

**STATE OF WYOMING
DEPARTMENT OF EDUCATION
Due Process Request/Complaint No.**

**(THE “STUDENT”),
by and through**

his parents,

Petitioners,

VS.

Respondent.

**AMENDED
DECISION and ORDER**

[Inadvertently, an uncorrected draft was issued as the Decision and Order on 12/21/09.

This Amended Decision and Order replaces the previous Decision and Order]

THIS MATTER came before the undersigned Hearing Officer, Robert “Bob” Mullen, pursuant to a Due Process Request/Complaint of Petitioners filed with the Wyoming Department of Education on August 4, 2009, under the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. 1400 et. seq., IDEA’s implementing regulations which appear in the Code of Federal Regulations (CFR) 34 CFR 300.1 through 300.818, and the companion provisions of the Wyoming Department of Education which are contained in Permanent Chapter 7 Rules Governing Services for Children with Disabilities (State Rules).

The requested Due Process Hearing was conducted in _____ on November 3, 4, 5, and 17, 2009. At the Hearing and in all preliminary matters, Petitioners were represented by _____, and Respondent was represented by _____ Esq.

PRE-HEARING MATTERS

The following conferences and hearings took place before the Due Process Hearing:

- (i) Conference on August 28, 2009;
- (ii) Motion Hearing on September 28, 2009;
- (iii) [First] Pre-Hearing Conference on October 22, 2009; and
- (iv) [Second] Pre-Hearing Conference on October 29, 2009.

THE RECORD

The following items make up the Record in this matter:

- (i) Pleadings (i.e., documents filed with the Hearing Officer or generated by the Hearing Officer for the Parties), including the original of this Decision and Order. All Pleadings are contained within two Volumes (binders) and are described in a table of contents appearing in the front of each Volume.
- (ii) Transcripts* of the Motion Hearing of September 28, 2009, the [First] Pre-Hearing Conference of October 22, 2009, the [Second] Pre-Hearing Conference of October 29, 2009, and the Due Process Hearing of November 3, 4, 5, and 17, 2009.

* The notation "Tr." refers to the transcript of the Due Process Hearing, which consists of four volumes, one for each day of hearing. References to transcripts from preliminary proceedings are identified by title of the proceeding and the date.

- (iii) Exhibits received into evidence at the Due Process Hearing are contained in three binders.

The Record is being forwarded to the State Director of Special Education, Wyoming Department of Education, 320 West Main, Riverton, Wyoming 82501.

WITNESSES

Testifying under oath at the Due Process Hearing held November 3, 4, 5, and 17, 2009 - in the order of their initial appearances - were the following:

(Tr. 11/3/09, pp. 23-104). is the Student's Mother.
(Tr. 11/3/09 p. 24)

Ph.D (Tr. 11/3/09, pp. 105 -166, Tr. 11/5/09, pp. 567-632)

(Tr. 11/3/09, pp. 168- 215; 11/4/09, pp. 224-369; 11/17/09, pp. 148-159). is the Student's Father. (Tr. 11/3/09, p. 169)

Ph.D (Tr. 11/4/09, pp. 370-470, Tr. 11/5/09, pp. 476-566, 632-713, and Tr. 11/17/09, pp. 7-61). Dr. is currently employed by Respondent as a school psychologist. She worked as an independent contractor for Respondent during the 2008-2009 school year. (Tr. 11/3/09, pp. 370-371, 436-437, 448; Tr. 11/17/09, p. 81)

Ph.D (Tr. 11/17/09, pp. 66 -133). Beginning with the 2007-2008 school year, became and remains Respondent's Director of Special Services. (Tr. 11/17/09, p. 68)

(Tr. 11/17/09, pp. 133 - 148). is and was at all pertinent times the Principal at Respondent's Elementary School.
(Tr. 11/17/09, p. 134)

FINDINGS OF FACT

1. On August 14, 2009, Petitioners Request for Due Process Hearing was received by the State Director of Special Education, Wyoming Department of Education. (Pleadings, Volume 1, tab 1)

2. The three issues identified in Petitioners' Request for Due Process Hearing, were summarized and agreed upon at the Motion Hearing on September 28, 2009, as follows:

(i) "One, that the Respondent failed to reasonably provide notice as to why it was refusing to change the identification, evaluation, or educational placement of the student or to provide him with FAPE;

(ii) Two, that the Respondent failed to provide FAPE pursuant to the recommendations of an independent evaluator; and

(iii) Three, that the Respondent failed to follow the Student's IEP."

These three issues were similarly summarized at a Motion Hearing which took place on October 29, 2009. (Transcript of Motion Hearing of September 28, 2009, pp. 3 -4; Transcript of Motion Hearing of October 29, 2009, p. 6)

3. The solution proposed in Petitioners' Due Process Request was:

"Implement all recommendations contained in report of [redacted] At a minimum, the four critical areas of positive reinforcement, find replacement of self stimulation, make breaks more enjoyable, reduce length of work periods, understand the functions of [redacted] s] behavior, more and better use of visuals, including visuals for work completion, make school fun for [redacted] and give [redacted] a feeling of control."

[Dr. report was to Petitioners' Request for Due Process.] (Pleadings, Volume 1, tab 1)

4. On October 27, 2009, Petitioners moved to amend their Request for Due Process Hearing, by adding a fourth issue (Pleadings, volume 2, tab 17). Respondent did not object to the amendment, waived any requirement that there be a written agreement concerning the amendment, and waived any further resolution period. (Transcript of Motion Hearing of October 29, 2009, pp. 8 -13) Accordingly, a fourth issue for the Due Process Hearing was allowed, stated as follows:

(iv) Four "that the School District [Respondent] failed to comply with the findings and the order of the due process hearing No. 2008-dp2."

5. At the inception of the Due Process Hearing, the period of time under review was discussed and the Parties agreed that it began immediately following the issuance of the prior Due Process Hearing Decision and Order (i.e., in Docket No. 2008-dp2) in July 2008 and ended on July 30, 2009, the date Petitioners filed the Due Process Hearing Request which resulted in the Hearing in this matter. (Tr. 11/3/09, pp. 4 - 7)

6. ("the Student") was born to Petitioners
At the time of the Hearing, the Student was 10 years old. (Tr. 11/3/09, p. 24; Exhibit 2, p. 3)

7. Petitioners have two other children, sons, ages 7 and 9 years.
(Tr. 11/3/09, p. 24)

8. The Student was diagnosed with autism in 2001, when he was 3 years old, by a neurologist in (Tr. 11/3/09, p. 25; Exhibit 2, p. 3)

9. Autism is a recognized developmental disability within the context of special education. It is defined as a disability which significantly affects a child's verbal and nonverbal communications and social interaction, and thereby adversely affects educational performance. Autism may qualify a student for special education services. (State Rules, Part 1, § 2[e][i], p. 7-3, and Part 4, § 1, pp. 7-54 and 54)

10. Petitioners are very loving and care deeply for their son, and they have become quiet knowledgeable about autism in children. (Exhibit 2, ¶¶ 6, 10, 16, and 18(c); Tr. 11/3/09; Tr. 11/3/09)

11 Respondent has eight or more students with autism, two of whom are attending Elementary School. (Tr. 11/4/09, pp. 461-462)

12. In November of 2006, Petitioners moved from Wyoming, where was enrolled in 2nd grade of Respondent's Elementary School. (Tr. 11/3/09, pp. 23 - 24, 26; Exhibit 2 p. 3 [Due Process Hearing Decision and Order in Docket No. #2008-dp2])

13. Prior to the Student's enrollment at the Elementary School, he attended school in where an Individual Education Plan (IEP) was formulated for him. (Tr. 11/3/09, pp. 26 -27; Exhibit 2, p. 4)

14. When enrolled with Respondent, the Student was classified as a "high functioning autistic child." He attended 2nd, 3rd, and the beginning of his 4th grade year at the Elementary School. At the beginning of his 4th grade year, pursuant to his three year evaluation in the Fall of 2008, the Student was qualified for continued special education as a student with Autism. (Exhibits 2 [p.3] and L)

15. The Student is "complex". Autism, in all circumstances, is a complex disorder, but the characterization of the Student as complex refers to the many behavioral challenges he presents, challenges which can change from day to day, and may have varying

meanings. Because he is high functioning, i.e., smart, his behaviors are more complicated. However, this complexity does not render him unsuitable for education in a public school setting. (11/3/09, p. 126, and Tr. 11/5/09, pp. 595-597, 623)

16. The Parties have had a series of disagreements about the Student's education and Respondent's compliance with the requirements of special education law, including the Student's receipt of a Free and Appropriate Public Education (FAPE) which is required by the IDEA. In July of 2008, a Decision and Order pursuant to a prior Due Process proceeding was issued by Wyoming Hearing Officer S. Joseph Darrah, and characterized as docket No. 2008-dp2 (the Prior Decision and Order). Judicial notice of the Prior Decision and Order was requested and the document was received, marked as Exhibit 2, and placed with the other exhibits. Exhibit 2 is not dated or signed, but the Parties agreed that it is an accurate copy of the Prior Decision and Order. Exhibit 2 was initially provided by Respondent as an attachment to its Motion in Limine, filed September 14, 2009. Petitioners stated in their Objection to that Motion, filed September 20, 2009, that they anticipated requesting that certain portions of it be judicially noticed. On October 9, 2009, they formally moved for judicial notice of those portions. Respondent's Response, filed October 20, 2009, was that Petitioners should not be allowed to "cherry-pick" from the Exhibit. Accordingly, the full Prior Decision and Order was received. (Tr. 11/17/09, pp. 61-65; Pleading, Volume 1, tabs 22, 24, and 30, and Volume 2, tab 3)

17. During the Student's 3rd grade year, Petitioners, his parents, became concerned about his academic progress and behavior. Those concerns continued into his 4th grade year, as the Student's school behavior continued to deteriorate. Specifically, he became more aggressive and anxious, and increasingly engaged in problematic behavior at school. This was in contrast to what Petitioners observed of the Student at home. (H.R, Tr. 11/3/09, pp. 32 - 33; Tr. 11/17/09, pp. 106-108)

18. Ph.D., had been a high school English teacher, principal, assistant superintendent for curriculum before accepting his current assignment as Respondent's Director of Special Services at the beginning of the 2007-2008 school year. (Radzich, Tr. 11/17/09, p. 67)

19. As Director of Special Services, Dr. directs all special education programs for Respondent. His duties include responsibility for hiring staff, developing curriculum, ensuring that laws and regulations are followed, providing training, and doing anything else that is necessary to make sure that Respondent correctly provides special education services. (Tr. 11/17/09, p. 68)

20. Dr. became acquainted with the Student and his Father, Petitioner in the summer of 2007, at a meeting in the office of the Superintendent of Respondent. (Tr. 11/17/09, p. 69)

21. Ph.D., is a school psychologist with Respondent.
(Exhibit L)

22. Dr. has bachelor degrees in psychology and Spanish, a master's degree in school psychology, a Ph.D in school psychology with a minor in clinical psychology, and is a certified school psychologist. (Tr. 11/4/09, pp. 437-439, 454)

23. Dr. first involvement with needs of the Student was in June of 2008, in the course of the Due Process proceeding which resulted in the Prior Decision and Order. Her first meeting with him was in the Fall of 2008. (Tr. 11/4/09, pp. 449-450)

24. Dr. freely acknowledges that she is not an expert on students with autism. (11/4/09, p. 464)

25. Dr. has been an advocate for Respondent having more school psychologists and psychological services. During one year, she was the only school psychologist for Respondent, but there are now four. She and the other school psychologists have Respondent for consideration of different, specific programming for students with autism. (Tr. 11/4/09, pp. 445-446, 457-458)

26. There is a discrepancy among Respondent's witnesses as to the number of Individual Educational Plan (IEP) Team meetings which occurred in the approximately four months between the beginning of the 2008-2009 school year and January 2009. This may indicate some uncertainty as to what an IEP meeting consists. It is apparent that the Student's IEP and Behavioral Intervention Plan (BIP) were reviewed a number of times, but that there were review meetings at which Petitioner parents were not present. (Tr. 11/4/09, pp. 426-427, Tr. 11/17/09, pp. 42, 46; Tr. 11/17/09, p. 114; Exhibit L)

27. On November 25, 2008, the Student's IEP Team met. Present for Petitioners was The IEP developed at that meeting is the IEP now under review. On the page labeled "Section III: Least Restrictive Environment", the IEP, in pertinent part, reads:

"Due to the nature of [the Student's] disability, [the Student] needs a specialized program to help him acquire appropriate social skills and manage anxiety. [The Student] will participate in a social skills program outside of the general education classroom where he will work on individualized activities that include the 1-5 scale, social stories, and conversation strips. [The Student] may be removed from the general education classroom if his behavior becomes a problem for himself or those around him and he will move into his work area with his special education teacher." (Exhibit 4; Tr. 11/5/09, pp. 491-495)

28. In December of 2008, the Student was attending 4th grade at the Elementary School. A transfer from to the Elementary School was first suggested by Dr. or Dr. Both seem to believe it was their idea, but the reasoning was the same: they felt it would be best because the staff at the School was more qualified and better equipped to take care of children with special needs. The change of placement was agreed to by the Student's IEP team, according to Dr.

"due to the escalation of his behaviors within that school setting and lack of educational progress within the given instructional context." She further testified, "[i]t was the consensus of the IEP team that the constellation of supports being offered to [the

Student] within that setting was not sufficient to meet his identified social-emotional and academic needs.” The “team” she said “made the recommendation that the one-to-one instructional context was significantly restrictive in comparison to services being offered to other students with similar disabilities within the District.” Petitioner parents also believed that the Student had been traumatized by use of a “cool-down room” at the School. The use of that room was a sore point between Petitioners and Respondent. For all of these reasons, a “fresh start ”at the Elementary School was recommended. (Tr. 11/3/09, pp. 31-35; Tr. 11/4/09, pp. 459-460; Exhibit L)

29. Following the Student’s transfer in January 2009, to the Elementary School, Respondent’s staff continued to be concerned about his pervasive social-emotional needs and the manner in which his behavior affected academic progress. The Student’s IEP which had been developed on November 25, 2008, included a Behavioral Interventional Plan (BIP) designed to set parameters on how to respond to his problematic behaviors, as well as how to proactively reinforce appropriate behaviors and prevent problem behaviors from occurring in the first place. The BIP also included a data collection system to assist in assessing progress toward behavioral goals. The BIP was revisited and modified after each of the Student’s major behavioral incidents. Between the beginning of the 2008-2009 school year and January 27, 2009, the Student’s IEP Team may have met formally four times to review the BIP and consider adjustments to interventions [see ¶ 26, supra]. (Exhibits L and 4)

30. On January 21, 2009, the IEP Team meet and a point of discussion was a recommendation for a change which would involve pulling the Student out or away from generalized instruction which was above his level. This appears to have positively affected the Student’s behavior, but it entailed a more restrictive environment. It was also part of a shift from the social cognitive approach, which is the primary focus of (see ¶ 59[j], infra), to a behaviorist approach. The behaviorist approach, and specifically the ABA approach of which Dr. is a proponent (see ¶¶ 32 and 42, infra), were the model on which Dr. personal academic background had been focused. The Team concluded that an Independent Educational Evaluation (IEE) would be sought from Dr. (Tr. 11/5/09, pp. 504-513; Exhibit L)

31. Respondent understood that it could establish the “parameters” for the Independent Educational Evaluation to be conducted by Dr. (Tr. 11/4/09, p. 392)

32. Ph.D, holds a doctorate in school psychology, is board certified as a behavior analyst, and is a certified school psychologist. He is the CEO of Pediatric Behavioral Services, and in that practice does educational, psycho educational evaluations of children, age 1 to 17. He also conducts psychological testing, parent consultations, teacher consultations, and trainings, and provides recommendations to parents and teachers working with children who present social, behavioral educational issues. Previously and for two years, he was the director of school consultations for the Southwest Autism Research and Resource Center. His pre and post doctoral residencies at the May Institute in Massachusetts consisted in part of doing similar evaluations and assessments for children with autism and providing school consultation services. (Tr. 11/3/09, pp. 106-108)

33. Dr. understood that Respondent had retained him to prepare an Independent Educational Evaluation (IEE) of the Student as outlined in a Confidential Report/Case Note provided to him by Dr. The purpose of the IEE, as he understood it, is reflected in the first paragraph of both the March 10th and March 23rd parts of his Reports: “ Pediatric Behavioral Services was hired to complete a school-based evaluation to determine the most appropriate behavioral supports necessary for [the Student], his family, and his staff.” (Tr. 11/3/09, pp. 108, 136 -137, 140 - 142; Exhibits 1, and 31)

34. Approximately a month before Dr. on-sight visit to conduct the requested IEE, Dr. sent him a Confidential Case Report, sometimes referred to as a “Case Note”, dated January 27, 2009. She had prepared this document with school psychologist Laura Burley. Dr. believed the Report/Case Note provided a context for the IEE Dr. was preparing to perform. A draft of the Report/Case Note was reviewed by Dr. prior to it being sent to Dr. The Report/Case Note is

quite thorough. Among the information provided Dr. _____ in the Report/Case Note were the following:

- (a) the Student's difficulty sustaining attention and that his attention span appeared to be decreasing, resulting in him interrupting instruction, thereby obstructing other students, and that the staff lacked effective strategies to address this issue, or to sustain their level of effort toward that end;
- (b) the Student's lack of academic progress in several important areas (i.e., math, reading, and writing), was believed to be a direct result of staff inability to effectively and consistently teach lessons to him;
- (c) as a result of the Student's behaviors and the ineffectiveness of then current interventions, Respondent's staff was significantly restricted and the academic progress of both the Student and of others was adversely affected;
- (d) the Student demonstrated a significant weakness in overall social skills and peer interaction, and although an improvement of those skills had been identified as a high priority by his IEP Team, from an intervention standpoint, the Student appeared to require significant systematic training, something which greatly concerned staff given limited resources, especially when they felt the majority of their time was spent managing inappropriate behavior at a level which, in any case, simply could not be sustained without significantly impacting other students;
- (e) a description of autism-specific training which Respondent's staff working with the Student had received, how that training was being implemented, and, while noting some success with these techniques, that the Student's responses to strategies were not always as expected;

- (f) Respondent's staff efforts to determine the function of some of the Student's observed behavior;
- (g) concern for the safety of the Student and that of others as a consequence of his behavior, including leaving the classroom, touching others, inhibitions related to toileting, and inappropriately self-stimulation;
- (h) the Student's then current placement - specifically, that his IEP specified the most restrictive environment then available for a 4th grade student outside of a therapeutic placement, that his Behavioral Intervention Plan (BIP) had been frequently revisited since the beginning of the 2008-2009 school year, and that all of Respondent's concerns presented impediments to maintaining the Student in the least restrictive environment, or, in Dr. _____ words, having access to "education in a general education context"; and,
- (i) concerns and questions the school-based members of the IEP Team had in relation to the Student, as well as their desired parameters and expectations for an IEE.

The Report/Case Note, beginning with the collection Dr. _____ of the information used to construct it, were at least in part intended for the development of a more specific Behavior Intervention Plan (BIP) by the Student's IEP Team. (Exhibits L and 23; Tr. 11/4/09, pp. 392, 395, 464, 477-479, 484-485, Tr. 11/5/098, pp. 484, 544; Tr. 11/5/09, pp. 571-577)

35. The IEE which Dr. _____ undertook for Respondent was consistent with the law and responsive to the information Dr. _____ provided to him in the Report/Case Note. Respondent, expressly - and appropriately, given the Findings in the prior Due Process Decision and Order which, in pertinent part, are summarized below at ¶ 59 - advised Dr. _____ that despite all supports which were being provided to the

Student, Respondent's staff working with the Student continued to be concerned about his ability to progress appropriately toward academic goals. She added that the school was seeking recommendations for interventions or behavioral strategies which would reduce the behavioral difficulties presented by the Student. By this Report/Case Note, Dr. [REDACTED] was told of Respondent's appropriate desire for an outside evaluation by an individual with specific expertise in autism, as well as clinical psychology, in order to "evaluate our current plan and provide suggestions for additional supports." The Report/Case Note very clearly expresses that the efforts of Respondent's staff who were working with the Student were of questionable efficacy, and that they did not expect to be able to continue the same efforts. This is consistent with what Dr. [REDACTED] informed Dr. [REDACTED] elsewhere when she questioned whether Respondent's staff were implementing the Student's plan as written, that she had concerns about the consistency with which its strategies had been employed, and even that one staff member "does, at times, instigate behaviors." The tenor of this information, which was provided to Dr. [REDACTED] on February 11, 2009, was one of caution. Dr. [REDACTED] indicated to Dr. [REDACTED] in no uncertain terms, the need for staff skills to be adjusted and/or improved. It must be noted, however, that, presumably because of what had become a very charged atmosphere, she also expressed to Dr. [REDACTED] that these facts about the educational environment should perhaps be concealed from Petitioner parents, and possibly even from the independent outside evaluator, Dr. [REDACTED]. (Exhibits L, 2, and 24; [REDACTED] Tr. 11/5/09, pp. 483-489)

36. It is contradictory for Dr. [REDACTED] to describe the Report/Case Note of January 27, 2009, as both a document that is not required to be presented to or discussed by an IEP Team, which by law includes parents such as Petitioners, and at the same time to say that it was intended to set the tone about what the IEP Team members are seeking in terms of additional information from an IEE. ([REDACTED] Tr. 11/5/09, pp. 480-481; Exhibit L)

37. Dr. [REDACTED] agreed that to address the needs of the Student, continuous

fine-tuning of approaches, methodologies, and techniques was required. She also agreed that staff members who work with the Student need to be trained in how to employ proper processes and methodologies in addressing the Student's needs in a consistent fashion. However, Dr. [redacted] did not think it appropriate to discuss in an IEP meeting, individual staff member qualifications or a situation in which an improperly trained individual was adversely impacting the Student by not following the BIP or how to make corrections, because those are personnel issues. ([redacted] Tr. 11/4/09, pp. 422-425)

38. In March 2009, [redacted] was receiving most of his education through small group and resource room services, including a series of staff who supported him throughout the day, and he was being included with the general education population for specials, such as music and art, and attending a homeroom class the last period of the day. (Exhibit 1)

39. In conducting his IEE of the Student, Dr. [redacted] made observations during March 3 through 5, 2009, while the Student was engaged in school activities and in the Student's home. Dr. [redacted] also visited with Respondent's staff members working with the Student, including the School Psychologist. Following these observations and meetings, Dr. [redacted] prepared his IEE Report, the first part of which was dated March 10, 2009. (Exhibit 1; [redacted] Tr. 11/3/09, pp. 108, 144-145, 150-151; Tr. 11/5/09, pp. 577, 628; [redacted] Tr. 11/5/09, pp. 558-560)

40. At the conclusion of his onsite visit, Dr. [redacted] was asked by Respondent's staff to reduce to writing suggestions for immediate implementation which he made during the visit. This resulted in the first part of his IEE Report, on March 10, 2009. In making this request of Dr. [redacted] Respondent's staff displayed a degree of frustration, asking him "Please help." Dr. [redacted] planned to follow the first part of his Report by specifically responding to the Report/Case Note Dr. [redacted] had provided, but felt somewhat less urgency in preparing it given the tone of staff's request. The second part of Dr. [redacted] Report followed on March 23, 2009. ([redacted] Tr. 11/3/09, pp. 110, 121, Tr. 11/5/09, pp. 578-579, 584-58; [redacted] Tr. 11/5/09, pp. 483-484 Exhibits L, 1, 27, and 31)

41. Dr. [redacted] recommendations, as reflected in his Report, parts 1 and 2 (March 10 and 23, 2009), were based on the specific nature of the Student's behavior. Among the matters he addressed were antecedents to the Student's behaviors, the behaviors themselves, replacement behaviors, and the function of the behaviors. In the Report, he provides a number of recommendations. Dr. [redacted] believes it is possible to implement each of these recommendations, provided Respondent's staff receives appropriate training. (Exhibits 1 and 31; Tr. 11/3/09, pp. 150 -151)

42. Dr. [redacted] IEE describes the Student as a classically autistic student who shows most, if not all of the symptoms and criteria to meet the diagnosis for autism. The Student is in the top 1% of the autistic population in terms of his need for positive behavior intervention support, meaning he needs the most intense of individualized approaches because of the complex learning and behavioral challenges he presents. When conducting the onsite visit, Dr. [redacted] paid close attention to the Student's learned behaviors, because children with autism learn through applied behavior and reinforcement. They learn to react according to what is being reinforced. In the first installment of his IEE Report on March 10th, Dr. [redacted] provided recommendations which are somewhat similar for all kids with autism, but written specifically with the Student in mind. Specific behavior modification techniques were suggested in order to teach the Student to replace poor behavior with more pro social behavior and to assist Respondent's staff in gaining better stimulus or academic control over the Student. Such measures are absolutely necessary to prevent the Student's poor behavior from occurring, and, with correct behavioral analysis and interventions, poor behaviors are controllable. Members of Respondent's staff working with the Student sometimes, perhaps inadvertently, failed to identify antecedents to the Student's poor behavior, and sometimes reinforced his negative behaviors. Instructions contained in his BIP, e.g. a staff member saying "Not nice" in response to the Student's inappropriate language used to draw attention to himself, may be partially responsible for this confusion. Many of the recommendations made in Dr. [redacted] IEE Report could be implemented without any direct staff training. Some counterproductive oversights and methods could be overcome with appropriate training. Such training could improve Respondent's ability to

understand the functions of the Student's behavior. Understanding "functional behavior" through training in behavioral assessment would improve staff effectiveness in managing the Student's behavior. Staff training in Applied Behavioral Analysis (ABA), the only evidence-based treatment for children with autism and the most widely accepted methodology in that regard, should be seriously considered. That approach to behavior modification includes analyzing the functions of the autistic student's behavior and teaching alternatives through positive reinforcement. Effectively working with the Student will necessitate consistent implementation of appropriate strategies. Determining appropriate strategies, including making adjustments, will entail collecting progress monitoring data of both good and bad behavior, and conducting periodic assessments such as the Vineland Adaptive Behavior Scale and the Behavioral Assessment for Children. Staff training to facilitate implementation of ABA suited to the Student's needs would only require a couple of days. (Exhibits 1 and 31; Tr. 11/3/09, pp. 110-113, 115-116, 122-123, 127, 158-159, and Tr. 11/5/09, pp. 595-597, 617-619, 627)

43. With the approval of Dr. Dr. wrote Dr. on March 17, 2009, about the March 10th portion of his IEE Report. Dr. stated purpose was to pose questions and express concerns to Dr. sufficiently in advance of the March 23, 2009 IEP meeting, so that he could prepare a response. Dr. was asked by Dr. to address the specific concerns enumerated in her Report/Case Note dated January 27, 2009. Signaling at least a partial rejection of the IEE, she stated that the number of recommendations in the March 10th Report "is way too many for any IEP team to consider in any reasonable format" and it "feels very overwhelming." (Tr. 3/5/09, pp. 580-589; Exhibits 27, L, and MMM)

44. An IEP meeting was held on March 23, 2009. Dr. attended in person, as did Petitioners parents, and representatives of Respondent, including Dr. and Dr. The purpose of the meeting included a review of the Student's November 25, 2008, IEP in order to determine if its components were sufficient. At the beginning of the

meeting, Dr. [redacted] was told that he had made too many recommendations, and that the Team should be informed which five were most important. Dr. [redacted] was asked to narrow the IEE down to the 5 most salient recommendations, those which would most impact the Student in a positive way. The meeting proceeded with the idea that those few recommendations would be incorporated by Dr. [redacted] into a revision of the Student's BIP. ([redacted] Tr. 11/3/09, pp. 159-161 and Tr. 11/5/09, pp. 601-604 ; [redacted] Tr. 11/4/09, pp. 409-411, Tr. 11/5/09, pp. 559, and Tr. 11/17/09, p. 20)

45. Dr. [redacted] recollection of the March 23, 2009, IEP Team meeting was that Dr. [redacted] announced that the number of recommendations made in Dr. [redacted] IEE were overwhelming, and she asked him for his top four. He also recalls that Dr. [redacted] described four, and then pressed for another. With five recommendations noted, Dr. [redacted] was to draft them, Dr. [redacted] said, into the Student's BIP. ([redacted] Tr. 11/17/09, pp. 98-99, 115-116)

46. There is no evidence that all of Dr. [redacted] recommendations or the entirety of the IEE he prepared was considered by the IEP Team on March 23rd or at any other time within the period under consideration.

47. Following the IEP Team meeting of March 23, 2009, Respondent began work on a revised IEP and BIP. However, work on those documents was halted when Respondent concluded that the Student had been absent from school for ten days, and it appeared unlikely that he would return for the balance of the 2008-2009 school year. ([redacted] Tr. 11/17/09, pp. 21-28)

48. The atmosphere leading up to the March 23, 2009, IEP Meeting was charged. In January and February 2009, Petitioner parents were expressing concern to Dr. [redacted] about the Student's lack of academic progress and the escalation of his poor school behavior. Dr. [redacted] said that "[t]here definitely were concerns ... about, 'Were

the interventions sufficient? Were we missing pieces of the plan that we needed more information on?" She was concerned from January until late March 2009, that the Student was not progressing academically. For example, he had 90 minutes of reading and 75 minutes of math, and his teachers were reporting that his behaviors made it hard to implement lessons, making it, in turn, hard to measure academic progress. Furthermore, Petitioner parents not only had cause to be concerned that the Student was not learning, they had cause to be alarmed at the prospect of his expulsion from the public school system. When a student's needs become primarily behavioral and exceed educational outcomes - that is, when a IEP team becomes focused on behavior and academics are secondary - at that point, Dr. testified, Respondent starts talking about suspending instruction and an alternative placement. Dr. Radzich had the same perspective. Asked if prior to the March 23, 2009, IEP Team meeting he had said to Petitioner parents that if the Student's behavior was not controlled, he would have to be removed, Dr. Radzich testified that he felt that removal might become necessary. (Tr. 11/4/09, pp. 431-432; Tr. 11/4/09, pp. 417, 428, and 430; Tr. 11/5/09, p. 482; Radzich, Tr. 11/17/09, pp. 131-132)

49. Within several days of the IEP Team meeting on March 23, 2009, Respondent closed school for Spring Break. Petitioners advised Respondent that the Student would not return until they saw a revised IEP that would be an improvement, one that would be effective for the Student, or they were going to hire a tutor. Their explanation was that the Student was spiraling downward, his behavior was regressing, that anyone like that cannot focus on school work, and that they were worried about what was going to happen to their son. I do not find that Petitioners withdrew from the IEP process. Much is attempted to be made by Respondent that Petitioner after taking the Student out of school, took him to Italy. This seems of little consequence, in light of the charged atmosphere and the fact that Petitioners hired a full time tutor to accompany and work with the Student during the period of his absence. In response to the Student's absence, Respondent suspended all work on revising the IEP and BIP, refusing to provide further information to Petitioners. (11/17/09, pp. 150-156; Tr. 11/17/09, pp. 116-122, 131-132)

50. Dr. testified that he understands Petitioners parents' desire for Respondent's staff to be trained relative to autism, to have autism experts come in, and he that he believes that the parents' requests for additional staff training in autism was not unreasonable. (Tr. 11/17/09, pp. 69-70)

51. In the face of what appear to be inadequate staff strategies however, Dr. Radzich's position seems to have amounted to wanting to shift more responsibility for behavioral modification onto the Student. When Dr. first met Dr. in person, during the course of Dr. onsite visit the first week of March, 2009, he recalls not being very happy at what he heard. Although Dr. was hired at the request of Petitioners to conduct an Individual Educational Evaluation (IEE), and although when initially talking with Dr. Dr. believed that what Respondent needed was greater insight into what was going on with the Student, when he met with Dr. he expected - and believed that he had only contracted for - an individual psychiatric or psychological evaluation. Therefore, he was distressed at time of their meeting because what he heard from Dr. seemed to suggestion programatic changes. (Tr. 11/17/09, pp. 77, 79-80)

52. In reviewing the first part of Dr. IEE Report, dated March 10, 2009, Dr. testimony was not sharply critical. He said his impression was again that it was not the individual psychological evaluation he believed he had contracted for, that Dr. had addressed Respondent's program, rather than the Student's needs. Although Dr. said he thought most of Dr. recommendations were within the realm of possibility, implementing them all at once would have been overwhelming. He did not know, for example, how staff could possibly try and make the Student smile 30 times a day. (Exhibit 1; Tr. 11/17/09, pp. 84-89, 93-97)

53. Documentary evidence suggests a sharper tone than depicted by Dr. testimony (see preceding paragraph). When the first part of Dr. Report arrived on or about March 10, 2009, Dr. perceived it as critical of Respondent's staff, not responsive to what was asked of Dr. and to contain suggestions for a change in

Respondent's overall program. Dr. [redacted] wrote in an e-mail to Dr. [redacted] on March 17, 2009, that in preparing the IEE Dr. [redacted] had not done "what we asked, and we are his customers". Beside the observation that the evaluation was, by definition, to be "independent", it is noteworthy that Dr. [redacted] opinion was not universally held. On March 19, 2009, Dr. [redacted] replying to Dr. [redacted] criticism, said that she had spoken with Laura Burley, [redacted] Elementary School Psychologist, and her reaction had been that Dr. [redacted] had only done what had been requested of him. Dr. [redacted] noted that although Dr. [redacted] ideas did seem "programatic", they were excellent and, in reference to Dr. [redacted] "the guy does know what he's talking about". Dr. [redacted] expressed caution however, stating that by highlighting the need for staff training, Dr. [redacted] may encourage Petitioners to "make an issue out of having all these recommendations in place". She wrote that Dr. [redacted] needs to know that 50 recommendations are too much. Dr. [redacted] reacted by writing Dr. [redacted] on March 20th "We hired him [Dr. [redacted] to evaluate [the Student]. We have yet to receive that evaluation. We do not have to accept any part of his report ... I am going to enjoy this!" On March 28th, Dr. [redacted] added "I think the most rejecting thing we can do is to totally ignore his report and him." ([redacted] Tr. 11/5/09, pp. 564-565; Exhibits L, 27, 28, 29, and 30)

54. Dr. [redacted] testified that although it is difficult to get a clear statement as to the degree of his progress due to behavioral interruptions, she believed the Student made academic progress during the period from September 2008 to March 23, 2009. The Student did not meet the goals described in his IEP, the period of which was November 25, 2008, to November 25, 2009. ([redacted] Tr. 11/17/09, pp. 37-40, 55)

55. Petitioner parents do not believe the Student progressed academically while at Respondent school during the 2008-2009 school year. ([redacted] 11/3/09, pp. 31-33; Tr. 11/3/09, pp. 191-192, 197)

56. I conclude the Student received de minimis educational benefit from Respondent during the 2008-2009 school year. Petitioners' testimony, the text of

Dr. Report/Case Note to Dr. and her testimony are sufficient to shift the burden of persuasion to Respondent. And, despite Dr. opinion as to the Student's academic progress, I remain unconvinced that it has been more than very marginal, if any. (Exhibit L; see ¶¶ 34[b], 35, 37, and 48, supra)

57. The Prior Decision and Order dismissed Petitioners' claims, and ordered the the Student's placement - including his then current Behavioral Intervention Plan (BIP) and Social Learning Profile - was to continue unless and until his IEP Team met and amended same. (Exhibit 2, p. 64)

58. Petitioners and Respondent were the only parties in the proceeding which resulted in the Prior Decision and Order. Among the issues in that proceeding were: (b) whether Respondent had failed to provide its staff with sufficient experience and training for dealing with autistic students?; (c) whether a lack of such experience caused the Student to be deprived of a Free and Appropriate Public Education (FAPE)?; and, (f) whether the Student's Behavioral Intervention Plan (BIP) was sufficiently specific, particularly with reference to antecedents, triggers of behavior, and interventions? Those issues are similar to Petitioners' complaints herein, but they relate to a different time frame. (Exhibit 2, p. 2)

59. The Prior Decision and Order contains findings which do, however, inform Respondent in relation to what might reasonably be expected in further development of intervention plans to address the Student's problematic behavior. Those findings include:

(a) The Student has the ability to succeed in controlling his frustrations provided he is given time to learn the skills. His social dysfunctions and behaviors are significant roadblocks inhibiting that ability. (Exhibit 2, pp. 29, 45)

(b) The Student's behavior impeding his academic progress while enrolled with Respondent is a long standing issue. (Exhibit 2, p. 8, ¶ 20, p. 9, ¶ 24, p. 9, ¶ 26, p. 12, ¶ 33, p. 13, ¶ 36)

(c) An issue which precipitated Petitioners initiating the prior proceeding involved the adequacy of the Student's Behavioral Intervention Plan (BIP), both in relation to the recognition of antecedents to problematic behavior and interventions to be employed in response. (Exhibit 2, pp. 2-3, 14)

(d) The "key method" of allowing the least restrictive environment for the Student - i.e., avoiding the need to use of restraint - is the ability to recognize antecedents to the Student's aggressive behavior. (Exhibit 2, p. 43)

(e) All of Respondent's staff who will work with the Student need to be trained about autism and how to employ proper processes and methodologies to address his needs in a consistent fashion. (Exhibit 2, pp. 42, 44-45)

(f) Continuous "fine tuning" of approaches, methodologies, and techniques for dealing with the Student's problematic behavior is required. (Exhibit 2, p. 30)

(g) Petitioners were put on notice that their failure to work within the IEP Team setting for the specific purpose of refining the Student's Behavioral Intervention Plan (BIP) effectively prevented them from complaining about the lack of appropriate interventions by Respondent. (Exhibit 2, p. 14, ¶ 38)

(h) Dr. _____ conducted an Independent Educational Evaluation of the Student for Respondent in or about April 2007. His IEE was entered into evidence in the prior proceeding, and the Hearing Officer there gave it significant weight, stating the expectation that Dr. _____ Report would serve as foundational support for development of the Student's subsequent IEP

and the “need” for bringing various resources to bear which are “necessary for the provision of services” to the Student. Dr. [REDACTED] it was noted, commented: on the Student’s difficulty paying attention; that the Student did not have the ability to succeed and move from task to task without prompting and almost continuous assistance; that the Student engaged in perseverative behavior, obsessively asking questions over and over; that the Student was “extremely” deficient in social skills - stating “I was surprised that this was not being directly targeted as part of his educational program” - and, consequently, recommending that the IEP Team specifically target development of these skills; and that, in light of his behavior, the Student posed safety concerns, indicating the need for staff working with the Student to receive appropriate training. Dr. [REDACTED] it was recognized, recommended a formal functional or behavioral assessment by an appropriately trained professional and that a formal behavior intervention plan be devised, said that a positive reinforcement system to motivate the Student was indicated, and stressed the need for a detailed behavior tracking system to determine if the Student’s behavior program was effective or needed to be modified.(Exhibit 2, pp. 16-22)

(i) Following Dr. [REDACTED] IEE recommendations in April 2007, Respondent hired Dr. [REDACTED] who had twenty years of experience dealing with children with autism. Respondent’s action was welcomed by Petitioners, who had expressed the perception in Summer 2007, that Respondent’s staff lacked experience with students with autism. Petitioners understood that the hiring of Dr. [REDACTED] was to address the Student’s needs, but in September 2007, in a discussion with Dr. [REDACTED] she explained to Petitioners that she had not been hired as an autism specialist, was instead to act as a middle school psychologist for Respondent, and that the role of autism specialist had not been discussed with her prior to her hiring. This was the beginning of mistrust between Petitioners and Respondent. (Exhibit 2, pp. 22-23)

(j) In Late 2007, Respondent hired Dr. _____ as a consultant, and gives her recommendations great weight. Dr. _____ had significant experience with children with autism, was nationally recognized, had authored several books on autism, and had developed the five point scale approach to dealing with behavioral issues in autistic children, and the five point scale approach was adopted by Respondent in relation to the Student's behaviors. Dr. _____ observed the Student at school and in Petitioners' home in November 2007. She provided a Report, and in February, 2008, was consulted further. Respondent's efforts in relation to Dr. _____ were recognized as a demonstration of extraordinary effort to provide educational services to the Student. Dr. _____ was convinced that the Student's difficulty socializing and his problematic behavior was the product of the anxiety he felt at school as a result of his autism, and she agreed with Dr. _____ that it was not possible to segregate academic from social skills. Dr. _____ made it clear for the Student's IEP Team that an ongoing systematic program, which include relaxation techniques and recognition of antecedents to behavior which would allow staff to intervene with appropriate strategies, was indicated. She stressed that providing educational services to the Student involves a tremendous amount of judgment in employing techniques which are often successful, but sometimes not. Her recommendations were found to be consistent with those of Dr. _____ and some of them were adopted by Respondent, which was found to be a good faith effort by Respondent. (Exhibit 2, pp. 23-29, 33, 37)

(k) Nevertheless, it was observed that Respondent's personnel, including Dr. _____ recognized that a level of specificity in the Student's BIP regarding antecedents to the Student's problematic behavior which lead to the use of specific strategies was lacking, and that this deficit should be addressed by his IEP Team. The BIP was found to be inadequate. And certainly, the IEP Team was anticipated to address deficiencies and amendments to the IEP were

contemplated by the author of the Prior Decision and Order. (Exhibit 2, pp. 37-38, 44, 55-56)

CONCLUSIONS OF LAW

60. Collateral estoppel principles apply in Wyoming administrative proceedings, but elements of the Prior Decision and Order cannot be given collateral estoppel effect because the issues decided in that proceeding are not identical to the issues in this proceeding. The facts pertain to different time frames. (*Jacobs v. State*, 2009 WY 118 (Wyo. 2009)).

61. The Individuals with Disabilities Education Act (IDEA) provides state and local agencies with Federal money to ensure that children with disabilities have access to “free appropriate public education” that “meet[s] their unique needs and prepares them for employment and independent living.” 20 U.S.C. § 1400(d), *Ellenberg v. New Mexico Military Institute, et al.*, 572 F.3d 815, fn 1 (10th Cir. 2009)

62. The core requirement of IDEA is that children with disabilities be provided with a free appropriate public education, commonly referred to by the acronym “FAPE”, which means “special education and related services which: (a) are provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the State educational agency; (c) include an appropriate education; and (d) are provided in conformity with the individualized education program required under section 614[d]. The Code of Federal Regulations provision is similar, as is the Wyoming Rule. (20 U.S.C. § 1401[9]; 34 C.F.R. § 300.17; Wyoming Department of Education Permanent Chapter 7 Rules Governing Services for Children With Disabilities [herein after referred to as “State Rules”], Part 1, § 2[o], p. 7-7)

63. A seminal decision concerning the provision of FAPE is *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Court said that although IDEA contains no substantive language regarding the appropriate

level of education for children with disabilities, but requirements are apparent. "Implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education ... be sufficient to confer some educational benefit." (458 U.S. at 200) Therefore, FAPE, "in addition to requiring that States provide each child with 'specially designed instruction,' requires the provision of 'such . . . supportive services . . . as may be required to assist a handicapped child to benefit from special education." This "'basic floor of opportunity' ... consists of access to specialized instruction and related services which are individually designed to provide educational benefit ..." (458 U.S. at 201)

64. In *Rowley*, the Supreme Court recognized the difficulty involved with determining whether access to educational benefit is being provided by a school and, therefore, established no bright line test. It did make clear, however, that a school is not obligated to maximize the potential of a child with a disability. "The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem." The requirement is "to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with non-handicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt ... to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." "[E]ducational services ... need not maximize each child's potential 'commensurate with the opportunity provided other children.'" However, the educational benefit mandated by IDEA must be more than de minimis. (*Rowley*, 458 at 202 and 198; *Thompson R2-J School District v. Luke P.*, 540 F.3d 1143 [10th Cir. 2008])

65. IDEA is silent regarding the burden of proof in special education due process hearings. However, case law provides that a party asserting that an IEP is deficient bears the initial burden of proof. (*Thompson*, 540 F.3d at 1148, citing *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 [2005] and *Johnson v. Index. Sch. Dist. No. 4 of Bixby*, 921 F.2d 1022, 1026 [10th Cir. 1990])

66. Developing or altering an IEP begins with the IEP team. The team is required to be assembled for each eligible student with a disability, and that team is charged with developing, reviewing, and revising the Student's IEP. (State Rules, Part 1, § 2[s] and [t], p. 7-10; see also 34 CFR §§ 300.320 and 324)

67. Membership in a student's IEP team is prescribed by the law. The team is to include the student's parents, various representatives of the student's school and school district, and others who can interpret the instructional implications of evaluation results and/or who have knowledge or special expertise regarding the student. (State Rules, Part 5, § 3[a], [b], and [c], p. 7-73; see also 34 CFR § 300.321)

68. Developing an IEP is a collaborative process, recognized by the Tenth Circuit Court of Appeals to be a central characteristic of the IDEA framework. This collaborative approach places special emphasis on parental involvement. Affording parents the opportunity to effectively participate in the development of their child's IEP is the responsibility of the school district in which the student is enrolled. Therefore, a school is required to provide parents with specific notifications and pertinent information. (*Systema vs. Academy School District No. 20*, 538 F.3d 1306 [10th Cir. 2008]; State Rules, Part 5, § 4 pp. 7-74 and 75; see also 34 CFR §§ 300.322 and 324)

69. An IEP is a written statement with specified contents to be developed in meetings conducted in accordance with applicable law. Among the required contents of an IEP are statements as to:

(a) the student's present levels of academic achievement and functional performance, including how his disability affects involvement and progress in the general education curriculum (i.e., the same curriculum as for students without a disability), how the disability he has affects participation in appropriate activities, and a description of measurable annual goals, both academic and functional, which have been designed to enable him to be involved in and progress in the general education curriculum as well as to meet each of his other educational needs which result from the disability;

(b) how the student's progress toward his measurable annual goals will be measured and when periodic reports will be provided;

(c) the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, which will be provided to the student, or on his behalf, and the program modifications or supports school personnel will be provided to enable the student to advance appropriately toward the annual goals and become involved and make progress in the general education curriculum in accordance with his present level of academic achievement and functional performance, to participate in extracurricular and other nonacademic activities, and be educated and participate with other children with disabilities as well as children who do not have a disability in school activities;

(d) why the student will not participate, as described, with students without disabilities in a regular class; and,

(e) when services and modification will be provided to the student, as well as the anticipated frequency, location, and duration of those services and modifications.

70. In developing an IEP for a student whose behavior impedes his learning or that of others, the student's team must consider the use of positive behavioral interventions, supports, and other strategies, as well as supplementary aids and services, program modifications, and support for school personnel, in order to address the student's behavior. These are all intended to allow the student to advance appropriately toward attaining his measurable annual goals, to be involved and make progress in the general education curriculum - in accordance with his present level of academic achievement and functional performance - and to participate in extracurricular and other nonacademic activities. (State Rules, Part 5, § 5[a] and [d], pp. 7-75 and 76, and § 6[b], pp. 7-77 and 78; 34 CFR § 300.324)

71. IDEA's dual emphasis is on procedure as well as substance. In determining whether an IEP complies with IDEA, a court looks first to see if the developmental process complied with IDEA's procedures. However, a procedural failure must result in substantive harm to be actionable. (*Systema vs. Academy School District No. 20*, 538 F.3d 1306 [10th Cir. 2008])

72. Neither the IDEA, its implementing regulations, nor the State Rules prescribe the specific substantive requirements for a behavioral intervention plan (BIP). This fact was recognized in an unpublished decision for the 10th Circuit Court of Appeals which, by its terms, is not binding precedent, but is nevertheless instructive. (*T.W. v. Unified School District No. 259, Wichita, Kansas*, D.C. No. 01-CV-1406-MLB (Order and Judgment entered June 6, 2005))

73. In the context of special education, the term "evaluation" refers not only to the development of information about whether an individual student has a disability but, if so, the nature and extent of the special education and related services that student needs. One of the procedural safeguards to be made available to parents under IDEA is an independent educational evaluation (IEE). An IEE is an evaluation conducted by a qualified examiner, independent of, but paid for through the school district. Criteria applicable to IEEs are to be

supplied to parents by the school district, and must be the same as the criteria that the school district uses when it initiates an evaluation. Except for consistency with such criteria, no conditions may be imposed in relation to the IEE. Upon their request, and not more frequently than once per year, parents of a child with a disability have the right to require such an IEE. Their request is to be honored by the district, unless it objects and can demonstrate in a due process hearing that its evaluation is appropriate or that the requested evaluation does not meet the applicable criteria. (State Rules, Part 1, §2 (l), p. 7-7, Part 2, § 4, pp. 7-24 and 26; see also 20 U.S.C. § 1415[b][1] and 34 C.F.R. 300.502)

74. The results of any IEE must be considered by the school district, provided it meets district or public agency criteria, in any decision made with respect to the provision of FAPE to the student. (State Rules, Part 2, §4 (e), p. 7-25 and 26; see also 34 CFR § 300.502)

75. Neither IDEA, its implementing Regulations, nor State Rules elaborate on what steps a district must take to fulfill its obligation to “consider” an IEE.

76. Providing educational opportunity to children with disabilities within the “least restrictive environment” (LRE) is an IDEA goal. The concept is that “[t]o the maximum extent appropriate, children with disabilities [are to be] educated with children who are not disabled.” (20 U.S.C. § 1412[a][5][A]; State Rules, Part 5, § 8 pp. 7-80 et seq.)

77. The Supreme Court in *Rowley* recognized a very practical reason for avoiding the segregation of children with special needs. When a child with a disability is educated in a regular classroom, the child’s access to educational benefit is more easily measured. “[T]he system itself monitors the educational progress of the child ... The grading and advancement system thus constitutes an important factor in determining educational benefit.” Therefore, an IEP “formulated in accordance with the requirements of the Act” for a “child who is being educated in the regular classrooms of the public education system, should be

reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." (*Rowley*, 458 U.S. at 203-204)

78. Determining methodology is a recognized prerogative of a school, however IDEA "[c]ertainly ... does not permit" a school "to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad.' *Daniel R.R.*, 874 F.2d at 1048" and "IDEA regulations indicate that 'in the case of a child whose behavior impedes his or her learning or that of others' the IEP team should consider "positive behavioral interventions, strategies, and supports to address that behavior." 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i)." (*T.W.*, pp. 4, 6)

79. "Neither the IDEA, nor its implementing regulations prescribe any specific substantive requirements for a BIP. See *Alex R. ex rel. Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. #221*, 375 F.3d 603, 615 [7th Cir.], *cert. denied*, 125 S. Ct. 628 [2004]. Courts should be leery of creating such substantive requirements 'out of whole cloth' where neither Congress nor the Department of Education, the agency charged with promulgating regulations for the IDEA, has done so. *Id.*" (*T.W.*, p. 6)

ANALYSIS

Did Respondent fail to reasonably provide notice as to why it was refusing to change the identification, evaluation, or educational placement of the student or to provide him with FAPE?

80. In their Closing Argument, Petitioners allege that Respondent failed to provide them with information in a timely manner, and in some instances, concealed information from them. They then describe the tests under *Rowley* (458 US 176, at 206-7) for judging the adequacy of an IEP, and then the requirement for periodic review of a student's IEP, citing applicable sections of the Code of Federal Regulations. They recite that

the March 23, 2009, IEP meeting resulted in a promise by Respondent to provide a “written response”, which I take to mean a draft IEP and BIP, but that did not occur. It is unclear, however, what proposed change or refusal to change relative to the Student’s identification, evaluation, or educational placement was expected to be the subject of the anticipated written response. And, there is no evidence that Respondent changed the Student’s identification as an eligible special education student, or that the educational environment described in the November 25, 2008, IEP was to be altered, except as discussed below. Although proposals to change the IEP, including his BIP of October 16, 2008, had been the subject of discussion at the IEP meeting on March 23rd, there is no evidence before me that notice of that possibility had been withheld from Petitioners. The argument seems to be that Respondent was not moving with reasonable speed in making appropriate changes. While that may be true, it does not make out a violation of the notice provisions under Federal or State law. (Pleadings, Volume 2, tab 33, pp. 14-18; Exhibits 4 and 22)

81. At the hearing, Petitioners questioned Dr. [redacted] about not supplying Petitioners with the second part of Dr. [redacted] IEE until after Petitioners filed for Due Process, the implication being that this had disadvantaged them. There was also disagreement about when Petitioners received the Confidential Case Report/Case Note Dr. [redacted] provided to Dr. [redacted]. Without the support of evidence as to how they were disadvantaged in this regard, I cannot find that they have met the burden of proof. (Exhibits 31 and L; Tr. 11/3/09, pp. 406-409)

82. Notice is a procedural matter and, as stated (§ 71), to be actionable, a procedural violation must result in demonstrated substantive harm. There is no evidence that Petitioners were injured or disadvantaged in participating in the IEP or from otherwise advocating for the Student by Respondent’s failure to provide notice or documentation, except to the extent described below.

83. I have concluded to view this issue in two parts. In this regard, I note that Respondent recognized that Petitioners were claiming a denial of FAPE and, consequently, introduced evidence concerning the Student’s behavioral part of the IEP and the BIP which it

believed related to whether FAPE was being provided, as well as its attempts to provide services for both behavior and education. (E.g., argument of Respondent Counsel, Tr. 11/5/09, p. 538)

RULING: Petitioners faulty notice claim is dismissed. Please see below regarding analysis in relation to the provision of FAPE.

Did Respondent fail to provide FAPE pursuant to the recommendations of an independent evaluator?

84. No authority has been cited for the proposition that Respondent was required to accept Dr. [redacted] recommendations. However, IDEA and State Rules (§§ 74) make it absolutely clear that an IEE must be “considered” by an IEP team. There is no dispute that Dr. [redacted] performed an IEE, even though Respondent disagrees with its breadth, and characterizes it to include “programatic” recommendations. Dr. [redacted] recommendations were consistent with the instructions which he was given. No evidence exists that the Student’s IEP Team considered the IEE. From at least the inception of the IEP meeting on March 23, 2009, if not before, the Team’s scope was improperly limited by Respondent. The failure to allow consideration of Dr. [redacted] IEE amounted to a denial of FAPE.

RULING: Petitioners are considered to have prevailed in relation to Respondent’s failure to allow consideration of the IEE prepared by Dr. [redacted]. The Student’s IEP Team is to be convened for the purpose of considering the IEE.

Did Respondent fail to follow the Student’s IEP?

85. I find that the Student’s academic progress during the 2008-2009 school year, up to the time of Spring Break in March 2009, was no more than de minimis, and FAPE was denied him as a result of Respondent’s actions and inactions [see §§ 34(b), 35, 37, and

48]. Petitioners have proven by a preponderance of the evidence that Respondent failed to follow the Student's IEP, including his BIP, with fidelity, which effectively denied the Student FAPE.

RULING: Petitioners are to be considered as having prevailed in relation to their claim that Respondent failed to follow the Student's IEP, including the BIP, thereby denying the Student FAPE.

Did Respondent fail to comply with the findings and the order of the due process hearing No. 2008-dp2, or stated otherwise, with the Prior Decision and Order?

86. No authority has been cited or is known which grants jurisdiction in the context of this Due Process proceeding to enforce anything about the Prior Decision and Order. Also, for the reason set forth above (§ 60), I find that the contents of the Prior Decision and Order have no preclusive effect.

RULING: Petitioners claim concerning the Prior Decision and Order is dismissed.

OTHER MATTERS

The Parties have each asked to be awarded costs and attorney fees. No authority has been cited or is known which grants a Hearing Officer the ability to make such award. Accordingly, these requests are denied.

The Parties are advised that they may appeal this decision according to the provisions of IDEA.

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DATED this 22nd day of December, 2009.

Hearing Officer, Bob Mullen
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Copies of the foregoing Amended Decision and Order were provided this 22nd day of December, 2009, electronically and via U.S. Post, addressed as follows.

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