A.M. with a FAPE. Based upon the same, a violation of special education laws and regulations is substantiated on this issue.

2. Are the draft IEPs since the 2017 Amendment IEP reasonably calculated to provide A.M. with a FAPE?

Based upon the preceding findings of fact and conclusions of law, and as described in the discussion section, the impartial hearing officer finds the Parents have met their burden of proof showing that the draft IEPs since the 2017 Amendment IEP (consented to on July 17, 2017) have not been and are not reasonably calculated to provide A.M. with a FAPE. Based upon the same, a violation of special education laws and regulations is substantiated on this issue.

3. Were Parents denied the opportunity to be meaningful participants in the IEP process?

Based upon the preceding findings of fact and conclusions of law, and as described in the discussion section, the impartial hearing officer finds the Parents have not met their burden of proof showing that they were denied the opportunity to be meaningful participants in the IEP process for A.M. both prior to, and after the last consented to 2017 Amendment IEP. Based upon the same, a violation of special education laws and regulations is not substantiated on this issue. The hearing officer finds in favor of the District regarding this issue.

4. Have the Parents raised issues that are outside the issues raised in the First Amended Complaint, and thus improper for consideration at the Due Process Hearing under Kansas law?

Based upon the preceding findings of fact and conclusions of law, and as described in the discussion section, the impartial hearing officer finds the Parents have not raised issues that are outside the issues raised in the First Amended Complaint or at the pre-hearing conference pursuant to K.S.A. 72-3416(b)(6), and thus all issues set forth in this entire decision are proper for consideration by the Due Process Hearing Officer under Kansas law. Based upon the same, a violation of special education laws and regulations is not substantiated on this issue. The hearing officer finds in favor of the Parents regarding this issue.

5. Nature and extent of reimbursement that the Parents entitled to regarding transportation issues raised in the first amended complaint, and whether the District's value of reimbursement due and owing to the Parents of \$3,275.64 appropriately complies with the requirements of the 2017 Amendment IEP, and their duties under the IDEA?

Based upon the preceding findings of fact and conclusions of law, and as described in the discussion section, the impartial hearing officer finds the Parents have met their burden of proof showing that they are entitled to transportation reimbursement in excess of the District's value of \$3,275.64, and that said value does not appropriately comply with the requirements of the 2017 Amendment IEP, and the District's duties under the IDEA. Based upon the same, a violation of special education laws and regulations is substantiated on this issue.

#### VII. DIRECTIVES FOR IMPLEMENTATION:

1. As the Parents were able to demonstrate by sufficient evidence that the 2017 Amendment IEP (consented to on July 17, 2017) was not reasonably calculated to provide A.M. with a FAPE, the District is directed to do the following within ten (10) days of the issuance of this decision:

- a. Within ten (10) days of this decision, convene an IEP meeting to evaluate, discuss and address the current placement of A.M. at KSSB, specifically addressing the housing of A.M. within the IEP, as well as the modified transportation reimbursement required based upon the housing deemed as appropriate by the IEP team, and the same to be included as a related service in A.M.'s IEP.

- b. In the consideration of the above, the District is specifically directed that the Parents are not required to maintain the Lenexa apartment in order to make the KSSB placement feasible. If Parents choose and indicate that they do not desire, wish, or have the financial ability to maintain the Lenexa apartment, the District must provide a continuum of related services to address the housing and transportation needs to

maintain the KSSB in a realistic manner, as long as this placement continues at no cost to the Parents.

c. Within ten (10) days of this decision, the District is ordered to convene the IEP team to address the transitional needs and related services and supports for A.M. upon his return to his home District from KSSB. Since this should have already occurred, the IEP team should address the same forthwith, and include in their related services how brailled materials will be provided in a quality and timely manner to A.M. upon his return, that all other technological supports (such as CCTV) indicated as necessary for A.M.'s educational progress are ready, available, and in proper working order. Finally, the IEP should include a member from the home district's placement school, Sacred Heart or other agreed upon local district school, and develop a transition plan, as well as ongoing plan after the transition, for A.M. in his home district.

d. If the District alleges that the Parents are refusing any services or supports that the IEP team agrees are appropriate, the District is directed to obtain a written refusal of services from the Parent(s) for each denied service or support, and such a denial of services form presented to the Parent(s) must contain plain and unambiguous language regarding the service or support being refused. This directive should be permanent in nature.

2. As the Parents were able to demonstrate by sufficient evidence that the draft IEPs since the 2017 Amendment IEP (consented to on July 17, 2017) were not reasonably calculated to provide A.M. with a FAPE, the District is directed to do the following within ten (10) days of the issuance of this decision:

a. Within ten (10) days of this decision, convene an IEP meeting to evaluate, discuss and address the current placement of A.M. at KSSB, specifically addressing the housing of A.M. within the IEP, as well as the modified transportation reimbursement required based

upon the housing deemed as appropriate by the IEP team, and the same to be included as a related service in A.M.'s IEP.

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d. If the District alleges that the Parents are refusing any services or supports that the IEP team agrees are appropriate, the District is directed to obtain a written refusal of services from the Parent(s) for each denied service or support, and such a denial of services form presented to the Parent(s) must contain plain and unambiguous language regarding the service or support being refused. This directive should be permanent in nature.

3. As the Parents were able to demonstrate by sufficient evidence that the nature and extent of the transportation reimbursement they are entitled to receive pursuant to the 2017 Amendment IEP is in excess of the District's value of \$3,275.64, and has not been made in compliance with the 2017 Amendment IEP or the District's duties under the IDEA and special education law, the District and the Parents are directed to do the following within ten (10) days of the issuance of this decision:

a. The Parents are directed to submit an itemized statement of mileage for transporting A.M. to and from his KSSB compensatory placement for educational purposes. This should include roundtrip mileage, including "dead end" trips such as transporting A.M. on Friday afternoon and return to \_\_\_\_\_, as well as return trips on Sunday evenings which would include driving back to \_\_\_\_\_. This shall also include all mileage for the transport of A.M. for each trip to and from KSSB from the Lenexa apartment address and KSSB. Parents are directed only to submit actual mileage traveled to transport A.M. in accordance with the Special Education Reimbursement Guide State Categorical Aid, Transportation (K.S.A. 72-3422(b)(1)-(3))(Ex. 28, 8), for "actual travel expenses incurred."

b. If the Lenexa apartment is not maintained by the Parents, and A.M.'s placement remains at KSSB for any period of time, the District and Parents are directed to convene an IEP meeting to determine the appropriate amount of lodging or an overnight stipend — if the Lenexa apartment is not available and Parents are required to travel from \_\_\_\_\_ to transport A.M., or to travel to KSSB for educational purpose indicated in A.M.'s IEP, such as frequency of reimbursed family visits, and trips for Parents to participate in services or supports which indicate their presence is necessary in A.M.'s IEP for his educational benefit.

c. The Parents shall not be reimbursed for transportation costs regarding any medical transport of A.M., something that the Parents themselves presented evidence that they were not requesting.

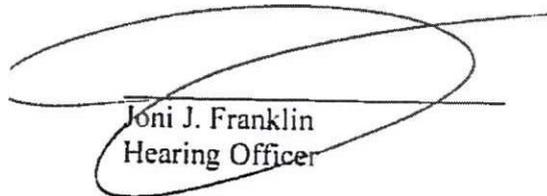
d. The District shall make timely payment for transportation reimbursements submitted by the Parents within fifteen days of their receipt of the mileage reimbursement request from the Parents.

e. From the date of this decision forward, the Parents are directed to submit mileage reimbursement requests to the District on a monthly basis, and use their best efforts to make the requests on or about the same day each month.

f. No reimbursement shall be directed regarding any expenses associated with the Lenexa apartment, which was the sole choice of the Parents to incur, and are not supports or services addressed within A.M.'s IEP, or discussed with or agreed to by the IEP team.

4. The hearing officer finds that the Parents are a substantially prevailing party, and here to for finds the same in a clear and unambiguous manner pursuant 20 USC 1415 (i)(3)(B)(i)(I) and 34 CFR 300.51 7(a)(1)(i). However, the hearing officer acknowledges that the District has prevailed on some issues, and therefore it would be at the discretion of the Court hearing any such motion in regards to any request for attorney's fees and costs to be reduced based upon the same. or any other applicable federal provisions.

IT IS SO ORDERED.



Joni J. Franklin  
Hearing Officer



APPEAL RIGHTS: Pursuant to K.S.A. 72-3418(a) this decision shall serve as the written notice of the result of any hearing provided for under this act shall be given to the agency providing for the hearing, and is hereby sent to the to the attorney of the child and the attorney for the school district within 24 hours after the result is determined via electronic mail, as mutually requested by the parties.

Such decision, after deletion of any personally identifiable information contained therein, has also been transmitted to the state board which shall make the decision available to the state advisory council for special education and to the public upon request.

(b) (1) Any party to a due process hearing provided for under this act may appeal the decision to the state board by filing a written notice of appeal with the commissioner of education not later than 30 calendar days after the date of the postmark on the written notice specified in subsection (a).

A review officer appointed by the state board shall conduct an impartial review of the decision. The review officer shall render a decision not later than 20 calendar days after the notice of appeal is filed. The review officer shall: (A) Examine the record of the hearing; (B) determine whether the procedures at the hearing were in accordance with the requirements of due process; (C) afford the parties an opportunity for oral or written argument, or both, at the discretion of the review officer; (D) seek additional evidence if necessary; (E) render an independent decision on any such appeal not later than five days after completion of the review; and (F) send the decision on any such appeal to the parties and to the state board.

(2) For the purpose of reviewing any hearing and decision under provision (1), the state board may appoint one or more review officers. Any such appointment may apply to a review of a particular hearing or to reviewing a set or class of hearings as specified by the state board in making the appointment.(c) Subject to the provisions of subsection (e), any action of a review officer pursuant to this section is subject to review in accordance with the act for judicial review and civil enforcement of agency actions or to an action in federal court as allowed by the federal law.(d) Consistent with state court actions, any action in federal court shall be filed within 30 days after service of the review officer's decision.(e) In any action brought under subsection (c), the court: (1) Shall receive the records of the administrative proceedings;(2) if it deems necessary, shall hear additional evidence at the request of a party;(3) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate; and(4) in accordance with the federal law, may award attorneys' fees to the prevailing party in any due process hearing or judicial action brought in accordance with this act.

Certificate of Service

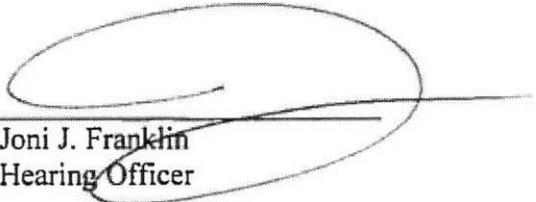
Certify that I served a copy of the above NOTICE OF DECISION upon each party as indicated below by email transmission at the request of the parties on MARCH 28<sup>th</sup>, 2019.

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Joni J. Franklin  
Hearing Officer

