

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM**

IN THE MATTER OF:

Docket No.: 16-008382

**Walled Lake Consolidated Schools,
Petitioner**

Case No.: 16-00097

v

Agency: Education

Respondent

Case Type: ED Sp Ed Regular

Filing Type: Appeal

**Issued and entered
this 2nd day of September, 2016
by: Kandra Robbins
Administrative Law Judge**

DECISION AND ORDER

PROCEDURAL HISTORY

This matter concerns a due process hearing request/complaint under the Individuals with Disabilities Education Act (IDEA) 20 USC 1400 et seq. On or about April 1, 2016 Petitioner, Walled Lake School District filed a due process request/complaint with the Michigan Department of Education (MDE). MDE forwarded the Due Process Hearing Request to the Michigan Administrative Hearing System for hearing. It was assigned to Administrative Law Judge (ALJ) Kandra Robbins.

The Due Process Hearing Request filed by Petitioner requested the following resolutions:

1. MDE's investigation of the Part 8 be set aside because all of the issues raised in the Part 8 Complaint are before the ALJ in this Complaint.
2. The Student's stay-put placement is the placement described in the Student's May 13, 2015 IEP.
3. The Student's May 13, 2015 IEP provides the Student with FAPE in the least restrictive environment.
4. The District did not circumvent the IEP placement process by proposing a trial placement agreement instead of convening an IEP team meeting.

5. The District did not circumvent the IEP placement process by proposing an arbitration agreement instead of convening an IEP team meeting in that:
 - a. Arbitration agreements are not prohibited by IDEA or Michigan special education law; and
 - b. The law favors arbitration agreements and neither DOE nor MDE have authority to rule out the use of arbitration agreements in special education.

This matter has had an extensive Prehearing history. On April 5, 2016, an Order Scheduling Prehearing Conference for April 20, 2016 was issued. On April 6, 2016, Respondents' counsel, Michael Dorfman, filed a Response to the Due Process Complaint and a Motion for Summary Disposition alleging that the Complaint failed to state a claim upon which relief could be granted. On April 18, 2016, Petitioner filed a Response to the Motion for Summary Disposition and a Motion to Establish Stay-Put.

On April 20, 2016, a Prehearing Conference was held. During the Prehearing Conference, Oral argument on both motions was set and the Prehearing Conference was continued. On April 27, 2016, Respondent filed a Response and Brief to Petitioner's Motion to Establish Stay-Put. On April 29, 2016, Petitioner filed a Response to the Respondent's Response to Respondent's Motion for Summary Disposition.

On May 3, 2016, a Prehearing Conference was convened during which Oral Argument was presented on Respondent's Motion for Summary Disposition and Petitioner's Motion to Establish Stay-Put.

Pursuant to Michigan Administrative Hearing System Rule 792.10129, Respondent's Motion for Summary Disposition was granted in part and denied in part. During Oral Argument, Respondents contended that this matter was a dispute between the Petitioner District and the MDE. Respondents contend that Petitioner District has filed this Due Process Complaint in an effort to dispute the procedures implemented by MDE in resolving a State Complaint filed by Respondents against Petitioner District prior to this Due Process Complaint being filed. Respondents contended, therefore, that there was no relief that can be granted against Respondents. Respondents contend that as there can be no relief granted from the Respondents, summary dismissal is appropriate.

Petitioner contended that the issues in this matter are: 1. Did the May 13, 2015 IEP provide Student with FAPE in the least restrictive environment; 2. Did the District circumvent the IEP Placement process in IDEA by proposing a trial placement agreement instead of convening an IEP Team meeting; 3. Did the District circumvent

the IEP placement process under IDEA by proposing an arbitration agreement instead of convening an IEP Team meeting.

This ALJ found that the plain language in IDEA provides that any party may present a complaint with respect to any matter relating to the identification, evaluations, or educational placement of the child or the provision of a free and appropriate education. 20 USC 1415(6). The Code of Federal Regulations provides that a parent or a *public agency* may file a due process complaint on any of the matters described in 34 CFR 300.503(a)(1) and relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to the child. 34 CFR 507(a). (Emphasis added) In this matter, the District is a public agency. The District was within its rights to file a Due Process Complaint. The issue identified in this Due Process Complaint concerning whether the May 13, 2015 IEP provides Student with FAPE in the least restrictive environment clearly relates to the identification, evaluation, or educational placement of a child with a disability and the provision of FAPE to that child. Therefore, the District had standing to file this Due Process Complaint and this tribunal had jurisdiction to resolve this issue identified for hearing.

In addition, this ALJ found that that neither of the two remaining issues concerned the identification, evaluation, or educational placement of Student¹ or the provision of FAPE to Student. It was determined that the jurisdiction of this tribunal is limited to matters relating to the identification, evaluations, or educational placement of a *particular* child or the provision of a free and appropriate education to a *particular* child. This tribunal lacks jurisdiction to determine whether a District has exceeded its legal rights and responsibilities under IDEA in its general practices. The issue of whether a District has the legal authority to enter into placement agreements in an attempt to resolve disputes, or it is a violation of IDEA for a District to propose that parties to a dispute participate in arbitration rather than filing a due process complaint or, exercising the legal options of settlement agreements or arbitration is circumventing the IEP placement process, are outside of the jurisdiction of this tribunal. These issues address systemic application of IDEA and are not specific to a *particular* child's education. Therefore, this ALJ granted the request for summary disposition as to these two issues.

Respondents contended that this Tribunal lacked jurisdiction to preside over this matter because the Respondents had previously filed a State Complaint or Part 8 Complaint.² This ALJ found that IDEA and the Federal regulations authorize two specific forums to formally resolve disputes concerning the provision of special education. The first is a request for a Due Process Hearing and the second is a State Complaint. Each is a separate and distinct process. Although each is a separate and distinct process, the

¹ Student is used in place of the name of the minor child involved in this matter to protect the privacy of the child.

² State Complaints are often referred to as Part 8 Complaints. State Complaints are governed by Part 8 of the Michigan Administrative Rules for Special Education R 340.1851 et seq.

Federal Regulations contemplate that a Due Process Complaint and a State Complaint may be filed concerning the same issues. The Federal Regulations contain specific procedures to be followed under such circumstances. 34 CFR 300.152(c). In Michigan, these procedures are implemented by the MDE staff submitting a request to the ALJ to compare the issues raised in the Due Process Complaint with the issues raised in the State Complaint. The ALJ identifies which issues will be resolved during the Due Process Hearing and are therefore, set aside in the State Complaint. MDE proceeds to resolve any issues raised in the State Complaint that will not be addressed in the Due Process Hearing. In this matter, MDE submitted the request to the ALJ on approximately May 18, 2016. The ALJ sent a letter to MDE identifying the issues for the due process hearing on or about May 31, 2016. On or about June 3, 2016, MDE again contacted the ALJ seeking clarification. A second letter regarding the issues for hearing was submitted to MDE on June 9, 2016.

Additionally, this ALJ addressed the issue of Stay-Put during the May 3, 2016 Prehearing Conference. The ALJ requested additional briefs from the parties regarding the issue of a State Department order and any effect such order should be granted by the ALJ in determining Stay-Put. On May 10, 2016, each party filed a supplemental brief regarding the issue raised by the ALJ. This ALJ determined that Stay-Put, based on the statute and case law, is generally either the placement in the last agreed upon IEP or a placement agreed to by the parties. In this case, the last agreed upon IEP had Student in a categorical classroom based on the May IEP that was implemented in May 2016. Also, in this matter, the parties in the Trial Placement Agreement had specifically agreed that the Stay-put placement would be the placement identified in the May 2016 IEP. However, MDE had issued an Order requiring the District to keep Student in the general education placement implemented as part of the Trial Placement Agreement. Because MDE had ordered Student to remain in the general education classroom identified in the Trial Placement Agreement, this ALJ found that this would remain as the Stay-Put placement for the final 16 days of the 2015/2016 school year. On May 13, 2016, an Order Establishing Stay-Put was issued.

On May 20, 2016, Petitioner filed a Motion for Leave to Amend the Due Process Complaint with a Proposed Amended Complaint. On May 27, 2016, Attorney Brad Dembs, on behalf of Respondents, filed a Response to the Motion for Leave to Amend Due Process Complaint. On June 2, 2016, Petitioner's for Leave to Amend the Due Process Complaint was granted. On June 8, 2016, Petitioner filed an Amended Complaint. On June 17, 2016, Respondents filed a Response to the Amended Complaint. In the Amended Due Process Complaint, Petitioners requested the following resolution:

1. The Student's Stay-Put Placement during the 2015/2016 school year was as described in the Student's May 2015 IEP Report and the Trial Placement Agreement.

2. The Student's May 2015 IEP Report provided the Student with a free appropriate public education during the 2015/2016 school year.
3. The Student's May 2016 IEP Report will provide the student with a free appropriate public education for the 2016/2017 school year.
4. If the Parents appeal the ALJ's decision and order, the May 13, 2016 IEP Report will be the Student's Stay-Put placement during any such appeal.

On May 31, 2016, Respondents filed an Emergency Motion to Permit Classroom Observations. On June 1, 2016, Petitioner filed a Response to Respondents' Request to Conduct Pretrial Discovery. On June 3, 2016, An Order Regarding Motion to Permit Classroom Observations was granted in part.

During the Prehearing Conference held on May 2, 2016, it was determined that the Due Process Hearing would be held for ten days beginning on July 25, 2016. On July 19, 2016, Petitioner requested to adjourn the hearing. This request was denied.

On July 18, 2016, each party submitted their proposed witness and exhibit lists pursuant to the Order Following Prehearing Conference issued on May 3, 2016. Respondent also provided 22 proposed Joint Exhibits but noted that the exhibits had not been reviewed or approved by Petitioner as Joint Exhibits.

On July 25, 2016, the hearing was convened as scheduled. Director of Special Services Sheryl Brown and Attorney Robert Lusk appeared on behalf of Petitioners. Attorney Crystal Grant and Respondents E.A. and M.A. appeared on behalf of Respondents.³ Attorney Bradley Dembs joined as counsel during parts of the hearing.

The following exhibits were offered by Petitioner and admitted into evidence unless otherwise indicated:

1. Petitioner Exhibit No. 1 consists of 127 pages of Individualized Family Service Plans and evaluations for 2011 through 2014.
2. Petitioner Exhibit No. 2 consists of 145 pages of daily behavioral reports for December 2014 through June 2015.
3. Petitioner Exhibit No. 3 is the Goals and Objections from the May 13, 2015 Individualized Education Plan (IEP).

³ Initials are used in place of Respondents name to protect the privacy of the minor Student. At the request of Respondents' counsel, Intern Erin Hanksin Diaz was present on behalf of Respondents during most of the hearing. Although Attorney Michael Dorfman filed the original response, Attorneys from Michigan Protection and Advocacy substituted as counsel in this matter.

4. Petitioner Exhibit No. 4 consists of the Consent for Multidisciplinary Evaluation, dated January 29, 2015; the Review of Existing Evaluation Data (REED), dated January 27, 2015; the Multidisciplinary Evaluation Team Summary, dated March 10, 2015; Confidential Psychological Evaluation, dated March 2015; Speech and Language Evaluation, dated February 2015; Early Childhood Special Education Classroom Observation, dated March 2015; Occupational Therapy Evaluation Report, dated February 2015; Physical Therapy Evaluation, dated February 2015; and School Social Worker Report, dated March 2015.
5. Petitioner Exhibit No. 5 is the Invitation to Attend the Individualized Educational Planning Team Meeting; Individualized Education Plan; and Notice for Provision of Services and programs, dated March 10, 2015.
6. Petitioner Exhibit No. 6 consists of classroom observations of Sandy Jenkin; Charlene Harris-Freeman; and Miranda Whitley.
7. Petitioner Exhibit No. 7 is the Invitation to Attend the Individualized Educational Planning Team Meeting; Individualized Education Plan, and Notice of Provision of Services and Programs, dated May 13, 2015.
8. Petitioner Exhibit No. 8 is a transcript of the May 2015 IEP Team meeting.⁴
9. Petitioner Exhibit No. 9 is the core vocabulary sheet for the Core 32 system.
10. Petitioner Exhibit No. 10 consists of the initially proposed Trial Placement Agreement; the amended Trial Placement Agreement, dated July 2015; and the executed Trial Placement Agreement, dated September 1, 2015.
11. Petitioner Exhibit No. 11 consists of two draft Trial Placement Agreements proposes for two unrelated students.
12. Petitioner Exhibit No. 12 consists of the Kindergarten curriculum standards.
13. Petitioner Exhibit No. 13 consists of 500 pages of Behavioral Data Collection Sheets compiled by Paraprofessional for the 2015/2016 school year.
14. Petitioner Exhibit No. 14 consists of 16 pages of summary reports completed by providers regarding Trial Placement progress.
15. Petitioner Exhibit No. 15 is a Notice for Provision of Services and Programs, dated November 19, 2015.

⁴ Dr. Sheryl Brown identified the various speakers and wrote the names of each speaker on the exhibit. Resp. Exhibit L is also a transcript of the May 2015 IEP, however, the transcriber identified the speakers.

16. Petitioner Exhibit No. 16 consists of six pages of correspondence between counsel, dated December 2015.
17. Petitioner Exhibit No. 17 is a transcript of a meeting held on January 6, 2016.
18. Petitioner Exhibit No. 18 is an invitation to attend an IEP meeting on February 12, 2016.
19. Petitioner Exhibit No. 19 is an Order for Placement issued by Joanne Winkelman, Ph.D. Supervisor, Program Accountability, Office of Special Education, Michigan Department of Education, dated February 11, 2016.
20. Petitioner Exhibit No. 20 was not offered.
21. Petitioner Exhibit No. 21 is a Request for Due Process Complaint, dated March 29, 2016.
22. Petitioner Exhibit No. 22 is Respondent's Answer to Petitioner Due Process Complaint, dated April 6, 2016.
23. Petitioner Exhibit No. 23 was not offered.⁵
24. Petitioner Exhibit No. 24 was not offered.
25. Petitioner Exhibit No. 25 is the Request for Functional Behavioral Assessment and related documents.
26. Petitioner Exhibit No. 26 is the Curriculum Vitae of Lauri Anne Lundblad, Psy. D. PPCNP-BC, LP.
27. Petitioner Exhibit No. 27 is the Curriculum Vitae of Aubry D. Dodge, MS, BCBA.
28. Petitioner Exhibit No. 28 is a Consultation Report, completed by Dr. Laurie Lundblad, Psy. D. PPCNP-BC, LP.
29. Petitioner Exhibit No. 28 is the Walled Lake Consolidated School Invitation to Attend the Individualized Educational Planning Team Meeting; Individualized Education Program, dated May 13, 2016; and Notice for Provision of Services and Programs, dated May 13, 2016.

⁵ Petitioner Exhibit No. 23 consists of two CDs of the May 2015 IEP meeting. Joint Exhibit 21 and 22 are also CDs of the May 2015 IEP meeting and were admitted instead.

30. Petitioner Exhibit No. 30 was not offered.
31. Petitioner Exhibit No. 31 consists of eleven pages of correspondence between parties.
32. Petitioner Exhibit No. 32 is the common core curriculum standards for the First Grade.
33. Petitioner Exhibit No. 33 is Amended Due Process Complaint dated May 16, 2016.
34. Petitioner Exhibit No. 34 is the Respondent's Response to the Petitioner's Amended Complaint, dated June 17, 2016.
35. Petitioner Exhibit No. 35 is the May 2015 IEP Goals and Objectives / Benchmarks.
36. Petitioner Exhibit No. 36 is the Functional Behavioral Assessment Results and Initial Treatment Plan completed by Aubry Dodge, MS, BCBA, dated July 18, 2016.
37. Petitioner Exhibit No. 37 is classroom observation notes, dated June 6, 2016.
38. Petitioner Exhibit No. 38 consists of 13 pages of correspondence between Petitioner's counsel and the MDE.
39. Petitioner Exhibit No. 39 consists of 29 pages of correspondence between Respondents and the MDE.
40. Petitioner Exhibit No. 40 is a written copy of a presentation to the Walled Lake School Board by Respondent.
41. Petitioner Exhibit No. 41 is copies of news articles concerning the matters in this case.
42. Petitioner Exhibit No. 42 consists of various prehearing orders entered in this matter.
43. Petitioner Exhibit No. 43 is an Individualized Education Program Amendment, dated July 21, 2016.

he following exhibits were offered by Respondent and admitted into evidence:

- A. Respondent Exhibit A is a Comprehensive Speech-Language Evaluation, completed by Landria Seals Green, MA, CCC-SLP, dated June 1, 2016.
- B. Respondent Exhibit B is the Curriculum Vitae for Landria Seals-Green, MA, CCC-SLP.
- C. Respondent Exhibit C is a report completed by Carol Quirk, Ed.D., dated July 1, 2016.
- D. Respondent Exhibit D is the Curriculum Vitae for Carol Ann Quirk, Ed.D.
- E. Respondent Exhibits E through J were not offered.
- F. Respondent Exhibit K is a Henry Ford Hospital and Medical Centers consultation report completed by Dr. Jacquelyn Roberson, MD, FACMG, Clinical Geneticist, dated January 2010.
- G. Respondent Exhibit L is a transcript of the May 2015 IEP meeting.
- H. Respondent Exhibit M is correspondence between Respondent and Ms. Harris-Freeman concerning REED.
- I. Respondent Exhibit N is a Review of Existing Evaluation Data (REED) and Evaluation Plan, dated March 29, 2016.
- J. Respondent Exhibit O is an email from Ms. Harris Freeman to Respondent, dated April 27, 2016.
- K. Respondent Exhibit P is an email from Dr. Sheryl Brown to Respondent, dated May 5, 2016.
- L. Respondent Exhibit Q is an Elementary FAPE Teacher Report for Art, dated May 4, 2016.⁶
- M. Respondent Exhibit R is an Elementary FAPE Teacher Report for Music, dated May 4, 2016.⁷

⁶ This exhibit was initially marked as Joint Exhibit 11. However, Petitioner never consented to the admission of any Joint Exhibits. As a result, the Exhibit was re-marked at the hearing as Resp. Exhibit Q.

⁷ This exhibit was initially marked as Joint Exhibit 12. However, Petitioner never consented to the admission of any Joint Exhibits. As a result, the Exhibit was re-marked at the hearing as Resp. Exhibit R.

Joint Exhibits 1 through 22 were filed with the Michigan Administrative Hearing System as proposed exhibits by Respondent's counsel. However, Petitioner's counsel had neither seen nor approved of the submission of the joint exhibits. At the hearing, Petitioner's counsel consented to the submission of the proposed Joint Exhibits 21 and 22. Therefore, the following exhibits were marked and offered as Joint Exhibits:

1. Joint Exhibit 21 is a CD audio recording of the May 2015 IEP.
2. Joint Exhibit 22 is a CD audio recording of the May 2016 IEP.

The following individuals testified in this matter:

1. Sheryl Brown, Director of Special Services
2. M.A., Respondent
3. Heather Travis, Early Childhood Special Education Teacher
4. Scott Nolan, School Psychologist
5. Cristina Swaggerty, Speech Language Pathologist
6. Kristen McLaughlin, Occupational Therapist
7. Stacy Zousmer, Physical Therapist
8. Miranda Whitley, Speech Language Pathologist
9. Eileen Derengowski, School Social Worker
10. Cristopher Franke, Speech Language Pathologist
11. Sarah Kiffner, Teacher Consultant
12. Amy Bland, Special Education Teacher, Resource Room
13. Charlene Harris-Freemen, Special Education Teacher, Resource Room
14. Carol Quirk, Ed. D.
15. David Routledge, School Psychologist
16. Jacquelyn Roberson, M.D.

17. Phillip Pittman, Director of Curriculum Allen Park Schools
18. Aubry Dodge, MS, BCBA
19. Alisha Lominac, Occupational Therapist
20. Nashella Zarek, First Grade, General Education Teacher
21. Molly Horal, Special Education Teacher, CI classroom
22. Laurie Lundblad, Psy.Ed.
23. Landria Seals Green, Speech Language Pathologist
24. Juliann Snavely, Kindergarten, General Education Teacher

At the conclusion of the hearing, a post-hearing brief schedule was ordered. The Parties had until August 24, 2016 to file a written closing argument and post-hearing brief. Each party filed a written closing argument and post-hearing brief on August 24, 2016.

ISSUES

1. Did the Student's May 2015 IEP Report provide the Student with a free appropriate public education during the 2015/2016 school year in the least restrictive environment?
2. Did Student's May 2016 IEP Report provide the student with a free appropriate public education for the 2016/2017 school year in the least restrictive environment?
3. If the Parents appeal the ALJ's decision and order, should the May 13, 2016 IEP Report will be the Student's Stay-Put placement during any such appeal?

APPLICABLE LAW

After a lengthy analysis, the Supreme Court in *Schaffer v Weast*, 546 US 49; 126 S Ct 528; 163 L Ed 2d 387 (2005); *Doe v Defendant I*, 898 F2d 1186 (CA 6, 1990) clearly stated:

The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this case, that party is Brian, as represented by his parents. But the rule applies with equal effect

to school districts: If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an ALJ.

Although the District is the party that has brought the claim in this matter, the District is not challenging the IEP but rather attempting to defend their position that the IEP provides Student with a free and appropriate public education. This District only brought this claim after the Respondent-parents filed a state complaint challenging the IEP. In this case, the Respondent-parents are the party seeking relief from the IEP, specifically the educational placement. The Respondent-parents, as the party challenging the IEP, have the burden of proof by a preponderance of the evidence to establish that IEP has failed to provide Student with a free appropriate public education in the least restrictive environment. Additionally, as relief, Respondent-parents specifically requested that the District create a new IEP.

The Code of Federal Regulations, 34 CFR 300.39 defines “special education” as follows:

Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including— (i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (ii) Instruction in physical education. 34 CFR 300.39

Michigan Administrative Rule for Special Education, R 340.1701c(c) defines “special education” as follows:

"Special education" means specially designed instruction, at no cost to the parents, to meet the unique educational needs of the student with a disability and to develop the student's maximum potential. Special education includes instructional services defined in R 340.1701b (a) and related services.

The Federal Regulations defines “specially designed instruction” as follows:

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child's disability; and

- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 CFR 300.39(b)(3)

Students protected by the provisions of IDEA are entitled to be appropriately identified, evaluated, placed, and provided a free appropriate public education (FAPE) that includes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 USC 1400(d); 34 CFR 300.1.

Under 20 USC 1415(f)(3)(E), it may be found that FAPE has been denied to a disabled student based on either substantive or procedural violations of the Individuals with Disabilities Education Act (IDEA or Act). To find a denial of FAPE based on procedural violations of the Act, it must also be found that the procedural violation impeded the student's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to their child, or caused a deprivation of educational benefits.

In *Board of Education of Hendrick Hudson Central School District v Rowley*, 458 US 176, 102 S Ct 3034, 73 L Ed 2d 690 (1982), the U.S. Supreme Court articulated the two bases for assessing the provision of FAPE. The first was whether the school district had complied with the procedural requirements of the Act, and the second was whether the student's Individualized Educational Program (IEP) was "reasonably calculated" to enable the student to receive educational benefits. *Id.*, at 206-07.

In assessing whether a student's IEP was reasonably calculated to enable the student to receive educational benefits under *Rowley's* second basis above, our Sixth Circuit Court of Appeals noted that nothing in *Rowley* precludes the setting of a higher standard than the provision of "some" or "any" educational benefit, and held that the IDEA requires an IEP to confer a "meaningful educational benefit gauged in relation to the potential of the child at issue." *Deal v Hamilton County Bd of Ed*, 392 F3d 840, 862 (CA 6, 2004).

Nevertheless, the IDEA requirement that school districts provide disabled children with a free appropriate public education does not require that a school either maximize a student's potential or provide the best possible education at public expense. *Doe v Tullahoma City Schools*, 9 F3d 455 (CA 6, 1993); *Fort Zumwalt Sch Dist v Clynes*, 119 F3d 607, 612 (CA 8, 1997), *cert den*, 523 US 1137 (1998).

In determining whether the District provided a free appropriate public education in the least restrictive environment for the student in this case, it must first be asked whether the District has complied with the procedures set forth in the IDEA in developing the

IEP, and second, whether the IEP developed through those procedures was reasonably calculated to enable the student to receive a meaningful educational benefit gauged in relation to his potential. *Rowley*, 458 US at 206-07; *Deal*, 392 F3d at 862.

IDEA provides in pertinent part:

(j) Maintenance of current educational placement

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed. 20 USC §1415j [Emphasis Added]

Additionally, the Code of Federal Regulations provides for determining educational placement as:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that-

(a) The placement decision-

- (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
- (2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118 ;

(b) The child's placement-

- (1) Is determined at least annually;
- (2) Is based on the child's IEP; and
- (3) Is as close as possible to the child's home;

- (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
- (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
- (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. 34 CFR §300.116

FINDINGS OF FACT

Based on the entire record in this matter, including the testimony and admitted exhibits, the following findings of fact are established:

Student was born on [REDACTED]. Student was born at 35 weeks' gestation due to premature rupture of membranes to mother. He and his twin were delivered by cesarean section. Down syndrome was suspected. Student was diagnosed with non-inherited form of Down syndrome called "trisomy 21". Parents were informed by their medical providers that children with Down syndrome have learning delays which vary from the mild to moderate level. Parents were informed by their medical providers that early intervention and special education services can assist a child with Down syndrome to develop their abilities to their fullest potential. Parents were informed by their medical providers that early intervention, physical therapy and appropriate school placement have improved the developmental skills of children with Down syndrome compared to what was seen many years ago. [Resp. Exhibit K].

An Early On Oakland Individualized Family Service Plan was implemented in February 2011. [Pet. Exhibit 1].

Respondents consented to an Initial Multidisciplinary Evaluation on July 5, 2011. On August 3, 2011, the Multidisciplinary Evaluation Team recommended that Student was eligible for services as a child with an Early Childhood Developmental Delay pursuant to MARSE Rule 340.1711. An Individualized Educational Program/ Family Service Plan Team Meeting was held on August 3, 2011. Student began attending the Twin Sun Preschool at that time. He received speech services, occupational therapy services and physical therapy services. [Pet. Exhibit 1].

On May 30, 2012, an Individualized Educational Program/Family Service Plan Team Meeting was held for the development of a new Service Plan. This Service Plan determined that Student would remain at Twin Sun Preschool until June 6, 2012. Then Student would begin attending the Early Childhood Special Education (ECSE) Program. Student would continue to receive speech and language services, physical therapy services and occupational therapy services. Student continued to attend the ECSE program under the annual Service Plans through June 2015. Student attended the ECSE program for two years at Keith Elementary School and one year at Dublin Elementary School. [Pet. Exhibit 1].

On January 28, 2015, Petitioner E.A. consented for a Multidisciplinary Evaluation (MET) of Student. It was determined that Student would be evaluated for the following areas of concern: (1) social/emotional/behavioral (2) learning/assessment (3) cognitive ability (4) speech/ language, and (5) delayed development. The Evaluation Team would consist of a psychologist, a social worker, a special education teacher, a speech and language teacher, an occupational therapist, and a physical therapist. [Pet. Exhibit 4].

On March 4 and 5, 2015, School Psychologist Scott Nolan conducted a psychological evaluation of Student primarily to determine Student's current academic and cognitive levels of functioning. This evaluation consisted of classroom observation, behavioral observation, Primary Test of Nonverbal Intelligence, Bracken Basic Concept Scale-Revised, and the Vineland Adaptive Behavior scales II – Teacher Rating Form. Mr. Nolan found Student to be a delightful boy who was a polite and well-mannered student. Student appeared to be receptive and positive toward the testing environment. Student exhibited a low level of frustration with tasks that were perceived as challenging. Student obtained a Nonverbal Index score of 64 placing his performance within the Very Low Range as less than 1st percentile on the Primary Test of Nonverbal Intelligence. This score has a 95 percent confidence. Mr. Nolan administered the Bracken Basic Concept Scale-Revised to estimate Student's level of academic readiness. Student received a School Readiness Composite score of 4 or 2nd percentile. This is within the Delayed range of functioning. The Vineland Adaptive Behavior Scales -II- Teacher Rating Form was completed with the help of Student's teacher. In the Communication Domain, Student had a Standard score of 67 or 1st percentile. In the Daily Living Skills, Student had a Standard Score of 57 or less than 1st percentile. In the Socialization Domain, Student had a Standard Score of 67 or 1st percentile. In the Motor Skills Domain, Student had a Standard Score of 61 or less than 1 percentile. All of the scores were within the Deficient range of functioning. [Pet. Exhibit 4].

As part of the MET, Christina Swaggerty, MA, CCC-SLP, completed a Speech and Language Evaluation of Student in February 2015. Ms. Swaggerty determined that Student's voice, pitch, intensity, and quality were within age norms. She determined that Student's rate of speech was appropriate. The Goldman-Fristoe Test of Articulation-2nd Edition was administered to evaluate articulation skills. Student would

imitate the number of syllables for one to two syllable words and use appropriate intonation. He used the following consonants within his utterances: /p, b, w, h, g, k, d, t, v, th/. Student was administered the Peabody Picture Vocabulary Test-IV to measure his ability to understand single, spoken words. Student had a Standard Score of 52 or 0.1 percentile or age equivalent 2:1. The Preschool Language Scale-5th Edition (PLS-5) was administered to assess auditory comprehension of language and expressive communication skills. Student had a Standard Score of 62 or 1st percentile for Auditory Comprehension; a Standard Score of 55 or 1st percentile for Expressive Communication; and a Total Language Standard Score of 55 or 1st percentile. Ms. Swaggerty determined that Student demonstrates below age level skills within the areas of speech and language that would negatively impact his ability to access academic content, interact with peers and get basic wants/needs met. [Pet. Exhibit 4].

As part of the MET, Ms. Travis, ECSE Teacher, completed a classroom observation report. As part of the ECSE classroom, the Assessment, Evaluation, and Programming System (AEPS) is utilized to monitor a student's progress in the six different areas of development; adaptive, cognitive, fine motor, gross motor, social communication, and social. Ms. Travis reported that Student is able to successfully perform some of the expected adaptive behavior skills for a child his age. As to Cognitive skills, Ms. Travis reported that Student performs inconsistently with many cognitive skills. Ms. Travis reported that Student was able to identify ten uppercase letters and six letter sounds as pre-reading skills. In pre-math skills, Student was able to recognize three basic shapes and five out of eleven basic colors. Student was non-verbal and therefore unable to demonstrate any rote counting. He was tested on counting by having him place the numbers in the correct order. Student was unable to use one to one correspondence. He was unable to order numbers from one to ten. He could recognize two numbers (1 and 5). He was unable to perform AB or ABC patterns. Ms. Travis noted that Student struggles with multi-step teacher direction. He is able to follow routine instruction. Ms. Travis noted Student was non-verbal. Student was utilizing the Picture Exchange Communication System (PECS). Student was currently at PECS Phase 4 with attributes. Ms. Travis noted that Student is able to greet familiar people hello, initiate preferred activities, initiate play with others, and will remain with group during a majority of activities. Student is able to maintain appropriate proximity with others when playing sometimes. Student is unable to resolve conflicts on his own. Student struggles with being able to follow classroom rules and directions. Student will push others down when they walk in front of him, he will grab items out of their hands and he will be non-complaint when given directions. [Pet. Exhibit 4].

Kristen McLaughlin, MOTRL, completed an Occupational Therapy Evaluation as part of the MET on February 26, 2015. Ms. McLaughlin administered the Peabody Developmental Motor scales, second edition (PDMS-2) to determine Student's fine motor skills. Student had a Standard Score of 3 or 1st percentile in grasping and a Standard Score of 4 or 2nd percentile in Visual Motor Integration. Student had an overall

fine motor quotient of 61 or less than 1 percentile. Student's fine motor skills are well below average. Student's grasping score has an age equivalent of 28 months. Student's visual motor integration has an age equivalent of 27 months. Ms. Swaggerty recommended that Student continue to receive occupational therapy services. [Pet. Exhibit 4].

As part of the MET, Stacy Zousmer, MPT, C/NDT, conducted a Physical Therapy Evaluation of Student on February 26, 2015. Ms. Zousmer administered the Peabody Developmental Motor Scales-Gross Motor Subtest (PDMS-2) to measure Student's abilities and age equivalencies (AE). Student had a Standard Score of 6 or 40 months AE on Stationary. Student had a Standard Score of 4 or AE of 31 months on Locomotion and a Standard Score of 5 or AE of 33 months on Object manipulation. Student had a Total Gross Motor Quotient of 68. This is interpreted as "Very Poor". Student demonstrates significant delays. Ms. Zousmer recommended that Student continue to receive physical therapy services to address his gross motor delay and improve his strength, dynamic balance, and functional mobility. [Pet. Exhibit 4].

Leslie Corneau, LMSW, completed a School Social Worker Assessment as part of the MET. Student's Teacher, Ms. Travis completed that school portion of the Student Responsiveness Scale (SRS). The SRS measures Social Awareness, Social Cognition, Social Communication, Social Motivation, and Restricted Interests and Repetitive Behavior. Student had a raw score of 11 in Social Awareness; 13 in Social Cognition; 22 in Social Communication; 0 in Social Motivation and 3 in Restrict Interest and Repetitive Behavior. This resulted in a Total score of 49, indicating that Student's communication problems are the most severe concern in the classroom. Ms. Corneau indicated that due to Student's limited communication and other social factors, she believed Student would have difficulty in the general education classroom. She also recommended that social worker services be part of Student's IEP. [Pet. Exhibit 4].

On March 2, 2015, Ms. Travis sent an invitation for an Individualized Educational Planning Team Meeting to be held on March 10, 2015 for a Reevaluation. On March 10, 2015, an IEP meeting for reevaluation was held. The IEP Team included M.A., Petitioner; District Representative/Special Education Teacher Heather Travis; School Psychologist Scott Nolan; School Social Worker Leslie Corneau; Physical Therapist Stacy Zousmer; and Occupational Therapist Kristen McLaughlin. The IEP Team determined that Student would remain in the ECSE program and continue to receive speech and language, physical therapy, and occupational therapy services and would begin to receive social worker services. Petitioners consented to this IEP. [Pet. Exhibit 5].

On May 13, 2015, an Individualized Educational Planning (IEP) Team Meeting was held to develop Transition Individualized Educational Plan for Student as Student was to transition from Preschool to Kindergarten. An invitation was sent to the parents prior to

the meeting. The invitation included a list of all invitees as well as information for the location of the Parent Handbook; District and Special Services and the Procedural Safeguards. [Pet. Exhibit 7].

The following individuals attended the IEP Team meeting: Heather Travis, ECSE, Special Education Teacher; Dr. Sheryl Brown, District Representative; Juliann Snavely, Kindergarten General Education Teacher; Petitioner M.A.; Petitioner E.A.; Sandy Jenkin, Cognitive Impaired Classroom Special Education Teacher; Charlene Harris-Freeman, Resource Room Special Education Teacher; Jeffrey Drewno, Principal at Dublin Elementary School; Phillip Pittman, Principal at Keith Elementary School; Cristina Swaggerty, Speech and Language Pathologist at Dublin Elementary; Miranda Whitley, Speech and Language Pathologist at Keith Elementary; Ellen Stacy, Speech and Language Pathologist at Meadowbrook Elementary; Stacy Zousmer, Physical Therapist at Dublin Elementary; Kristen McLaughlin, Occupational Therapist at Dublin Elementary; Leslie Corneau, School Social Worker at Dublin Elementary; Scott Nolan, Psychologist at Dublin. The following individuals were invited but did not attend the IEP meeting: Administrator Kathleen Said, Principal Christopher Peale, Occupational Therapist Sue Aldea, Physical Therapist Justine Evans, School Social Worker Jennifer Manna, Occupational Therapist Alishia Lominac, and Physical Therapist Liz Robinson. It was agreed that their attendance was not necessary. [Pet. Exhibit 7].

The IEP Team determined that Student was eligible for special education as a child with early childhood developmental delay under MARSE R 340.1711. In addition, it was noted that Student has a speech and language impairment under MARSE R. 340.1710. [Pet. Exhibit 7].

As the Present Level of Academic Achievement and Functional Performance (PLAAFP), the IEP listed the results from the most recent MET held in March 2015. Additionally, the IEP Team indicated that the Student's communication needs and the need for assistive technology devices and services would need to be considered. [Pet Exhibit 7].

In the PLAAFP for reading, the IEP Team noted that at the time, Student was able to recognize 23 uppercase letters in at least two out of three trials when placed in a field of six cards. He was only able to recognize the letters I, N and U in one out of three trials. Student was able to recognize 15 out of 26 lowercase letters on two out of three trials when placed in a field of eight to nine lowercase letter cards that were similar in formation. He was able to recognized five lowercase letters (k, y, p, m, w, f) on three out of three occasions, eight lowercase letters (l, l, d, b, u, o, j and r) on two out of three occasions, and six lowercase letters (x, a, z, v, c, s) on one out of three occasions. Student was able to recognize two letter sounds (O and Z) on two out of three trials and ten letter sounds (U, C, A, W, B, Y, S, F, L, E, K) on one out of three trials and the other fourteen letters Student could not recognize at all. [Pet. Exhibit 7].

In the PLAAFP for mathematics, the IEP Team noted that Student is unable to consistently point to the six different shapes in three out of four trials. He was able to point to the star and triangle in two out of four trials and to the heart in one out of four trials. He was unable to correctly point to the circle and square. He had previously been able to identify the circle in two out of four trials and the square in one out of four trials. He is inconsistent with the skill. For colors, Student was able to point to the colors red and orange in all four trials, the colors brown and blue in two out of four trials and to the color yellow in one out of four trials. Student was inconsistent with both shapes and colors. [Pet. Exhibit 7].

In the PLAAFP for assistive technology, the IEP Team noted that Student has a limited repertoire of consonants and vowels that he is able to either imitate or produce. He has a few spontaneous words/phrases in his vocabulary: hi, bye, I did it, what's that. Student struggles to communicate in a way that is understandable to both familiar and unfamiliar listeners in and out of context. It was noted that Student benefited from using a low tech Augmentative Assistive Communication (AAC) system to functionally communicate. [Pet. Exhibit 7]

The IEP Team determined a number of goals and objectives for Student in the May 2015 IEP. The first goal is a Speech/Language goal. It was determined that the Michigan Content Expectations upon which the goal will be based was ELE #3 and 4: Children develop abilities to express themselves clearly and communicate ideas to others. Children grow in their capacity to use effective listening skills and understand what is said to them. Based on the March 2015 evaluation and the May 2015 therapy data, the IEP team determined that Student's baseline achievement was that Student is 30% accurate in independently formulating a three-part sentence in the correct order (carrier phrase + attribute/action + object) using picture icons and 0% accurate receptively identifying the basic spatial concepts in, on, under and in front. The annual goal was to improve language skills by May 12, 2016, Student will identify from a field of two to three, an object that demonstrates a given spatial concept (in, on, under and in front) given one to two visual, verbal and /or gestural prompts if needed as well as independently formulate a three-part sentence in the correct order (carrier phrase + attribute/action + object) using picture icons and/or verbal approximations with 70% accuracy for each skill. This annual goal is supported by two short-term objectives. The first is that Student will identify (point to or pick up) an object from a field of two to three that demonstrates a given spatial concept with 70% accuracy for four different basic spatial concepts (in, on, under, in front) given one to two visual, verbal and /or gestural prompts if needed. This objective will be measured bi-weekly using documented observation for a 70% accuracy. The second short term objective is that Student will independently construct a two to three-part sentence in the correct order (carrier phrase + action or attribute + object) using picture icons and/or verbal approximations with 70% accuracy. This objective will be measured bi-weekly using documented observations with a 70% accuracy. The objectives for this goal are to be

implemented by special education teacher, speech and language provider, school social worker, and classroom staff. The Speech and Language Pathologist is responsible for reporting on the progress for this goal. [Pet. Exhibit 7]

The second goal determined by the IEP Team was another Speech/Language goal with a focus on articulation. The Michigan Content Expectation is ELE #3: Children begin to develop in their abilities to express thoughts and ideas. The baseline data as of May 2015 based on documented observation was that Student was able to produce CV1CV2 words with known consonants given visual and verbal prompting as well as repetition with 60% accuracy. The annual goal was that by May 12, 2016, Student will improve articulation skills by learning to produce CV1CV2 words with 80% accuracy given one visual and verbal prompt. This goal is supported by two short term objectives. The first that given visual and verbal prompting as well as the chance to repeat, Student will produce CV1CV2 words with 80% accuracy. This goal will be measured by documented observation bi-weekly with an 80% accuracy. The second objective is that given one visual and verbal prompt, Student will produce CV1CV2 words with 80% accuracy. This objective will be measured on a bi-weekly basis using documented observation. The Speech Language Pathologist will be responsible for implementing and reporting on this goal. [Pet. Exhibit 7].

The third goal determined by the IEP team was a cognition goal in the instructional area of reading. The Michigan Content Expectations upon which the goal was based is ELE: Language and Early literacy development #1: Children begin to understand written language read to them from a variety of meaningful materials, using reading like behaviors, and make progress towards becoming conventional readers. AEPS: Cognition, Stand H: Phonological Awareness and Emergent Reading Objective 2.3. Produce correct sounds for letters. Objective 3.1. Identify letter names. Student's baseline data for this goals was noted as Student can recognize 15 of the 26 lowercase letters on two out of three trials when placed in a field of eight to nine lowercase letter cards that were similar in formation. He could recognize five lowercase letters (k, y, p, m, w, f) on three out of three occasions, eight lowercase letters (i, l, d, b, u, o, j and r) on two out of three occasions, and six lowercase letters (x, a, z, v, c, s) on one out of three occasions. Student would benefit from knowing a majority of the lowercase letters since the majority of reading materials use lowercase letters. Student was able to recognize two letter sounds (O and Z) on two out of three trials and ten letter sounds (U, C, A, W, B, Y, S, F, L, E, K) on one out of three trials, and the other fourteen letters, Student was not able to recognize the sound of at all. The IEP Team determined that the annual goal for Student would be that when placed in a field of eight to nine cards, he would be able to point to the correct letter sound and be able to point to the correct lowercase letter stated in three out of four trials. This goal is supported by two short term objectives. The first objective is that when placed in a field of eight cards, Student will be able to point to the correct letter sound stated in three out of four trials for ten to twelve different letter sounds. This objective would be measured on a bi-weekly basis

using documented observation. The second objective is that Student would be able to increase his cognition skills in reading by being able to point to the correct lowercase letter stated in three out of four trials with 24 different lowercase letters when placed in a field of eight to nine cards. This objective would be measured using documented observation on a bi-weekly basis. This goal would be implemented by the Special Education Teacher and the para professionals. The Special Education Teacher would be responsible for measuring and reporting on progress. [Pet. Exhibit 7].

The next goal was a cognition goal in the instructional area of pre-math. The Michigan Content expectation upon which the goal was based was ELE Intellectual Development #1: Children explore with increasing understanding the physical characteristics and relationships of objects and happenings in their environment. AEPS: Cognition-Strand A: Concepts. 1.1 Demonstrate an understanding of eight different colors. 1.2. Demonstrate an understanding of five different shapes. As to baseline data, it was noted that as of April 2015, Student could point to the star and triangle in two out of four trials and to the heart in one out of four trials. He was unable to correctly point to the circle and square. However, on March 26, Student was able to point to the star in three out of four trials, the heart and circle in two out of four trials, and to the square in one out of four trials. Student was inconsistent with this skill. For recognizing colors, as of April 2015, Student was able to point to the colors red and orange correctly in all four trials, the color brown and blue in two out of four trials, and to the color yellow in one out of four trials. However, at the end of March, Student could point to the colors red and black in all four trials, to the color purple in three out of four trials, and the color blue in two out of four trials. He was unable to correctly point to the color green. The annual goal was that Student would increase his cognition skills in mathematics by being able to recognize six to eight basic shapes and by recognizing nine basic colors when placed in a field of six in three out of four trials. This goal is supported by two short term objectives. The first is that Student will increase his cognition skills in mathematics by being able to recognize six to eight basic shapes when placed in a field of eight in three out of four trials. This objective would be measured on a bi-weekly basis using documented observations. The second objective is that Student would increase his cognition skills by being able to recognize nine basic colors when placed in a field of six to eight in three out of four trials. This goal was to be implemented by the special education teacher and paraprofessionals. The special education teacher was responsible for reporting progress on this goal. [Pet Exhibit 7].

The next goal was a physical therapy goal to address the instructional area of gross motor skills. The Michigan Content Expectation upon which the goal was based was ELE: Physical health and development 2: Children experience growth in gross motor development and use large muscles to improve a variety of gross motor skills in both structured and unstructured settings. AEPS Strand B: play skills- Objective 1.3 Balances on one foot; Objective 2.2 Catches ball; Goal 1 Jumps forward. Strand C: Balance and Mobility-Goal 2 Alternates Feet walking up and down stairs. The annual

goal was determined to be that Student would independently navigate three obstacles, including reciprocal stair climbing at least six steps, jumping forward a distance of 22 inches, and ambulating across an 8' x 4" balance beam while only losing his balance less than or equal to one time. This goal is supported by two short term objectives. The first that Student will demonstrate single leg stance x 6' without trunk sway greater than 20 degrees, demonstrating improved proximal strength and balance. This objective would be measured bi-weekly using documented observation in two out of three trials. The second objective would be that Student would jump forward a distance of 22 inches, demonstrating improved strength and locomotor skills. This objective would be measured bi-weekly using documented observation in two out of three trials. This goal would be implemented by the physical therapist and physical therapist assistant. The physical therapist would be responsible for reporting on the goal. [Pet. Exhibit 7].

The next goal was an Occupational Therapy goal for the fine/visual motor instructional area. This goal addressed the Michigan Content Expectation ELE: Physical Development and health #3: Children experience growth in fine motor development and use small muscles to improve a variety of fine motor skills both in structured and unstructured settings. The goal was that by May 2016, Student would be able to demonstrate improved bilateral hand skills as evidenced by independently stringing four beads onto a string and cutting a piece of paper in half with adaptive or regular child scissors in four out of five trials. This goal was supported by two short term objectives. The first that Student will string four to six one inch beads onto a string with no more than three verbal and /or visual cues and after one demonstration in four out of five trials. This objective would be measured on a bi-weekly basis using documented observation. The second objective would be that Student will use adaptive or regular child scissors to cut a piece of paper in half (making at least three consecutive cuts) with no more than three verbal and/or visual cues and after a demonstration in four out of five trials. This objective would be measured bi-weekly using documented observation. This goal would be implemented and reported by the occupational therapist. [Pet. Exhibit 7].

The final annual goal in the May 2015 IEP was a social work goal to address the social emotional behavior instructional area. This particular goal addressed Michigan Content Expectation ELE: Social and Emotional Development #3: Children develop healthy relationships with other children and adults. As baseline data it was noted that Student's social motivation problems are the most severe concern in the classroom. The annual goal was determined to be that by May 2016, Student would increase his social interaction skills by being able to take turns with his peers and to be able to initiate play with his peers. This goal is supported by two short term objectives. The first is that by May 2016, in the classroom or in a social workgroup, Student will increase his social interaction skills by being able to take five to seven turns with two peers with an adult present to give verbal cues while playing the game. This objective would be measured on a bi-weekly basis using documented observation. The second short term

objective is that by May 2016, in the classroom and/or social work settings, Student will increase his social interaction skills with his peers by being able to initiate play with two to three different peers by using gestures, picture cards, and /or verbal approximations. This objective would be measured on a bi-weekly basis using documented observation for three out of five trials. This goal would be implemented by the Special Education Teacher and the School Social Worker. The School Social Worker is responsible for reporting on this goal. [Pet. Exhibit 7].

In order to meet these goals, the IEP Team also determined that Student would need the use of the low tech AAC system: social supports / visual supports (i.e. sit down, wait cards, help cards, and my turn cards) and Positive Behavior Support System (i.e. praise, high fives, food items for reinforcers). [Pet. Exhibit 7].

Additionally, the IEP Team determined that the District wide assessments would not be appropriate as they were above the Student's current ability level and alternative assessments would be appropriate. [Pet. Exhibit 7].

Student would receive 20-30 minutes two to four times per month of Physical Therapy and Occupational Therapy services. Student would receive 15-20 minutes three to four times a month of social worker services. Student would receive 20-30 minutes four to eight times a month for Speech and Language Services. [Pet. Exhibit 7]

The May 2015 IEP called for Student to attend the Early Childhood Special Education Program located at Dublin Elementary for four two to three hour sessions per week and one two to three hour session per month and two hours in general education until June 9, 2015. Beginning on September 15 until May 2016, the IEP called for Student to attend the Program for students with a moderate cognitive impairment for 21-26 hours per week and 10 hours per week in general education classroom at Meadowbrook Elementary. [Pet. Exhibit 7].

During the May 2015 IEP Team meeting, Respondents argued for Student to be placed in the general education kindergarten classroom in the neighborhood school located at Keith Elementary. [Pet Exhibit 8 / Resp. Exhibit L].

The consensus of the IEP Team was that the general education kindergarten classroom was not appropriate for Student for a number of reasons. This included that Student was not able to access the general education curriculum and any social or emotional benefits from inclusion were outweighed by the benefits of the specialized classroom including the specialized highly trained teacher, staff expertise and experience in the use of the student's communication system (PECS). Student would require specially designed instruction in academics, cognition, fine and gross motor skills. Additionally, the IEP Team noted that Student was prone to behaviors and behavioral outbursts that would disrupt the general education classroom. Also, there was concern that a 1:1

paraprofessional would inhibit Student's development of appropriate self-monitoring, school and social skills. [Pet. Exhibit 7].

The May 2015 IEP was implemented beginning on May 14, 2015.

The Respondents continued to dispute the IEP Team determined placement. Respondents inquired about revoking consent for special education services for Student in order to have Student attend the general education classroom at Keith. [Tr. Vol. I, pg. 40]

In July 2015, in an effort to informally resolve the disputed IEP, the District proposed a Trial Placement Agreement. There was a meeting held and the District modified the Trial Placement Agreement to address issues raised by Respondents.

On July 27, 2015, Dr. Sheryl Brown sent the modified Trial Placement Agreement to Respondents with a copy of the Procedural Safeguards. [Pet. Exhibit 10].

On September 1, 2015, in an attempt to informally resolve the disputed IEP, the parties signed the negotiated Trial Placement Agreement. [Pet. Exhibit 10].

The Trial Placement Agreement specifically indicated that the Trial Placement would begin on September 8, 2015. The Trial Placement Agreement indicated that Student would be placed in the general education kindergarten classroom with paraprofessional support and that all other supports and services would be consistent with the May 13, 2015 IEP. [Pet. Exhibit 10].

The Trial Placement Agreement specifically stated that the Trial Placement Agreement would not change Student's "Stay-put" placement and that the May 13 IEP would remain the Student's "Stay-put" placement until a successor IEP was developed that was mutually agreeable to the parties. [Pet. Exhibit 10]

The Trial Placement Agreement specifically stated that the District would schedule a meeting with the Parents no later than the week before the end of the District's first marking period to evaluate the Trial Placement. If the District, in its discretion, believed that Student might receive a free appropriate public education in the Trial Placement, the District would convene an IEP Team meeting to develop a successor IEP Team Report for Student which would place Student in the Trial Placement. [Pet. Exhibit 10]

The Trial Placement Agreement specifically stated that if, during the Trial Placement, the District, in its discretion, concludes that Student is not receiving a free appropriate education in the Trial Placement, the District would not convene an IEP Team but would return Student to the placement determined by the IEP Team as stated in the May 13, 2015 IEP. [Pet. Exhibit 10].

There is nothing in the Trial Placement Agreement that prohibits either party from exercising their rights under IDEA, the federal regulations or MARSE rules.

As a result of the Trial Placement Agreement, Student began the 2015/2016 school year attending the general education kindergarten classroom located at Keith Elementary School taught by Ms. Snively. Student was assigned a 1:1 paraprofessional. In addition, the services, speech and language, physical therapy, occupational therapy, and social work, were provided to Student. Student did spend time in the Resource Room while at Keith Elementary. Respondent, M.A. is a teacher at Keith Elementary School.

In preparation for the meeting called for in the Trial Placement Agreement, Director of Special Services, Dr. Sheryl Brown obtained summary reports from each of Student's providers. [Tr. Vol. I, pg. 56].

On October 19, 2015, Ms. Snively, general education Kindergarten teacher, sent an email to Principal Pittman, Ms. Harris-Freeman, Ms. Derengowki, Mr. Franke, and Ms. Bland indicating that they were continuing to struggle with setting consequences for Student when he is aggressive and physical with the other students. She indicated that their first step was to use the sorry card and then they tried a time out. The problem was that Student refused and became noncompliant. She indicated that she was not trained in non-violent crisis intervention. She indicated that she was worried that without consequences they were glossing over the incidents. [Pet. Exhibit 14].

Ms. Lominac, OTRL, indicated that Student was making slow but steady progress with his goals and was able to don his coat with minimum/moderate assistance and three verbal prompts in three out of five trials and able to don coat with minimum assistance and three to four verbal prompts in two out of five trials. He is able to string eight blocks with two verbal prompts and six small beads on pipe cleaners with verbal prompting at each bead to keep working. He will work for short periods, but gets distracted by items in the room that he may want to play with. Concerns include being able to stay focused on an activity for longer than five minutes and refusal to work if the task is too hard. He has gone under the table to hide when refusing to work on two occasions. On the second occasion, Ms. Lominac was able to bring him back to his chair by offering therapy putty to play with on the table. General concerns include his fine motor coordination is well below that of his same age/grade level peers and he struggles with all aspects of curriculum due to his fine motor issues. [Pet. Exhibit 14].

Ms. Bland, Resource Room Teacher, provided pre-math special education instruction to Student. Ms. Bland reported that Student had been working on identifying shapes and colors. The last couple times that she had tested Student, he was able to correctly identify the colors from a set and name all ten colors. When working on identifying shapes she had been having Student point to or place an item (mini turtle) on a given

shape in a set of no more than six shapes. Student was pretty consistent with being able to identify triangle and star. She was focusing on circle and square at that point in time. She stated that in regards to naming shapes, it was much harder to determine if Student was saying the correct word to represent the shape. [Pet. Exhibit 14].

Mr. Franke, MA, CCC-SLP/L, reported that Student has a severe expressive and receptive language disorder. He also has apraxia of speech that severely limits his motor speech movements and verbal capabilities. Student has been using the PECS to communicate his wants and needs for the past several years. Mr. Franke reported that Student was not yet proficient with the system, which is designed for functional communication and to develop fundamental language skills for non-verbal children. He also indicated that the general education and adult staff are not trained in the system and it was not being used in an optimal way even after extensive explanations and modeling. Mr. Franke noted that Student had improved his verbal and gestural ability to obtain what he wanted or needed but remains extremely unintelligible. He reported that Student is not using language for social purposes or to gather or share information. Mr. Franke reported that since beginning at Keith Elementary, Student has been involved in trials to better understand if he would benefit from a higher tech device for communication, such as an iPad. Mr. Franke stated that it was decided that an augmentative/alternative communication device (GoTalk) would be used on a trial basis. Mr. Franke stated he made this determination with the assistance of Stacy Fox, Oakland Schools AAC Consultant. He reported that Ms. Fox had visited Keith Elementary four times and spent several hours with Student. Additionally, he stated that Student had made limited progress on his goals and objectives. Student had not mastered the basic concepts of "in" and "on". He did note that Student had increased his ability to attempt verbal communication by producing single CVC words and that Student tries very hard to reproduce the words with a model. [Pet. Exhibit 14].

Ms. Kiffner, Teacher Consultant, conducted a classroom observation of Student on October 19, 2015. Ms. Kiffner noted that during her observation, Student engaged in one physical incident with a peer that appeared unprovoked. She noted that teacher and adult support were required to keep Student and other students safe. Student demonstrated resistance toward taking a time-out and had observable difficulty keeping his body in control. In another observation conducted by Ms. Kiffner on October 7, 2015, she noted that Student required adult support a total of 14 times to remain on task and teacher support a total of five times. A third classroom observation was held on October 23, 2015. During this observation, Student engaged in two physical altercations where he struck or pushed a peer. It was noted that teacher support was frequently required to assist Student and to protect other students' safety. In a second classroom observation completed by School Psychologist, Mr. Routledge, it was noted that Student is well accepted by his peers but his interaction is encumbered by his pragmatic language limitations. Student demonstrates a less developed social repertoire than his peers. It was noted that additional concern to both academic and

social issues is the intermittent defiant behavior demonstrated by Student. Student's behavior can create a certain amount of classroom upheaval when he does not want to be engaged in a particular activity. [Pet. Exhibit 14].

Mr. Lanterman, PT, reported that gross motor skills did not appear to be a limiting factor in Student's participation in the general education classroom. He noted that behavior was initially a concern but over the last month Student was more receptive to direction and even displayed patience and turn taking. [Pet. Exhibit 14].

The School Social Worker reported that from September 28 through October 30, 2015, Student required more verbal/gestural prompting or partial physical prompting to participate in learning activities. Independent participation/engagement had been consistently low. Full physical prompting remained low. Student often refuses assistance from adult support (yelling / pushing away) however he requires the support to participate in classroom activities. [Pet. Exhibit 14].

As a result of the various staff reports, Dr. Brown, in her discretion on behalf of the District, according to the Trial Placement Agreement, determined that Student was not receiving a free appropriate public education in the general education classroom. Dr. Brown decided to place Student in the placement determined by the IEP Team on May 13, 2015. [Tr. Vol. I, pgs. 56-62].

Respondent was upset with this determination. However, Respondent did not file a request for either a due process hearing or a state complaint to formally resolve the dispute.

District Superintendent Mr. Gutman had legal consultation and phone and email communication from Respondents. Mr. Gutman was still interested in informally resolving the dispute. Mr. Gutman wanted to try a type of arbitration where a third party person would come in and observe and meet with staff; in effect make a decision on placement and that both the District and Respondents would agree to accept the placement. [Tr. Vol. I, pg. 65]. As a result, Student was not placed in the Cognitive Impaired classroom determined to be the appropriate placement by the IEP Team on May 13, 2015. [Tr. Vol. I, pg. 63].

It was difficult to arrange the meeting proposed by Mr. Gutman. It was hoped that the parties would be able to meet the week prior to Thanksgiving break. There was a number of correspondence between legal counsel during November and December 2015. A meeting was finally held on January 6, 2016. During this meeting, the Respondents indicated that they did not wish to proceed with this proposed arbitration. [Tr. Vol. I, pgs. 65-68].

On December 18, 2015, the District notified Respondents that as of January 8, 2016, Student would be placed in the CI classroom as determined by the IEP Team on May 13, 2015. [Pet. Exhibit. 16].

Student did not return to school on January 8, 2016. Student was hospitalized as the result of an illness for approximately three weeks. [Tr. Vol. I, pg. 130]. On January 25, 2016, Student's twin brother died. [Tr. Vol. I, pg. 129].

On January 6, 2016, Respondents requested an IEP team meeting. On February 2, 2016, the District sent an Invitation to Attend the Individualized Educational Planning Team Meeting to be held on February 12, 2016. [Pet. Exhibit 18]

On or about February 10, 2016, Respondents requested to cancel the IEP Team meeting scheduled for February 12, 2016. [Tr. Vol. I, pg. 70].

On February 11, 2016, Joanne Winkelman, Supervisor, Program Accountability, Office of Special Education, sent a letter to Marc Siegle, President of Walled Lake Consolidated Schools Board of Education and Mr. Gutman indicating that the Office of Special Education received a state complaint against the Walled Lake School District involving Student. The letter ordered the District to place Student in the program placement and services as they existed at Keith Elementary school during the trial placement upon Student's return to school on February 22, 2016. [Pet. Exhibit 19].

On February 15, 2016, legal counsel on behalf of District filed a Freedom of Information (FOIA) Request with the Michigan Department of Education. On March 14, 2016, MDE denied the FOIA request. On March 17, 2016, the District appealed the denial to State Superintendent Brian Whiston. On April 5, 2016, MDE granted the appeal in part and denied in part. [Pet. Exhibit 38]. After reviewing the documents provided to the District pursuant to the FOIA request, the District filed their request for Due Process Hearing. [Tr. Vol. I, pg. 77].

On February 25, 2016, Respondent requested that the IEP team meeting that was scheduled in response to their request be delayed until after the conclusion of the State Complaint process. [Pet. Exhibit 18].

In March 2016, Ms. Harris-Freeman, Resource Room Teacher, became concerned with the behaviors demonstrated by Student. She requested a meeting with Respondents to discuss a Functional Behavior Plan. A meeting was held. Alisha Lominac, OT; Amy Bland, resource room teacher, Mr. Lanterman, PT; Eileen Derengowski, School Social Worker; Laura Jones, Advocate; Respondents and Ms. Harris-Freeman attended. During the meeting, Ms. Jones requested a Functional Behavior Assessment. [Tr. Vol. VI, pgs. 670-672].

On March 29, 2016, A Review of Existing Evaluation Data (REED) and Evaluation Plan was completed for an additional assessment. It was noted that a Functional Behavior Assessment was needed. [Pet. Exhibit 25]

On April 25, 2016, a Request for Additional Special Education Assessment was prepared and submitted to Respondents for consent. Under the section "The additional assessment will be conducted by the following qualified personnel and will be provided in the student's native language as appropriate: other: Functional Behavior Assessment was checked. In addition, it was noted that Respondents were receiving the notice as the result of the REED dated March 29, 2016 and that no other options were considered and refused. [Pet. Exhibit 25].

On April 26, 2016, Respondent submitted an altered Request for Additional Special Education Assessment. Respondent had typed "xxxx" over the language Functional Behavior Assessment and added the language "Certified Behaviorist". In addition, Respondents had typed over standardized language on the form referring to FAPE and the language indicating there were no other actors that were relevant to the district's proposal or refusal. [Pet. Exhibit 25].

Dr. Brown was concerned that the amount of alterations of the documents were significant enough that she was unsure if the documents represented consent for the Functional Behavioral Assessment (FBA). Dr. Brown then prepared a new Request for Additional Special Education Assessment on May 5, 2016. This form clearly identified that the qualified personnel conducting the assessment would be a Psychologist and a Certified Behaviorist. In addition, it clearly stated that the purpose of the FBA was to result in a Positive Behavior Support Plan. Respondent consented to the FBA on May 13, 2016. [Pet. Exhibit 25].

Laurie Anne Lundblad, Psy.D., PPCNP-BC, LP, and Aubry Dodge, MS, BCBA, from Building Bridges Therapy Center, contracted by District completed the FBA.

Dr. Lundblad completed a Consultation Report. Dr. Lundblad had previously conducted a classroom observation of Student in November at the request of Dr. Brown. Dr. Lundblad completed a second classroom observation of Student on May 5, 2016 as part of the FBA. Dr. Lundblad noted that over the five months Student had made some progress in his ability to participate in instruction in the general education classroom. She stated that it was important to note that Student is most successful during times of passive instruction, such as listening to a story or watching a video or during self-selected nonacademic leisure tasks such as coloring or looking at books. Student disengages from instruction when demands to produce evidence of learning are placed to the group. She stated that he may look away, roll around on the floor, make a bid for attention from the para-pro or teacher, or point out something unrelated. This behavior results in an interruption of the flow of instruction within the classroom. Student is

primarily interactive with adults and at times took direction from peers or visually referenced them. Student expressed displeasure at the visual attention of a peer and he was unaware that his action of sitting in another student's seat caused that student distress. She noted that Student struggles with transitions that resulted in escape and attention maintained behaviors.

Dr. Lundblad stated that due to the significant and pervasive impact of Student's disabilities, it was her opinion that Student's educational needs could not be sufficiently addressed within the context of the general educational setting. She found that Student required intensive, structural instruction within the zone of his proximal development by a teacher with endorsement to educate children with cognitive impairment in order to maximize his language, communication, social, academic, behavioral and adaptive skill development. Student has significant delays in language, fine and gross motor skills, adaptive, cognitive and academic skills. She stated that research has shown that intensive early intervention is critical to improving long term outcomes in children with developmental delays. Educational programming with intensive small group instruction, frequent repetition, well integrated visual and language supports with access to general education peers through mainstreaming would be of most benefit to Student. He should have access to the use of augmentative communication to improve his ability to "speak" his thoughts and feelings, assistive technology to support academic skills such as reading, writing and math and intensive direct instruction by a certified teacher to remediate language, reading, math and written expression skill delays. He would be best supported through the use of a classroom-wide positive behavior support system that aligns with a classroom schedule with structure and a pace at his zone of proximal development with the goal of promoting independence. Student's unwanted behaviors that result in attention, escape, and offering of materials occur when the classroom of student is instructed and expected to produce novel response or academic tasks that exceed Student's ability. Similarly, he struggles when demands are placed directly on him. [Pet. Exhibit 28]

On May 12, 2016, Student's annual review of his IEP was due. On May 2, 2016, an Invitation to Attend the Individualized Educational Planning Team Meeting was sent to Respondents scheduling the IEP meeting for May 12, 2016 and May 13, 2016. [Pet. Exhibit 29].

The following individuals attended the IEP Team meeting: Dr. Sheryl Brown, District Representative; Respondents; Jennifer Shaw, first grade general education teacher; Molly Horal, CI special education teacher; Charlene Harris-Freeman, Resource Room special education teacher; Alisha Lominac, OTRL; Amy Bland, Resource Room special education teacher; Kyle Lanteman, PT; Ellen Stacy, Speech and Language Pathologist; Dr. Chris Peal, Principal; Sarah Kiffner, Teacher consultant; Nashella Zarek, first grade general education teacher; Juliann Snavey, Kindergarten general education teacher; Justine Evans, PTA; Nicole Cornichione, School Social Worker; Glenn Whitelaw, School

Social Worker; Phil Pittman, Principal; Laurie Lundbland, Psychologist; Laura Jones, advocate; Crystal Grant, attorney for Respondents; Daniel Routlege, school psychologist. Additional staff were present on when the IEP team reconvened on May 13, 2016. Again, the IEP Team determined that Student was eligible for special education under the Early Childhood Development Delay, MARSE R. 340.1711. [Pet. Exhibit 29]

The PLAAF again restates the findings from the February 2015 MET. The PLAAF also includes General Education Input. It was noted that as Student begins assignments and projects, he sits and looks like a kindergarten student. He uses crayons and other tools. However, Student has difficulty understanding oral directions and concepts presented and therefore the work is incorrectly completed. For quality of work, it was noted that Student has difficulty understanding kindergarten concepts and multiple verbal and picture directions. Therefore, his completed work is typically incorrect. Student usually begins his work by coloring all over his paper. As to response to instruction, it was noted that Student's response to instruction has improved. He still resists help, but the time to overcome that resistance has decreased. It was noted that Student's attitude toward criticism has improved. However, he can still display his unhappiness when he is corrected or his work is being interrupted by re-teaching. Student preferred to have the teacher instead of his para-pro help him with corrections and instruction. As to frustration tolerance, Student become easily frustrated when "his plan" for an activity is interrupted. He can be stubborn and resist attempts at corrections. As to perseverance, Student is interested in the challenge of learning a concept, his perseverance is good. However, if his interest and desire is low, then his perseverance decreases. As to attention span, Student has difficulty sustaining time on task. He often requires redirection or a new activity to engage him. It was noted that staff found that switching up his activities with manipulatives such as the iPad, playdough, and puzzles helped his attention. For verbal communication, it was noted that Student is creative in relaying his intended messages using gestures and pointing. However, when his needs or ideas are out of context, his ideas, thoughts, and questions cannot be understood. For participation in class, it was noted that Student often raises his hand to answer questions and tries to participate during classroom discussions. However, his verbal skills don't allow for him to be understood and therefore, he cannot fully engage. For ability to follow directions, Student has learned to follow classroom routines and procedures with minimal redirections. However, he struggles to follow academic directions to complete tasks and assignments. His completed work needed one on one assistance from his teacher or para-pro. For self-control, it was noted that Student's self-control has increased. However, Student can still have periods of time when he struggles to solve problems appropriately or remain on task for given periods of time. [Pet. Exhibit 29]

The following scores were reported for curriculum based assessments:

Reading:

DRA:A-is hard for Student – below grade level

Letter ID: 52/54 = below grade level

Concept of Print= 6/24

Word Test 0/20

Hearing recorded sounds =1/37

Rhyming – 0/16

Blending – 0/16

Segmenting – 0/16

Reading- Student worked one on one with his para-pro and teacher on letter recognition and one to one correspondence. Student required hand over hand assistance and shared reading is used to teach concepts. Student is beginning to learn high frequency words: my, to, a, I. In addition, he is being introduced to how pattern books work.

Writing

Developmental Writing Assessment = 9

Writing – Due to Student's verbal skills, he struggled with oral language and planning his story. The teacher had difficulty understanding his story ideas and thoughts. Student is beginning to understand that spoken words can be written and then read. At this time, Student is unable to hear and record beginning sounds to words. This is modeled for him during interactive writing in a small group or one on one setting.

Math:

One trial

Rote can clearly hear to 6 and afterwards becomes difficult to understand.

Written numbers 1, 3, 4, 6, 7

Identify numbers 1-10

Can identify: triangle, circle, square, and hexagon

Mathematics- Student worked one on one with his teacher and para on a daily basis to increase his ability to rote count and recognize numbers and count sets on numbers accurately. Manipulatives, puzzles, playdough, and iPad technology were all utilized to increase motivation and learning. Student is working on accurately counting sets of numbers.

Resource Room

Math 5/3/2016

Student is able to correctly identify and name the following colors: red, orange, yellow, blue, green, purple, pink, white, brown, and black. Student uses a combination of saying and signing to name the color orange.

Shape identification:

Progress monitoring 4/14/2016-5/3/2016 (6 total trials)

Student was able to identify (point to) the following shapes within a set of 6:

Circle 2/6 trials

Square 3/6 trials

Rectangle 0/6 trials.

Triangle 3/6 trials

Diamond 6/6 trials

Heart 6/6 trials

Star 6/6 trials

Oval 6/6 trials

Number identification

Progress Monitoring 4/14/2016 -5/3/2016 (#1-5 = 5 trials. 1-10=4 trials)

Student was able to identify (point to) the following numbers within a set of 6:

#1-3/5 trials

#2-4/5 trials

#3-4/5 trials

#4-5/5 trials

#5-5/5 trials

#6-4/4 trials

#7-4/4 trials

#8-3/4 trials

#9-1/4 trials

#10-1/4 trials

Observations:

Rote counting: Based on observations, Student is able to count to 10; numbers 1-5 are easily recognizable, numbers 6-10 are hard to understand.

One-to-one correspondence:

Based on observations, Student is typically able to use 1-1 correspondence to count a set consisting of 1-5 objects with few mistakes. When given a set of objects larger than 5, Student struggles with using 1-1 correspondent independently. He will often miss objects or count them more than once.

Understanding quantity:

Based on observations, Student is inconsistent with answering "how many?" questions. Student is able to count a set of objects (with/without support), but is inconsistent on identifying the number that represent the quantity (Exhibit: how many blocks? Counts 3 blocks, but point to the number 4).

Reading 4/1/2016

Results from 4/11/2016-5/11/2016 Letter recognition goal achieved

Letter Names Recognition (lower case)

Trial 1 = 19/26 = 73% accuracy

Trial 2 = 23/26 = 88% accuracy

Trial 3 = 20/26 = 77% accuracy

Trial 4 = 22/26 = 85% accuracy

Trial 1 = 24/26 = 92% (missed letters q and d)

Trial 2 = 24/26 = 92% (missed letters a and d)

Trial 3 = 24/26 = 92% (missed letters d and q)

Trial 4 = 23/26 = 88% (missed letters d, q and x)

Letter name recognition (upper case)

Trial 1 = 21/26 = 81% accuracy

Trial 2 = 23/26 = 88% accuracy

Trial 3 = 24/26 = 92% accuracy

Student's behavior continues to keep him from making adequate progress towards his letter sounds. He does not recognize any letter sounds in isolation. He isn't able to complete one set of 5-9 letters per sitting.

5/3/2016

Student can independently write the following lowercase letters in sand when given a verbal prompt: t, v, A, O, F, H, L m, p, Q, r, t u, x.

Student can independently trace the upper case letter A in his name. With hand over hand support, he can trace lower case letters d, a, and m. [Pet. Exhibit 29].

The May 2016 IEP included several goals and objectives for Student. The first goal is an Occupational Therapy goal focusing on self-care skills. As a baseline data, it was noted that per documented observation, Student is able to doff his coat independently with verbal cues, but requires minimal assistance to don his coat on most occasions in school. He has demonstrated this skill in the past but not consistently. He needs maximum assistance to engage the zipper. Student is able to pull up/down the zipper after an adult places hands correctly on the garment. Student is able to use the bathroom independently and wash his hands with verbal prompting. Student is unable

to open up most of his lunch/snack items. Student has a difficult time packing up his personal items at the end of the day. He needs adult assistance to unzip the backpack and place the papers, folder and lunch tote into the backpack. Student gets frustrated when adults attempt to help and will benefit from working on being independent with these skills. The annual goal is that by May 10, 2017, Student will improve self-care and fine motor skills, as evidenced by being able to engage and zip his jacket while donned with supervision, three out of four trials per documented observation. This goal is supported by two short term objectives. The first is that by February 10, 2017, Student will be able to engage zipper on jacket when placed on table surface, with one to two verbal prompts in three out of four trials as measured by documented observation on a monthly basis. The second short term objective is that by April 10, 2017, Student will be able to engage the zipper on his jacket while donned, with one to two verbal prompts in three out of four trials per documented observation on a monthly basis. The Occupational Therapist is responsible for implementing and reporting on this goal. [Pet. Exhibit 29].

The second goal is a speech and language goal in the instructional area of language. This particular goal is based on the Michigan Content Expectation ELE #3 and 4: Children develop abilities to express themselves clearly and communicate ideas to others. Children grow in their capacity to use effective listening skills and understand what is said to them DLM.EE.SL. K.1.a Communicate directly with supportive adults or peers. Baseline data was noted that based on documented observation, while using his home-provided iPad AAC program, Student is able to construct a two-part sentence using "I want___" and is beginning to independently use the action of an object or attributes with 71% accuracy. Currently he is not commenting independently or using his device to express himself in natural contexts. Student's annual goal is to improve language skills by May 2017, Student will formulate a three-part sentence while using high or low tech AAC system in the correct order (carrier phrase + attribute/action + object) using picture icons and/or verbal approximation with 70% accuracy for each skill in eight out of ten trials. This goal is supported by two short term objectives. The first is that by May 2017, Student will increase the number of communicative functions expressed in natural context to five expressions daily, by generating three to four word sentences while using his high or low tech AAC device, given a visual or verbal prompt in three out of five trials as measured by documented observation bi-weekly. The second short term objective is that by May 2017, Student will produce two to three words in natural contexts with the verbal cue "tell me more" about a topic, picture, or story, to comment five times in a school day while using high or low tech AAC device in three out of five trials as measured bi-weekly using documented observation. This goal will be implemented by the Special Education Teacher, Speech and Language Provider, and classroom staff. The goal will be monitored by the Speech Language Pathologist. [Pet. Exhibit 29].

The second speech language goal focuses on the articulation instructional area. This particular goal is based on the Michigan Content Expectation ELE #3: Children begin to develop their abilities to express thought and ideas. EE.SL.K.1a Communicate directly with supportive adults and peers. As baseline data, it was noted that Student is inconsistent with his verbalizations as of May 2016. He is able to imitate and produce CV1CV2 but struggles secondary to his verbal apraxia. He can imitate these words up to 83% accuracy but remains inconsistent and has not carried-over this skill to spontaneous word, phrase or sentence level. The annual goal is that by May 2017, Student will improve articulation skills by learning to produce CV1CV2 words with 80% accuracy given one visual and/or verbal prompt and use at the phrase level given a prompt and mode in eight out of ten trials. This goal is supported by two short term objectives. The first is that by May 2017, given visual and verbal prompting as well as the chance to repeat, Student will produce CV1CV2 words from the attached list, consistently with 80% accuracy in three out of five trials. This objective will be measured bi-weekly using documented observation. The second objective is that by May 2017, given visual and verbal prompting as well as the chance to repeat, Student will produce CV1CV2 words and use that word in a modeled phrase with 60% accuracy in three out of five trials. This objective will be measured bi-weekly using documented observation. This goal will be implemented and reported by the Speech Language Pathologist. [Pet. Exhibit 29].

The next goal is a goal in the instructional area of math. It is based on the Michigan Content Expectation EE.1. G.2. Sort shapes of same size and orientation (circle, square, rectangle, triangle). The annual goal is that by May 11, 2017, Student will be able to identify eight shapes by point to a requested shape (circle, square, rectangle, triangle, oval, star, heart, and diamond) when placed in a field of eight with 75% accuracy in three out of four trials. This goal is supported by two short term objectives. The first is that by December 1, 2016, Student will be able to identify eight shapes in a field of six with 75% accuracy in three out of four trials as measured bi-weekly using documented observations. The second short term objective is that by May 11, 2017, Student will be able to identify eight shapes by pointing to a requested shape (circle, square, rectangle, triangle, oval, star, heart, and diamond) when placed in a field of eight with 75% accuracy in three out of four trials measured bi-weekly using documented observation. This goal will be implemented by special education teacher and classroom staff. The special education teacher will report on the progress. [Pet. Exhibit 29].

The second Math goal address Michigan Content Expectations EE.1.NBT.1.b: Count as many as 10 objects and represent the quantity with corresponding numeral. The annual goal is that by May 11, 2017, Student will demonstrate 1:1 correspondence to ten as well as match the corresponding numeral to the quantity with 80% accuracy through documented observation. This goal is supported by two short term objectives. The first is that by December 1, 2016, Student will identify the numbers one thru ten by pointing

to a requested number in a field of ten with 80% accuracy through documented observation measured on a bi-weekly basis. The second objective is that by May 11, 2017, Student will demonstrate 1:1 correspondence to ten as well as match the corresponding numeral to the quantity by pointing to the numeral in a field of ten with 80% accuracy through documented observation measured bi-weekly. This goal will be implemented by the special education teacher and classroom staff. The special education teacher will report on the progress. [Pet. Exhibit 29].

The next goal is an occupation therapy goal for the instruction area of the fine motor /visual motor skills. As baseline data for this goal, it was noted that Student demonstrates fine motor, visual motor and functional hand skills below that of his same aged peers in the school environment. He struggles to use school tools independently and safely, especially scissors. Per documented observation Student has demonstrated stringing blocks in the past, consistently stringing four blocks out of six blocks presented in four out of five trials. Cooperation fluctuates from session to session and he will choose another activity rather than the ones presented as choices, and most importantly to work toward achieving his occupational therapy goals. Most recently, he was given six blocks to string and he did two and said he was done. Student has improved use of standard child scissors and is using them in the classroom, but having difficulty. He needs assistance to place standard scissors in his hand appropriately as he sometimes has the thumb and finger holes confused. Student also needs assistance to line up the scissors on a line when given a one quarter inch straight line to cut. Adaptive scissors are currently being encouraged, as he performs cutting tasks more accurately with them, but he chooses to use the standard scissors like the other children in class. Beyond two cuts, lines are jagged, not smooth, and he needs assistance to manage moving and turning paper to reposition the helper hand that is holding paper, in order to progress forward across the paper. He is snipping paper strips independently with occasional verbal prompts and with more confidence. We have been using colored paper, as it is easier to manage. In OT sessions, Student is using adaptive scissors to cut across the short side of an 8.5 x 11 inch sheet of construction paper with jagged cuts but good progression. We need to continue to work on bilateral hand coordination needed to move the helping hand across the paper as he progresses so that paper does not rip. Student is improving being able to form the letters in his name but the "A" often looks like an "H" and he is unable to put the letters in the spaces given or touching the line given. We will work on forming all letters appropriately with attention to size, use of space given and touching baseline so that he may put his name on his worksheets in the classroom without writing over the other areas. The annual goal is that by May 10, 2017, Student will demonstrate improved fine motor/visual motor and bilateral hand coordination skills, as evidenced by, cutting a piece of 8.5 x 11 inch paper in half (with standard child scissors, and by being able to write the letters of his name on a given line while maintain bilateral coordination and tripod grasp in three out of four trials. This goal is supported by two short term objectives The first is that by May 10, 2017, Student will be able to use standard child scissors to cut a 6x6 inch drawn square

with no more than three verbal and/or visual cues and after demonstration, while maintaining bilateral coordination skill of moving the helper hand along the edge of the paper in three out of four trials as measured monthly by documented observation. The second objective is that by May 10, 2017, Student will write the letters of his name on a given line, while maintaining bilateral coordination skill of holding his paper firmly with his helper hand and maintaining a tripod grasp on pencil in three out of four trials as measured monthly by documented observation. This goal will be implemented and reported by the Occupational therapist. [Pet. Exhibit 29].

The next goal is a physical therapy goal focused on the instructional area of gross motor skills. As baseline data, it was noted that Student has made significant progress with his jumping skills, especially jumping distances and being able to jump down from a height with two footed take-off and landing. Student is able to run, and climb stairs reciprocally, though still needs handrail or step to pattern to descend. Student shows interest in attempting novel gross motor activities. Student's ability to balance on one foot is improving but still frequently displays increase trunk sway when attempting. His skills at throwing, catching, bouncing and kicking balls are emerging, but continue to require more work. Student is beginning to attempt single leg hopping and can demonstrate a 1-2 cycles of skipping, though these skills continue to require further practice. The annual goal is that Student will demonstrate improved balance and coordination by accomplishing more than 80% of the following short term goals within the next year. The first short term objective is that Student will be able to hop on one foot eight consecutive times without stepping down with the other foot or losing balance by May 2017 as measured by documented observation on a monthly basis. The second objective is that Student will be able to demonstrate a skipping pattern for >20' by May 2017 as measured by documented observation on a monthly basis. This goal is to be implemented and measured by the physical therapist. [Pet. Exhibit 29].

The next two goals address the instructional area of reading. The first addresses Michigan Content Expectation EE.RF.1.2 Demonstrate understanding of spoken words, syllables, and sounds (phonemes). A. Recognize rhyming words. B. with guidance and support match orally presented segmented phoneme (e.g. C-A-T) to pictures or words illustrating the corresponding word. C. Identify a single syllable spoken word with the same onset (beginning sound) as a familiar word. D. With guidance and support, substitute individual sounds (phonemes) in simple, one syllable words to make new words. The annual goal is that by May 11, 2017, given a letter sound provided by the teacher, Student will point to the corresponding lowercase letters (b, o, s, t) in a field of eight lowercase letters with 80% accuracy in three out of four trials through documented observation. This goal is supported by two short term objectives. The first is that by March 24, 2017, given a letter sound by the teacher, Student will point to the corresponding lowercase letters (b, and o) in a field of eight lowercase letters with 80% accuracy in three out of four trials through documented observation measured bi-weekly. The second objective is that by May 11, 2017, given a letter sound by the

teacher, Student will point to the corresponding lowercase letters (b, o, s, t) in a field of eight lowercase letters with 80% accuracy in three out of four trials through documented observation measured bi-weekly. This goal will be implemented by the special education teacher and classroom staff. The special education teacher will report on the progress. [Pet. Exhibit 29].

The second reading goal addresses Michigan Content Expectation EE.RF.1.3 Demonstrate emerging letter and word identification skills. A. Identify uppercase letters of the alphabet. B. With guidance and support, recognize familiar words that are used in every day routines. The annual goal is that by May 11, 2017, Student will identify the following high frequency sight words when presented to him in isolation or when encountered in text (I, a, the, and, see, can, look, like, is, my) with 80% accuracy in three out of four trials through documented observation. This goal is supported by two short term objectives. The first is that by December 1, 2016, Student will identify the following, high frequency sight words when presented to him in isolation or when encountered in text (I, a, the, and see, can, look, like, is, my) with 50% accuracy in three out of four trials as measured bi-weekly through documented observation. The second objective is that by May 11, 2017, Student will identify the following high frequency sight words when presented to him in isolation or when encountered in text (I, a, the, and see, can, look, like, is, my) with 80% accuracy in three out of four trials as measured bi-weekly through documented observation. This goal will be implemented by the special education teacher and classroom staff. Progress will be reported by the special education teacher. [Pet. Exhibit 29].

The final goal in the May 2016 IEP is a social skills goal. The annual goal is that by May 2017, Student will increase his social interaction skills by being able to take turns with his peers and be able to initiate play with his peers. This goal is supported by two short term objectives. The first is that by May 2017, in the classroom and or in a social work group, Student will increase his social interaction skills by being able to take five to seven turns with two peers with an adult present to give verbal cues while playing the game. This goal is to be measured quarterly using documented observation. The second objective is that by May 2017, in the classroom and or in a social work group, Student will increase his social interaction skills with his peers by being able to initiate play with two to three different peers by using gestures, picture cards and/or verbal approximations. This goal will be measured quarterly using documented observations. [Pet. Exhibit 29].

The IEP Team determined that Student would take alternative assessments because the District wide assessments were above the Student's current ability level. The teacher would be responsible for creating assessments that measure progress on IEP goals. In addition, Student would be given the following accommodations: (1) Directions would be simplified (2) Visual supports- modeling of instructions with pictures/picture

cues, use of charts, boards, or posters to help with staying focused and on task (3) frequent breaks. [Pet. Exhibit 29].

The IEP Team determined that Student would receive occupational therapy services for 20-30 minute sessions four to six times per month. He would receive physical therapy services for 20-30 minute sessions two to four times per month. He would receive speech and language services for 20-30 minute sessions four to eight times per month and school social worker services 15-20 minute sessions for two to four times per month. [Pet. Exhibit 29].

The IEP Team determined that Student should be in the Elementary Cognitive Impairment program for 25-30 hours per week. Student would have one to six hours of general education per week. The IEP Team also determined that Student should have extended school year services for speech and language as well as academic support each for one hour sessions two times a week from July 5 through August 9. [Pet. Exhibit 29].

The Respondents do not disagree with any of the goals or objectives in the May 2015 or the May 2016 IEP. Respondents also do not appear to object to any of the support services identified in each IEP. Respondents' sole objection to each IEP is the determination that Student should be in the CI classroom rather than general education classroom.

On July 1, 2016, Carol Quirk, Ed.D., Executive Director of Maryland Coalition for Inclusive Education provided a report regarding Student. Dr. Quirk reviewed several documents and conducted a classroom observation of Student in the Keith Elementary Classroom and also observed the District's CI classroom. Dr. Quirk noted that Student needs a behavioral plan in which he can participate and learn self-regulation skills, be provided with choices, be given the opportunity to request and receive a timed break, use words to request (and be allowed to) stop a lesson etc. Dr. Quirk noted that an Augmentative and Alternative Communication (AAC) system using core vocabulary with the option for voice output needs to be utilized. She stated that a single system should be used consistently both in home and at school. She noted that in her classroom observations of Student no AAC was observed being utilized. Dr. Quirk stated that Student's disability means that he requires thoughtful and planned modifications to the general instructional activities so that his participation is meaningful. She indicated that those modifications could be delivered in any location if the general education teacher is supported through collaborative planning time and training. Dr. Quirk concluded that Student's IEP could be implemented in the general education classes. [Resp. Exhibit C].

Dr. Quirk noted that Student needs clear structured behavioral expectations related to participation in school activities. He needs a visual schedule for his day, daily, and visual routines for classroom activities that are less appealing to him. Teachers need to

rely less on verbal directions and more on teeing up the classroom interactions such that he receives prior notice, pre-correction, choices especially in difficult activities and social reinforcement for being engaged in instruction and kind touches. [Resp. Exhibit C].

The Functional Behavioral Assessment consented to by Respondent on May 13, 2016 was not completed prior to the IEP Team meeting held on May 13, 2016.

Dr. Lundblad and Ms. Dodge presented the completed the Functional Behavioral Assessment and Initial Treatment Plan on July 18, 2016. [Pet. Exhibit 36].

In her report, Ms. Dodge found that demands are the most frequent trigger for problem behavior and attention is most often provided contingent on problem behavior. She determined that the antecedent events and consequences continue to reinforce (increase over time) the problem behaviors observed. [Pet. Exhibit 36].

Ms. Dodge determined that Student would benefit from a function-based Behavior Intervention Plan based on the principles of Applied Behavior Analysis as well as education/academic remediation. She determined that Student will need to be taught to comply with demands of all kinds, to work independently and in a group on academic tasks, to wait for attention, to accept no, and to appropriately initiate with peers. She indicated that communication training should be implemented throughout the day on an ongoing basis. Staff will need to be able to add things to his device quickly and in the moment in order to teach him how to use the device to communicate. [Pet. Exhibit 36]

Ms. Dodge identified three Behavior Reduction goals and five Acquisition goals. Ms. Dodge recommended that this Plan be implemented in the CI classroom. She stated that a small group area with more experienced staff will provide the most likely success for Student. [Tr. Vol. VI, pgs. 985-986].

An Individualized Education Program Amendment meeting was held on July 21, 2016 to discuss the Functional Behavioral Assessment and Initial Treatment Plan prepared by Ms. Dodge and the Report prepared by Dr. Quirk. The following individuals attended: Respondents; Dr. Brown, District Representative; Charlene Harris-Freeman, Resource Room Special Education Teacher; Amy Bland, Speech and Language Pathologist; Chris Franke, Speech and Language Pathologist; Eileen Derengowski, School Social Worker; Alisha Lominac, Occupational Therapist; Robert Lusk, Attorney for District; Julianne Snavely, Kindergarten General Education Teacher; Nashella Zarek, First Grade General Education Teacher; Molly Horal, CI Special Education Teacher; Crystal Grant, attorney for Respondents; and Dr. Laurie Lundblad, Consulting Psychologist. [Pet. Exhibit 43].

During the meeting, the PLAAF was amended and the Supplementary Aids and services was amended. A communication action plan was included in the amended IEP and a Behavior Plan presented by Ms. Dodge was included in the amended IEP. [Pet. Exhibit 43].

DISCUSSION

In the instant matter, like in most due process hearings, a number of witnesses testified and there were numerous exhibits offered and admitted into evidence. Post-hearing briefs were permitted. The briefs filed in this matter were lengthy, detailed and thorough regarding the witnesses' testimony, documentation offered at hearing and the applicable law. I have reviewed and considered all that is contained in the post-hearing briefs, the exhibits and the transcripts of the hearing in making a determination in this matter.

Did the Student's May 2015 IEP Report provide the Student with a free appropriate public education during the 2015/2016 school year in the least restrictive environment?

The first step in determining whether the District met the FAPE standard is to determine whether the District complied with the procedures of IDEA, *supra*. In this instance, I do not find any evidence to indicate that the District did not comply with the procedural requirements of IDEA, *supra*. The IEP Team included the required participants from the various disciplines. Respondent received notice of the IEP meeting as well as information concerning the procedural safeguards. The IEP team reviewed all of the evaluations and assessments in their possession regarding Student. It is clear that the May 2015 IEP considered the Student's current levels of achievement. The IEP included clear and measurable goals. In fact, Respondents do not appear to have any disagreement with the goals and objectives included in the IEP.

Although Respondents contend that there were procedural errors, I do not find any procedural errors in the development of the May 2015 IEP. When asked specifically what procedural errors, Respondent cited the fact that Ms. Gartell started the discussion by stating that the team thought the CI program at Meadowbrook would be the most appropriate placement. [Tr. Vol. I, pg. 240]⁸ Respondent felt that the general education placement should have been discussed first. I do not find anything in IDEA that requires any particular order for placement discussion. The IEP team is required to consider all options. There has been no evidence presented that the IEP team did not consider the general education placement. It is clear that while the CI classroom teaching team attended the IEP meeting, the general education teaching team also were invited and attended the IEP team meeting. The record shows that the general education staff participated in the placement discussion during the development of the

⁸ Resp.Ex. L (pgs. 58/59) indicates that Ms. Travis is the individual that stated "team", she clarified that this was her personal opinion but that she and the teaching staff in the ECSE classroom speak weekly about the students.

May 2015 IEP. [Resp. Exhibit L]. There has been no evidence presented that the District representatives at the IEP team entered the IEP meeting with a pre-determined placement. While it does appear that several members may have entered the room with a preference based on their particular knowledge and experience, there is no evidence that any decision had been made. In fact, based on the evidence, the only team members that arrived at the meeting with a pre-determined placement were the Respondents. Respondents clearly testified that their philosophy was that Student attend school with his non-disabled peers. This was the only placement acceptable to Respondents. It does not appear from the evidence that Respondents were willing to consider the appropriateness of the CI classroom.

The second step in determining whether or not a District has complied with FAPE requires a determination as to whether the IEP is reasonably calculated to enable the child to receive a meaningful educational benefit. The question is does the IEP confer a meaningful educational benefit gauged in relation to Student's potential. In this case at the time that the May 2015 IEP was developed, Student was transitioning from the ECSE preschool classroom. This is a special education classroom in which Student attended a portion of his day in the general education preschool classroom. The IEP Team consisted of a number of individuals who were familiar with Student's actual performance. This included his teacher, parents as well as a number of service providers. In developing the IEP, the Team had data from very current assessments and evaluations.

The IEP Team developed very clear and measurable goals and objectives. From the evidence, it does not appear that the Respondents have any dispute with the goals and objectives that were developed. Also, it does not appear that the Respondents had any objection to the supports and services of the physical therapist or the occupational therapist nor any dispute with the amount of services provided under the May 2015 IEP. Therefore, I find that the goals and objectives as well as the services were developed to confer a meaningful benefit to Student.

The issue in this case is limited to the appropriate educational placement for Student for the implementation of the May 2015 IEP. Based on all of the testimony provided, it appears that each member of the May 2015 IEP Team, with the exception of Respondents and their advocate, believed that based on the Student's disability and the level of services needed that the CI program at Meadowbrook would be the most appropriate educational placement for Student to obtain the most educational benefit. Respondents do not appear to dispute the claim that Student would likely have a more beneficial academic experience in the CI program. Rather, it appears that Respondents primary concern is that Student be located in the neighborhood school where Respondent M.A. teaches. [Resp. Exhibit L, pgs. 74 and 75]. Respondents want Student in the neighborhood school and all services be brought to them. [Resp. Exhibit L, pg. 63]. Respondents appear to clearly understand that placement in the general

education classroom might not be academically where Student should be located. [Resp. Exhibit L, pg. 76].

The IEP Team through consensus determined that based on Student's needs, the most appropriate placement would be the CI classroom located at Meadowbrook. The program was selected based on: 1.) the small ratio of students to staff, and 2.) the specialized knowledge and training of the instructor and support staff, and 3.) the built in supports in the classroom for the various services to push-in. The classroom instructor was familiar with both Applied Behavioral Analysis (ABA) and the use of AAC devices. The IEP developed provided that Student would be in the ECSE special education program for four two to three hour sessions per week plus one two to three hour session per month and he would spend two hours per week in general education until June 9, 2015. Beginning in September 2015, Student would spend 21-26 hours per week in the Program for Students with a moderate cognitive impairment and ten hours per week in general education programs.

This IEP was implemented beginning on May 14, 2015. Student attended the ECSE special education program for four two to three hour sessions per week plus one two to three hour session per month and spent two hours per week in general education through June 9, 2015. I find that this placement was developed to give Student a meaningful educational benefit. However, the implementation of the May 2015 IEP did not continue when school resumed in September 2015.

The Respondents disagreed with the placement selection for the fall of 2015. During the summer, the District and Respondents had discussions concerning this matter. At one point, Respondents even suggested revoking consent for special education rather than have their child attend school at Meadowbrook. As a result of the parties' discussions, the parties negotiated and agreed to a trial placement agreement rather than have a Due Process Complaint filed or services removed. In agreeing to the Trial Placement Agreement, the District agreed not to place Student in the educational placement selected by the IEP Team. Student was permitted to attend the general education program at Keith Elementary, his neighborhood school with support and services. The Trial Placement Agreement was limited to the first marking period, essentially September through the first of November. The Trial Placement Agreement specifically stated that if District in its discretion concluded that Student was not receiving FAPE, Student would be moved to the placement determined by the May 2015 IEP Team in the CI classroom. If the District in its discretion concluded that Student was receiving FAPE, an IEP Team meeting would be called to develop a successor IEP and change Student's placement.

Although Respondents' contend that the Trial Placement Agreement required them to give up their rights, there is nothing in the Trial Placement Agreement to support this claim. Respondents were free to file a Due Process Complaint, a State Complaint, or

even to request a new IEP meeting. In fact, Respondents requested an IEP meeting in January 2016. Respondents filed a State Complaint in February. It is clear from the record that Respondents chose to sign the Trial Placement Agreement because it gave them exactly what they were asking for: Student's placement in the general education classroom in the school in which Respondent taught. Respondents became dissatisfied when the District staff decided that Student was not receiving FAPE and that Student should be educated in the placement determined by the IEP Team, the CI program at Meadowbrook.

There is no doubt that the May 2015 IEP was written to enable Student to receive a meaningful educational benefit. However, because the May 2015 was not implemented during the 2015/2016 school year, the question becomes did Student receive FAPE during the 2015/2016 school year?

Based on the evidence submitted, it appears that the two most significant areas of concern for Student are his communication and behavior. It is clear from the record that Student's need for the occupational and physical therapy services can be met while Student is in the general education classroom or the CI classroom. In addition, Student has made progress on both his occupational therapy goals and his physical therapy goals while he was in the general education classroom.

The question is whether his communication and behavior needs can be met in the general education classroom. Student is largely non-verbal. Because of the speech apraxia, his speech is inarticulate. He had been using the PECS system while attending the ESCE program. In addition, he uses gestures to express his wants and needs. However, his language needs are quite severe. Student definitely needs an Augmentative Alternative Communication System as called for in the IEP. It was the recommendation of the speech and language pathologists working with Student that Student continue to use the low tech PECS system to foster Student's growth in communication fundamentals such as give and take. [Tr. Vol. III, pg. 538]. Based on Student's inability to identify letters it is clear that he is not able to type words at this time. Respondents have pushed for the use of higher tech devices. To accommodate Respondents' requests, the Core-32 system was selected. The system was selected in conjunction with the advice of the Oakland School Consultant. This system utilizes a basic set of vocabulary words that Student needs to master to express his wants and needs. [Tr. Vol. III, pgs. 539/540]. Mr. Franke provided instruction and modeling of the use of both the PECS system and the Core-32 system to the general education teacher assigned to Student. The Core-32 was sent home with Student over holiday break, however, the family did not utilize it much. [Tr. Vol. III, pgs. 547]. Respondents purchased an iPad which utilized the Proloquo2go system. The device selected by Respondents was not appropriate and was too complex to be utilized by both Student and the staff working with him. The next system selected was the iPad with the program Touch Chat. This system was available to be utilized by Student during the

Extended School Year. [Tr. Vol. III, pg. 548]

The evidence established that the family failed to use the AAC at home, the staff in the general education classroom failed to use the AAC and Student prefers to be verbal rather than use an AAC. However, Student's inability to communicate is detrimental to his ability to meaningfully participate in the classroom. His inability to communicate has led to the behavioral difficulties. Based on the evidence presented by Ms. Landria Seals-Green, as well as Mr. Franke, it is essential that Student have one AAC system to be used with identical programming in both the school and home. The family, Student and all staff members need to be trained on the use of the iPad touch chat as the current selected method. It is the system that must be used in all locations in order for Student's needs to be met.

Based on the evidence submitted, I do not find that Student's language needs were properly met during the 2015/2016 school year. The AAC device was not utilized by anyone in the general education classroom as observed by the many classroom observations. Ms. Snavely testified that she did not understand how to use the device and Student preferred not to use it. Although Ms. Snavely testified that she had never been trained on the use of the various AAC devices utilized with Student, she subsequently acknowledged that Mr. Franke had indeed given her instruction. She then contended that this was not sufficient training but admitted that she never requested any additional training. It was clear from the testimony that Ms. Snavely did not utilize any AAC device with Student. This was noted in the classroom observation conducted by various staff members as well as Dr. Quirk. It is clear that Ms. Snavely did not feel comfortable or competent in the use of the devices and therefore, chose not to use them. However, this failure directly impacted Student's abilities. When asked specifically why she did not request any additional assistance, Ms. Snavely never provided an adequate answer. It appears that she was either concerned that it would reflect poorly on her teaching ability or reflect poorly on Student's ability to succeed in her classroom. In light of her friendship with Respondents, she may have felt that such a negative view would not support her friend's position that Student's needs could be met in the general education program. However, Student's language needs were not properly addressed when both staff, family and Student refused to use the appropriate systems. Based on Student's disability it is imperative that he have early and intensive interventions for his long term success. The need for early interventions was discussed by both Dr. Roberson and Dr. Lundblad.

Dr. Lundblad testified clearly and credibly that the opportunities to learn in the general education classroom are beyond Student's language abilities, his cognitive and intellectual abilities, his processing speed and his working memory. [Tr. Vol. VIII, pg. 1155]. Dr. Lundblad testified that literature across all disability areas, including Down Syndrome, says that early intervention is critical for the long-term outcomes for children. Development is like a progressive staircase that you go from one step to the next and it

builds on each other. You can't skip steps, because then you don't have those foundational skills to turn back to in order to build educationally and to build developmentally. [Tr. Vol. VIII, pgs. 1158/1159]. While Respondents' concern that Student attend the neighborhood school to be happy is laudable, such a placement requires the skipping of several foundational skills that could be developed in the smaller classroom setting and design of the CI classroom particularly as the CI classroom allows for regular participation with a general education classroom as appropriate for Student's needs. Based on all of the evidence submitted, at this particular point in time, Student's needs require the smaller classroom with the specialized expertise of the staff in the CI classroom for FAPE. Student did not receive this during the 2015/2016 school year in the general education classroom.

The second critical area for Student is his behavioral needs. It is clear from the evidence, particularly Pet. Exhibit 13, that Student had significant behavioral concerns during the 2015/2016 school year. As Respondent correctly points out, the District made no effort to request a FBA during the first semester. To be fair, Student's teacher, Mrs. Snavely testified that she did not believe his behavior was a significant issue requiring an FBA. [Tr. Vol. VIII, pg. 1324]. Additionally, Respondents never requested an FBA until Ms. Harris-Freeman requested a meeting. Mrs. Harris-Freeman thought that Student's behavior was significant enough that she requested a meeting in March 2016. A meeting was held and an FBA was discussed. However, between March and May the parties, clearly in response to the various complaints to MDE, were not trusting of each other and neither party fairly reviewed nor consented to the FBA until June. Ms. Aubry Dodge, a BCBA, finally completed an FBA in July.

Ms. Dodge's report and testimony are given great weight. Ms. Dodge is an expert in her field. She is an independent consultant. The testimony she provided was clear and detailed. Ms. Dodge developed a clear and coherent unbiased FBA report concerning Student's behavior and the unintended consequences of the general education staff regarding the behavior. Ms. Dodge developed a critical Behavioral Intervention Plan. This BIP is well crafted and appears to properly address Student's needs. The drafting of a BIP is only the first step. The next critical step is the implementation of the BIP. Ms. Dodge testified that in order to be successful the BIP must be implemented with integrity and fidelity. Ms. Dodge testified that in her opinion the BIP needs to be implemented with integrity in a sort of controlled setting. "Student's learning needs to be in an errorless manner that's using Applied Behavioral Analysis principles to make it systematic and successful." [Tr. Vol. VI, pgs. 978-980]. Based on the testimony of both the kindergarten and first grade general education teachers, neither had any training or exposure to ABA principles. In contrast, the special education staff have been previously trained on ABA principles. In addition, the special education staff have experience working with ABA principles. Ms. Dodge testified to the difference between training and experience. [Tr. Vol. VI, pg. 967]. While general education teachers may be trained, their inexperience in the implementation directly affects the integrity of the

services. This is clearly demonstrated by the fact that the general education staff, despite training, did not properly utilize the AAC devices with Student directly negatively impacting his language development. Furthermore, based on the inability of the general education staff to utilize the AAC device despite training, there is a significant concern that the staff would be able to develop the skills necessary to address Student's behavioral needs and the appropriate implementation of the BIP. As testified to by Ms. Dodge, because of the actions of the general education staff to minimize Student's disruptions, the staff inadvertently reinforced Student's negative behaviors.

Ms. Dodge testified that she developed the BIP based on Student's needs. After the BIP was developed, she then determined the most appropriate placement for implementation. In her opinion, Student would be most successful with the BIP if it is implemented in a controlled setting using ABA principles. This would be the CI classroom. Ms. Horal testified that she had both training and experience with ABA principles. She has had experience implementing BIPs. The general education teachers all testified that they were not familiar with either the term ABA or the principles for ABA therapy. Based on Ms. Dodge's testimony regarding the appropriate placement to implement Student's BIP, it is clear that the CI classroom is the appropriate placement.

Based on Student's significant behavioral and language needs, which clearly were not met during the 2015/2016 school year, I find that Student did not receive FAPE in the general education classroom. Student's placement should have been the CI classroom as determined by the IEP Team in May 2015. The District was not permitted to place Student in the CI classroom upon his return to school in February because of an order by the MDE. Therefore, although Student was not given FAPE, the District is not liable for this error.

Although I find that Student did not receive a free appropriate public education during the 2015/2016 school year, I do not find that Student is entitled to any compensatory education. District and parents agreed to a temporary placement on a trial basis for the first marking period. Student was absent from school beginning in December for the school break through January as a result of illness, and did not return to school until February at which time, MDE ordered that the Student remain in the trial placement. Therefore, the District was prohibited from implementing the educational placement called for in the May 2015 IEP. Additionally, Dr. Lundblad testified that Student would not benefit from any educational time beyond the regular school day. [Tr. Vol. VIII, pgs. 1179-1180].

Although Respondents contend that all of the services from the CI classroom can be brought into the general education classroom, they have not produced any evidence to support this claim. In fact, the evidence established that the general education staff are not familiar with ABA principles and despite numerous attempts by the speech language

pathologists, the general education staff did not utilize Student's AAC device despite his significant needs. Whereas, the CI classroom staff have this specialized training and expertise. I do not find that these services can be feasibly provided in the general education classroom. Based on the evidence submitted in this matter, I find that Student will lose more in the general education setting as to his speech and behavioral needs than he would gain in the CI classroom with the specialized staff. The evidence established, despite Ms. Snaveley's claims, that Student's behavior was disruptive in the general education classroom. Based on the credible evidence submitted by Ms. Dodge, Student's behavior is a significant concern that will require a small classroom setting to be appropriately addressed. In addition, the general education classroom staff's actions inadvertently increased the disruptive behaviors rather than addressed them. In this case, I find that the IEP Team properly considered the continuum of placements required by IDEA when determining that Student's appropriate educational placement to meet his specific needs is the CI classroom.

The evidence established that the CI classroom provides multiple discrete and individualized opportunities for Student to work on his academic, language and behavioral skills. This classroom allows for the various ancillary services to be brought into the classroom in a less disruptive manner. The classroom is designed with the visual schedules and supports recommended by Dr. Quirk. The CI classroom teacher and paraprofessionals have expertise and training with AAC devices and ABA principles. This classroom provides the best opportunity for Student to obtain the academic, language and behavioral fundamentals that Student needs to have to develop to his potential.

All of the evidence has established that in order for Student to meet his potential, he must have early interventions that allow him to obtain the basic educational fundamentals to meet his potential. Student does not have the basic fundamentals necessary to access the general education curriculum; therefore, Student is not getting a meaningful educational benefit in the general education classroom. Student does not have the fundamental building blocks to progress in his education in a general education classroom. If Student cannot access the general education curriculum, Student cannot receive a meaningful educational benefit and therefore is not receiving FAPE.

Did Student's May 2016 IEP Report provide the student with a free appropriate public education for the 2016/2017 school year in the least restrictive environment?

Again, I do not find any evidence to indicate that the District did not comply with the procedural requirements of IDEA, *supra*. The May 2016 IEP Team included the required participants from the various disciplines. Respondents received notice of the IEP meeting as well as information concerning the procedural safeguards. The IEP team reviewed all of the evaluations and assessments in their possession regarding

Student. It is clear that the IEP developed considered the Student's current levels of achievement. The IEP included clear and measurable goals. In fact, Respondents do not appear to have any disagreement with the goal and objectives included in the IEP or the services called for in the IEP. This particular IEP did not include a BIP because the consent for the FBA was not received until the date of the IEP meeting. The District called for an IEP Team meeting in July to consider the FBA and BIP completed by Ms. Dodge as well as the report from the Respondents' expert, Dr. Quirk.

Based on the evidence submitted, I find that the BIP is clear and detailed and appropriate to meet Student's needs. The BIP was included in the proposed IEP amendment, Pet. Exhibit 43.

Again, the issue is can Student receive a meaningful educational benefit in the general education classroom as his least restrictive environment or does Student's needs require the more restrictive placement in the CI classroom. For all of the reasons discussed above, Student's needs require the more restrictive placement of the CI classroom. It is essential that Student receive the appropriate early interventions in order to permit Student to reach his potential as well as the legal standard of a meaningful educational benefit. This more restrictive placement is not for the entire school day. Student will have daily contact and interaction with his non-disabled peers. The IEP, the BIP as well as the various service providers including the special education teacher, all testified that Student would spend time in the general education classroom as appropriate. The smaller classroom with the specialized training and expertise of the CI classroom staff would allow Student to obtain the language and behavioral assistance he needs to meaningfully participate in the curriculum. Because of Student's cognitive, speech and behavioral needs, the first grade general education classroom would not allow Student to access the curriculum in a meaningful manner. Student needs more than just differentiated teaching. Student requires an entirely different curriculum, a specialized curriculum. This supports the more restrictive placement. Respondents correctly point out that Student made progress on his IEP goals including his academic goals while in the general education classroom. While it is true that Student made progress on his particular goals, the goals in the IEP are significantly below the first grade curriculum. Therefore, it is unlikely that Student would have any meaningful participation in the first grade curriculum in the general education classroom.

Respondents have made a large portion of their argument that Student needs to be part of the school community. There is nothing that would prevent Student from being a part of his school community at Meadowbrook. It is not required that his mother be a teacher or his sibling attend the same building for him to be a part of the community. It only requires the support of the family to attend the Meadowbrook school / community functions.

Respondents have also raised the concern that placement in the CI classroom at this time will mean that Student will always be segregated. This contention is merely speculative at this point in time. IDEA requires each IEP Team to look at a student's current educational needs and current level of achievement and develop an IEP on an annual basis. Furthermore, Dr. Lundblad testified that it was her expectation that if Student's challenges were addressed immediately and intensively he could be placed in general education in the future.

Based on the evidence submitted, I find that the May 2016 IEP and the July 2016 amendment provide FAPE to Student in the least restrictive environment.

If the Parents appeal the ALJ's decision and order, should the May 13, 2016 IEP Report be the Student's Stay-Put placement during any such appeal?

Under IDEA, an educational placement for each student is determined by an IEP team and included in the IEP. In this case, the current IEP which determined Student's educational placement was the IEP developed on May 13, 2015. In this IEP, the IEP Team determined that Student's educational placement would be in the Early Childhood Special Education Program until June 9, 2015 and then beginning in September 2015 placement would be 21-26 hours per week in the Program for Students with Moderate Cognitive Impairments (Mod. CI). Typically, the currently implemented IEP would identify the "current educational placement". In these circumstances, Student's Stay-Put placement would be the Mod. CI classroom.

However, in this case, the parties entered into a Trial Placement Agreement on August 4, 2015. This Agreement recognized that Respondents alleged that the May 13, 2015 IEP does not provide Student with FAPE. The Agreement provides that Student will be placed in the kindergarten general education classroom with paraprofessional support. The Agreement specifically states that the Trial Placement is temporary only lasting for the first marking period. Additionally, the Agreement states that Student's "stay-put" placement would be the educational placement identified by the IEP Team in the May 13, 2015 IEP. The Agreement states that the Respondents were provided with several copies of their special education due process rights and knowingly and voluntarily entered into the Agreement because they believed it was in Student's best interests. The Agreement stated that at the end of the first marking period, the District would determine if the placement was successful and would convene the IEP Team to develop a new IEP or whether the current IEP would be implemented as written. [Pet. Ex. B].

It is clear that the Trial Placement Agreement was intended to be a temporary placement lasting only for the first marking period of the 2015-2016 school year. Moreover, the Trial Placement Agreement specifically stated that Student's "stay-put" placement would be the educational placement identified in Student's current IEP - the

May 13, 2015 IEP. As a result of the Order by MDE, the District was required to leave Student in the Trial Placement implemented by the Trial Placement Agreement.

One Circuit Court has held that the stay-put provision does not apply to temporary placements. The policy behind the stay-put provision of preserving the status quo supports an interpretation of "current educational placement" that excludes temporary placements. See *Verhoeven v. Brunswick Sch. Comm.*, 207 F.3d 1 (1st Cir. 1999) (because a FAPE settlement stated that a student would attend a private facility through the end of the 1997-98 school year, at which point the IEP team would determine an appropriate placement, the placement should not be extended into the following school year). If an IEP indicates that a student's placement is merely temporary, that placement is not the student's current educational placement for purposes of the stay-put provision. *G.M. v. Drycreek Joint Elem. Sch. Dist.*, 55 IDELR 249 (E.D. Cal. 2010). Because the general education placement was a temporary placement, it would not appear that the stay-put provision would apply.

Again, the Trial Placement Agreement was entered into by the parties in an effort to resolve a dispute concerning the provision of FAPE to Student. The Trial Placement Agreement specifically provided for the temporary placement of Student in the general education classroom despite the educational placement determined by the IEP team. Also, the Trial Placement Agreement specifically determined Student's stay-put placement should the Agreement not resolve the dispute. When a student attends a particular school pursuant to a settlement agreement between the parents and the school district, that placement is not necessarily the student's current placement for purposes of the stay-put provision. Unless the agreement is explicitly an agreement about the child's placement, the settlement agreement will not dictate the child's stay-put placement. *K.D. v. Department of Educ., State of Hawaii*, 665 F.3d 1110. (9th Cir. 2011).

As discussed above, IDEA, the federal regulations, and the case law would indicate that Student's stay put placement is the Mod. CI classroom because that was the last implemented IEP and the placement identified as the stay-put placement. However, because of the MDE Order, this tribunal ordered that Student remain in the general education classroom for the remaining 23 days of the 2015/2016 school year.

However, I have found that that placement failed to provide FAPE to Student. In addition, for the reasons stated above, Student's stay-put placement under IDEA is the placement called for in the May 2015 IEP as that IEP had been agreed to and implemented in May 2015. This is the same placement called for in the May 2016 IEP as amended in July 2016.

Therefore, I find that Student's stay-put placement during any further proceedings in this matter is the CI classroom as called for in the May 2016 IEP as amended in July 2016.

CONCLUSIONS OF LAW


1. Respondents did not establish, by a preponderance of the evidence, that the May 2015 IEP denied Student a free and appropriate public education in the least restrictive environment.
2. Respondents did not establish, by a preponderance of the evidence, that the May 2016 IEP as amended in July 2016 denied Student a free and appropriate public education in the least restrictive environment.
3. I find by a preponderance of the evidence that Student did not receive a free appropriate public education during the 2015/2016 school year.
4. Student's stay-put placement is the placement in the May 2016 IEP as amended in July 2016.

ORDER

NOW, THEREFORE, IT IS ORDERED Petitioners' complaint is granted.

IT IS FURTHER ORDERED that any claims or defenses not specifically addressed herein are dismissed with prejudice.

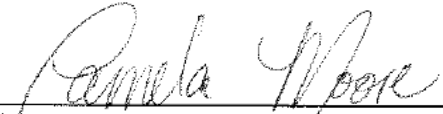
A party aggrieved by this decision may seek judicial review by filing an action in a court of competent jurisdiction within 90 days of the date of this order.



Kandra Robbins
Administrative Law Judge

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed below this 2nd day of September, 2016.



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