

STATE OF OKLAHOMA
STATE DEPARTMENT OF EDUCATION

DUE PROCESS HEARING DECISION

CASE NO. 2093

PETITIONER: [Parents Names]
ATTORNEY: [Parent Attorney name]
RESPONDENT: [School District Name]
ATTORNEY: [School District Attorney Name]
HEARING DATE: September 6, 2016 to December 9, 2016
HEARING DECISION: February 20, 2017
HEARING OFFICER: Lucy S. Kroblin

I. Background.

Student's date of birth is[date]. He is currently [number] years old. Student has been identified as a student with a disability, and his diagnosis is Autism and Severe

Receptive/Expressive Language Disorder. Two paraprofessionals are assigned to Student at all times while he attends school.

Petitioners filed Due Process Hearing Complaint against the District on December 1, 2015.

The operable time period for the Complaint is December 1, 2013 to December 1, 2015.

II. Procedural Safeguards.

The School District has complied with all aspects of the required procedural safeguards set forth in 20 U.S.C. § 1415. Further, the parties met the full disclosure requirement by exchanging witnesses and documentary evidence at least five (5) days prior to the hearing.

III. Issues Pending for Decision.

1. Whether the district provided FAPE to Student during the 2014-2015 school year and the Fall 2015 semester.
2. Whether the district abided by Student's IEPs in place during the 2014-2015 school year and the Fall 2015 semester.
3. Whether student's placement was Least Restrictive Environment during the 2014-2015 school year and the Fall 2015 semester.
4. Whether residential placement is appropriate.
5. Whether the district retaliated against student and parents.
6. Whether the hearing officer can award monetary damages.
7. Whether District personnel mocked Student.
8. Whether seclusion of student can be considered since it occurred outside the operable time period.

IV. Findings of Fact.

1. Petitioners are married, and they are the parents of Student.
2. Student's date of birth is [date]. He is currently [number] years old. As of September 2016, Student was 6'1" tall and weighed 260 pounds. [Tr. p. 65 lines 3-7]. Student attends [name] Elementary.

3. On October 19, 2007, at the age of two (2), Student was diagnosed with Autism and Severe Receptive/Expressive Language Disorder by the University of Oklahoma Pediatric Jumpstart Clinic. [PE 1; Tr. P. 48 line 1 through 49 line 13].
4. On July 12, 2012, [name], Ph.D., a licensed psychologist, conducted an Intelligence/Adaptive Function Assessment on Student. [Parent Exhibit "4"]. Dr. [name] concluded Student had an estimated IQ of 40 and warranted a classification of moderate mental retardation under the DSM-IV. [SE 38; PE 4; Tr. p. 65 line 8 through p. 68 line 11].
5. Student is eligible for special education and related services under the Individuals with Disabilities Act (IDEA).

IEP March 11, 2011 Modified December 19, 2012 and March 15, 2013

(H.O. Ex. "A" attached)

6. Beginning April 1, 2013, Student was attending school three hours a day from 8:00 a.m. to 11:00 a.m. Student's school day had been shortened to reduce aggression and overstimulation.
7. Student was to receive direct instruction in the Special Education classroom for three periods per day. The person responsible was the Special Education teacher.
8. Speech Language Therapy was to be provided for 20 minutes two times per week. The person responsible was the Speech Therapist.
9. The Dynavox was to be used to assist with Student's communication needs.
10. The assessment data on Student's IEPs goes back to 2011. In December 2014, the school psychometrist completed a re-evaluation assessment on Student. [PE 7]. It is unclear if the assessment included any recommendations and, if so, if they were ever implemented.

IEP December 13, 2013

(H.O. Ex. "B" attached)

11. The 12-13-13 IEP noted Student had made "huge improvements with communication, academics and behavior in the last three (3) months." Student's school day was lengthened 30 minutes based on his improvement in behavior.
12. Student was to receive direct instruction in the Special Education classroom. The Special Education teacher was the person responsible for the instruction.
13. Student was to attend Regular Education class thirty minutes a day for social interaction.

14. Student was to receive speech-language therapy for 20 minutes, twice a week. The person responsible was a Speech Therapist.
15. The IEP further indicates Student required assistive technology devices and services. A Dynavox would be utilized to assist with communication needs.
16. The IEP states Parents would be informed of progress in academics and speech annual goals in quarterly progress reports.
17. In the concerns section of the 12-13-13 IEP Parent, Mother noted a desire for student to gain more time during the day both at school and in the regular education classroom.
18. On May 13, 2014, Petitioner Mother again requested an increase in student's time in school to all day services at a meeting with the Special Education Director once Student's 2013-2014 school year teacher. [PE 39at Dist. Resp. L-3 p. 0654].
19. The assessment data on Student's IEPs goes back to 2011. In December 2014, the school psychometrist completed a re-evaluation assessment on Student. [PE 7]. It is unclear if the assessment included any recommendations and, if so, if they were ever implemented.

August 20, 2014 Amended December 13, 2013 IEP

(H.O. Ex. "B" attached)

20. On August 20, 2014, Student's IEP team met and amended the 12-13-13 IEP.
21. The August 20, 2014 amendments to the IEP were hand written on the 12-13-13 IEP.
22. The Amended IEP stated Student was to spend 240 minutes per day at school. However, it also stated Student will be in school for three and a half hours a day from 9:30 a.m. to 1:00 p.m. which equals 210 minutes, the same amount of school time as the spring 2014 semester. Student actually attended school for 210 minutes per day.
23. The Amended IEP provided for 180 minutes (3 hours) spent on all academics in direct instruction. The person responsible was the Special Education teacher.
24. Student was to spend 30 minutes in the regular education classroom for social interaction with both Regular Education and Special Education teacher responsible.
25. In the Amended IEP Student's speech therapy remained at 20 minutes twice a week.
26. The Dynavox continued to be used as a method to assist with communication needs.
27. The assessment data on Student's IEPs goes back to 2011. In December 2014, the school psychometrist completed a re-evaluation assessment on Student. [PE 7]. It

is unclear if the assessment included any recommendations and, if so, if they were ever implemented.

IEP December 11, 2014

(H.O. Ex. "C" attached)

28. The IEP noted Student was on a shortened school day. Student was to continue to receive direct instruction in the Special Education classroom for 180 minutes (3 hours). The Special Education teacher was responsible for the instruction.
29. The Regular Education classroom was to be attended 30 minutes a day for social interaction.
30. Student was to continue to receive Speech Therapy for 20 minutes twice a week. The 12-11-14 IEP notes "[student] is mostly nonverbal and is currently learning to use his talker to express his wants and needs."
31. Short terms benchmarks/objectives 2-4 of his speech goal reference use of the Dynavox/Talker.
32. The IEP goal pages reflect Parents would be informed of progress in annual goals for academic and speech in 9 weeks report card.
33. A new annual IEP was not drafted for Student on or before December 11, 2015, because due process had been filed and Parents did not agree to meet for an IEP team meeting. [Tr. p. 858 line 14 through p. 859 line 1].
34. In February 2016, Student had oral surgery. Following the surgery Parents did not return Student to the District.

Recordings

35. Beginning the first day of classes on August 19, 2015, and continuing until November 5, 2015, the Parents made audio and visual recordings of Student's school day. The recordings were made through a program installed on student [name] talker. The recordings were made without the knowledge of the District. [Tr. p. 191 line 12 through p. 195 line 19; p. 196 lines 1-5; p. 196 line 10 through p. 197 line 7; p. 199 line 22 through p. 200 line 12; p. 365 line 16 through p. 366 line 2; p. 698 lines 13 through 20; p. 698 line 23 through p. 699 line 10; p. 700 lines 5 through 8].

Sensory Room

36. Along with regular education classrooms, [name] Elementary contains Special Education classrooms and a sensory room. [Tr. p. 154 line 19 through p. 156 line

- 22]. The special education room to which Student was assigned is also referred to as the multi-handicapped room. The sensory room is not connected to the special education classroom requiring one to exit the multi-handicapped room and go around the corner to enter the sensory room. [Tr. p. 157 line 23 through p. 158 line 9]. According to the Principal, the “general approach was to use that [the sensory room] as a resource until a child calmed or wanted to” return to the classroom. [Tr. p. 2352 lines 3-12].
37. During the operable time period, December 1, 2013 to December 1, 2015, Student was assigned to the Special Education classroom, along with his disabled peers. Two paraprofessionals were assigned to work with Student. [Tr. p. 2612 line 1 through p. 2613 line 22].
38. During the spring semester of the 2013-2014 school year, Student began his day in the special education classroom with his Special Education teacher, peers and aides. [Tr. p. 705 lines 4-9]. Student also spent time in the sensory room. There is no testimony as to the amount of time Student was in the sensory room each day.
39. On or about August 21, 2014, Student was removed from the Special Education classroom to the sensory room for the majority of his school day. [Tr. p. 2630 lines 9-25; and p. 2636 line 1-14]. The amount of time Student spent in the special education classroom was not recorded.
40. On August 21, 2014, the school principal sent an email to the Director of Special Education stating “[Special Education teacher] is concerned about isolating [Student] in the sensory room when he is in an overly agitated state, which is frequent. She wants to know “How long is too [long] in the sensory room?” Ultimately, her question is what’s legal.” [PE 92]. Neither the Principal nor the Special Education Director remember ever receiving or sending a reply or discussing the matter. [Tr. p. 2351 line 9 through p. 2352 line 5].
41. The 2014-2015 Special Education Teacher testified Student received some of his instruction in the special education classroom but she cannot remember how long but thought the maximum time was maybe between 15 to 20 minutes. [Tr. p. 2636 line 1 through 25]. Student’s female paraprofessional testified Student spent the entire day (other than lunch or P.E.) in the sensory room.
42. During the fall semester of 2015 school year, Student continued to spend the majority of his day in the sensory room, rarely going into the Special Education room.
43. The IEP was not amended to reflect the Special Education classroom was not Student’s Least Restrictive Environment.

Academic Progress

44. During the 2014-2015 school year, Student primarily received his academic instruction in the sensory room. [Tr. p. 2635 line 7 through p. 2636 line 9].

45. The female paraprofessional testified she was hired by District on October 13, 2014. [Tr. p. 1111 line 18 through p. 1112 line 2]. She testified when she first began her employment as Student's paraprofessional, Student would watch Sponge Bob all day. Every once and a while Student's other paraprofessional would change the movie to something different. [PE 121, p. 6, lines 9-14].
46. The female paraprofessional testified the teacher just popped into the sensory room sometimes, but not for any length of time. [Tr. p. 1126 line 25 through p. 1127 line 4].
47. The 2014-2015 Special Education Teacher testified she took Student to the library while the paraprofessionals were at lunch. [Tr. p. 2654 line 6 through 17].
48. The 2014-2015 Special Education teacher and female paraprofessional testified Student has dictated his school day for the past two (2) years. It has been whatever Student wants to do, is what he does. [Tr. p. 1182 lines 6-23; Tr. p. 2765 line 24 through p. 2766 line 4].
49. Student's fourth grade 2015-2016 Special Education Teacher from the beginning of the school year until October was asked by the female paraprofessional how she should work with Student. The teacher laid down worksheets on the table and told her to pick out the ones she thought the Student could complete. [Tr. p. 927 line 19-25]. Any academic instruction Student received from his Special Education Teacher between August and October, 2015, was in the sensory room. [Tr. p. 324 lines 6-11, p. 929 line 23 through p. 930 line 10, p. 940 line 24 through p. 941 line 1].
50. When Petitioner Mother met with the fourth grade Special Education Teacher at the September 24, 2015 Parent-Teacher Conference, Mother asked what Student did every day and was told, "When he gets here, I guess – I haven't gone through it with [Paraprofessionals]. From what they tell me, he comes, he goes to the sensory room, they give him a break first thing." [PE 123 p. 6 line 22 through p. 22 line 1]. "After that break, he does some work with [Paraprofessional].
51. The teacher stated "I don't have much to go on of what everybody else has taught him, I don't have a lot to draw on." [PE 123 p. 8 lines 21-23].
52. The teacher stated she did not work with Student for a full half-hour a day. [PE 123 p. 16 lines 3-7].
53. When a new Special Education Teacher began teaching Student in late October through December 1, 2015, the teacher testified she attempted to provide Student's academic instruction in the special education classroom. However, due to overstimulation, instruction in the special education classroom was done incrementally. [Tr. p. 1005 line 10 through p. 1009 line 3].

54. Student's parents received progress reports and semester reports for Student.
55. The grading rubric used by District for children in the self-contained classroom at [name] Elementary describes the use of an A, B, C, or D grade to denote a child's academic standing. [Tr. p. 1924 line 22 through p. 1925 line 15]. The grading rubric was in use between December 2013 and December 2015.
56. According to the Grading Rubric, a "B" may be given when a student completes work with some assistance. [SE 141]. A "C" may be given when a student completes work with total assistance. [Id.] A "D" may be given when a student refuses to complete work at all. [Id.].
57. The 2013-2014 Special Education teacher testified she allowed her paraprofessionals to perform hand-over-hand instruction. [Tr. p. 1511 line 20 through p. 1512 line 11]. This is a technique used in errorless teaching whereby the instructor may move the child's hand to the correct response. The 2013-2014 Special Education teacher testified a hand-over-hand full physical prompt counted as a correct answer. [Tr. p. 1515 lines 11-19]. Dr. [name] testified the goal of the hand-over-hand technique is to gradually have the Student point to the correct answer on his own and to reduce the prompting as much as possible. [Tr. p. 2007 line 10 through p. 2009 line 8].
58. The testimony of the special education teachers was that when Student allowed hand-over-hand response the response would be counted as correct. It is difficult to know how many correct responses were elicited by the hand-over-hand technique since there was no documentation as to Student's baseline at the beginning of the 2014-2015 school year or 2015 Fall semester and no data was collected on how Student performed on specific tasks.
59. The 12-13-13 IEP noted Student had made "huge improvements with communication, academics and behavior in the last three (3) months." Student's school day was lengthened 30 minutes based on his improvement in behavior. [SE 56].
60. Student's 2013-2014 academic year report card reflected Student earned an average grade of "B" for Math and Science, and an average grade of "C" for Language Arts. [PE 38]. In the third quarter a "B" grade was reported for Student in Language Arts.
61. As of May 2014 Student could perform certain activities with "some assistance," and other activities with "total assistance". [SE 142].
62. At the conclusion of the spring 2015 semester, Student's grades, based on the grading rubric, reflect that he had regressed from the prior year. [Tr. p. 1975 line 14 through p. 1978 line 13].
63. Student's portfolio test (OAAP) dated April of 2015 indicated Student was in the emerging level, the lowest possible level in every section. [Tr. p. 1981 line 4

through p. 1984 line 3]. The Special Education Director testified she did not know if Student completed the portfolio test with full hand-over-hand assistance.

64. The Special Education Director testified she believed Student had plateaued and will only remain the same. [Tr. p. 1909 line 16 through p. 1912 line 19].

Speech Therapy

65. On April 26, 2011, the University of Oklahoma Health Sciences Center Department of Rehabilitation Sciences conducted an Assistive Technology Consultation Summary for Student at [name] City Schools. [Parent Exhibit “3”]. The Consultation Summary noted Student’s behavior decreased as Student learned to use his Assistive Technology Device. [PE 3].
66. On August 12, 2012, Parents obtained a private speech language evaluation from Speech Language Pathologist [name]. The evaluation was specifically for a Speech Generating Device “SGD”). [name] recommended a Dyna Vox Maestro. [name] further recommended upon receipt of a SGD, speech therapy occur four times per week. [PE 6].
67. Throughout the operable time period (December 1, 2013 to December 1, 2015) Student’s IEPs note Student would use a Dynavox to assist communication needs.
68. The Dynovox was replaced with an alternate assistive communication device (the “Talker”) provided by Parents in the Spring of 2014.
69. No formal training on the speech generating device was provided to the District personnel. [Tr. 1756 lines 14- p. 1758 line 14].
70. Students IEPs during the operable time period noted Student was to receive Speech-Language Therapy for 20 minutes, 2 times a week with a Speech Therapist as the Person Responsible.
71. Student received his Speech Therapy from a Speech Language Pathology Assistant (SLPA). The SLPA testified she is required to be supervised by a Speech Language Pathologist for a certain amount of time. [Tr. p. 1299 line 20]. No evidence was presented as to whether the Speech Language Pathologist ever supervised the SLPA’s work with Student.
72. During the 2014-2015 school year and fall 2015 semester the same SLPA provided Student’s speech therapy.
73. During the 2013-2014 school year, the SLPA referenced in her session notes she used the Dynavox with Student four (4) times. Two (2) times during the spring semester. [SE 118].

74. During the 2014-2015 school year, the SLPA referenced in her session notes she used the “Talker” with Student four (4) times. [SE 119, Tr. p. 1434 line 4 through p. 1444 line 17].
75. During the 2015-2016 school year, the SLPA referenced in her session notes she used the “Talker” with Student three (3) times in the fall semester. [SE 120].
76. During the 2014-2015 school year, the SLPA’s written log referenced she missed 34 speech-therapy sessions with Student. On 17 of these days school was either not in session, activities or state testing or specific work with Student was occurring or Student was absent. On the remaining 15 days, the SLPA was absent or in meetings on six (6) days. The remaining 10 days missed were noted as due to Student being asleep or upset. [PE 189].
77. In the fall 2015 semester, the SPLA began speech language therapy sessions with Student on September 8, 2015. School started on August 19, 2015 causing three (3) therapy sessions with Student to be missed. [PE 189].
78. The SLPA’s written log for the fall 2015 semester referenced she missed nine (9) additional sessions with Student for a total of twelve (12) sessions missed in the fall 2015 semester. Five of the nine (9) missed sessions recorded, school was either not in session, activities with Student were occurring, or Student was absent. On three (3) of the nine (9) missed sessions recorded Speech Language Pathology Assistant was absent or in training. Student’s behavior was the recorded cause for not completing one (1) session.
79. None of the missed therapy sessions during the 2014-2015 school year or 2015 fall semester were made up. [Tr. p. 1339 line 17 through 20].
80. Over the course of December 2013 through December 2014, Student did not make any progress on his speech therapy goals. [PE 28] and [Tr. p. 1327 line 10 through p. 1330 line 5].
81. The SLPA’s notes did not reflect the actual time the SLPA working with Student during a session or performed a specific activity. [Tr. p. 1339 line 24 through p. 1342 line 25].
82. Student also received speech therapy once a week from a private therapist employed by parents.

Student’s Behavior

83. On March 13, 2013, Project PEAK of the University of Oklahoma Health Science Center, Child Student Center, observed Student. A Consultation Summary based

on their observations was prepared by Project PEAK. [SE 50]. In the Project PEAK Consultation Summary, it was reported “the primary reason for the referral is to get assistance in addressing [Student’s] challenging behavior.” [Id.] As of that time, his challenging behaviors included “roaming around the room, being physically aggressive to others (pulling hair and pulling adults to the ground) and hitting objects with his hands.” [Id.]

84. On December 11, 2014, the student’s IEP team completed a functional behavior assessment (“FBA”) and adopted a behavior intervention and support plan (“BISP”) for Student. The FBA and BIP addressed the following behavior exhibited by Student at school: “When directed to sit at his desk and work on an assignment, [Student] screams, hits himself in the head and runs out of the room.” [SE 77, 78; Tr. p. 2689 line 14 through p. 2691 line 23; p. 2703 line 4 through p. 2704 line 16].
85. On January 5, 2015, Student’s IEP team completed a second FBA and adopted a second BISP for the Student. The FBA and BIP targeted the following behavior being exhibited by Student at school: “Prior to [student] hitting [Para professional] in the back with his fist, [student] would hit, pinch, push and squeeze other students or staff in order to get something he wanted”.
86. Also on January 5, 2015, Student’s IEP team completed a third FBA and adopted a third BISP for Student. The FBA and BIP targeted the following behavior being exhibited by Student at school: “[Student] puts his hands in his pants almost constantly. Twice he has exposed himself to school staff”. [SE 84, 85; Tr. p. 2702 lines 15-20, p. 2704 line 17 though p. 2706 line 11].
87. On December 20, 2014, Project PEAK completed a second consultation with the District regarding Student’s behavior. [PE 62].
88. Female paraprofessional testified Project PEAK’s recommendations were helpful. However, she also testified the paraprofessionals method of dealing with Student’s challenging behavior was to attribute it to over stimulation or anxiety and remove Student from the situation. If Student did not want to continue with academic work, an effort would be made to redirect him to the assignment and then to discontinue with the work if Student refused to be redirected. This approach was also used by Student’s Special Education teacher as well as the SLPA.
89. There is no evidence the BIPs developed were consistently used to modify Students behavior except the January 5, 2015 BIP, “hands in pants”.
90. The paraprofessionals tried to take Student to the regular education third grade class at a consistent time every day. However, if on the way to the class, the paraprofessionals saw the markers or cues that Student was over stimulated or was having a meltdown, they would not force him to go into the class because they did not want him to hurt himself or anyone else on the way there or in the classroom. Sometimes Student was able to stay in the regular education classroom for a short period of time and sometimes he could stay the entire time. When Student was

ready to leave the classroom, he would get up and go to the door. The paraprofessionals would not force him to stay. [Tr. p. 904 lines 2-11; p. 1152 line 24 through p. 1155 line 6].

91. During the 2014-2015 school year, Student's Special Education Teacher would, at times, accompany Student to the regular education classroom. Teacher testified Student could not remain in the regular education classroom for 30 minutes because Student could not tolerate the classroom and Student would throw down his activity and walk or run out of the room. [Tr. p. 1167 line 19 through p. 1168 line 2; p. 2652 line 21 through p. 2653 line 12; p. 2677 line 1 through p. 2678 line 9; p. 2678 line 19 through p. 2679 line 15; p. 904 line 17 through p. 906 line 2].
92. In the Fall of 2015 the Regular Education teacher told Parent, Mother, Student only came by once every week or week-and-a-half. [Tr. p. 324 line 23 through p. 325 line 5].
93. During the fall of the 2015-2016 school year, the longest time Student was able to stay in the regular education classroom was between 10-15 minutes. [Tr. p. 906 lines 3-12].
94. During the 2014-2015 school year, Student began the school year in the special education classroom. Soon after the beginning of the school year, Student's third grade special education teacher, determined the special education classroom was stressful to Student causing him to cover his ears, scream, rock and run out of the room and into the sensory room. [Tr. p. 2630 line 9 through p. 2634 line 14].
95. During the 2014-2015 school year, Student's paraprofessionals believed he preferred to be in the sensory room.

Residential Placement

96. Petitioners' requested residential placement for Student at [name], a residential school that specializes in serving children with special needs. [name] is located in Kansas and is accredited by Kansas State. [Tr. p. 2206 line 4 through p. 2207 line 16].
97. At [name], Student would be educated with his peers. [Tr. p. 2217 lines 7-19].
98. Petitioner, Mother, requested residential placement for Student during the 2015 Spring semester. [PE 83]. Mother discussed with the Special Education Director the district applying for a High Needs Application from the Oklahoma State Department of Education to offset the district's costs. [PE 83; Tr. p. 1786 line 24 through p. 1787 line 13].
99. The Special Education Director made the recommendation to the District that Student be placed at [name]. The Superintendent told the Director to wait. [PE 96;

Tr. p. 1791 line 1 through p. 1798 line 3]. The High Needs Application was never requested.

100. The Special Education Director testified she could not recall if an IEP meeting was held to discuss the placement at [name] that Mother requested. She also testified the request was denied. [Tr. p. 1821 line 23 through p. 1822 line 17].

Seclusion Room

101. On January 23, 2013, outside the operable time period December 1, 2013, to December 1, 2015, Student was walked to the “cool off” room by his first grade special education teacher, after Student began acting out by hitting the wall and door, screaming, throwing things, hitting, punching, kicking and biting. [Tr. p. 1459 line 8 through p. 1464 line 5]. The “cool off” room is a padded room attached to the special education classroom and is roughly 4 x 10 feet or 5 by 10 feet. [Tr. p. 1460 line 1-10].
102. Special Education teacher kept Student in the cool off room for 15 to 20 minutes. [PE 7]. The door was then closed by the teacher to calm Student. [Id.]. Student continued with his rage for approximately 15 more minutes, with the door closed. [Id.].
103. Petitioner Mother testified no person at [name] Elementary told her about the incident and she was unaware of it until she received Student’s school file in the summer of 2015. [Tr. p. 96:16-25].
104. Petitioners allege the District’s seclusion of Student caused Student to be afraid to attend school in the Special Education Classroom, where he was locked up in a closet. As a result, Petitioners allege Student has been placed in the Sensory Room for the majority of his time at school, resulting in a complete deprivation of FAPE in the least restrictive environment because he does not receive special education instruction from a highly qualified and certified teacher alongside his disabled peers in accordance with his IEP. [Petitioner Second Amended Complaint Allegation (H)].
105. Special Education teacher testified she discussed the seclusion incident and that Student had been in the padded room the same day of the occurrence when Petitioner, Mother picked up Student. According to teacher, Mother did not express any displeasure regarding the incident. [Tr. p. 1467 lines 5-12; p. 1470 line 12-25].

[Name]
Respondent’s Expert Witness

[Name] is a licensed clinical psychologist who specializes in applied behavioral analysis, autism spectrum disorders, child adolescent therapy, and psychological evaluations. [SE 174, Tr. P. 2833 line 14 through p. 2838 line 19].

[Name] reviewed the records of Student (on behalf of the District) and rendered an opinion based on those records on whether the District provided Student with a FAPE. Dr. Howard never observed or evaluated the Student. [Tr. p. 2838 line 4-7; p. 2839 line 15 line 15-17].

[Name] testified Student's least restrictive environment would be the self-contained special education classroom. [SE 114, Tr. p. 2891 line 1-5]. Dr. Howard further testified Student's educational needs can be met in the public school district. [SE 114, Tr. p. 2891 line 20 through p. 2892 line 11].

[Name] testified Student's IEPs as written would provide Student some educational benefit in the least restrictive environment. [SE 114, Tr. p. 2890 line 13-19 through p. 2988 line 25].

[Name] testified she assumed the Student's records she reviewed were accurate. "I take any records I review and people sign them and date them, I assume that these are accurate reflections". [Tr. p. 2975 lines 14-22].

[Name]
Petitioner's Expert Witness

[Name] is a board certified behavior analyst (BCBA), with a background in psychology, early childhood education, and autism spectrum disorders. [Tr. p. 1995 line 17 though p. 1997 line 15].

[Name] evaluated Student [Tr. P. 2100 line 12 through p. 2101 line 12].

[Name] testified that, based upon her knowledge of Student and her review of his school materials, Student has not been provided any educational benefit. She saw a lack of progress from the first time she met Student several years ago, and the time of her formal evaluation in July 2016. [Tr. P. 2091 line 25 through p. 2092 line 9; Tr. p. 20911 through p. 2092 line 17].

[Name] testified that Student can be educated in the Ardmore School District as long as something is significantly different in either party in order to have a different outcome. [Tr. p. 2083 line 2-21].

[Name] testified Student needs to receive more intensive services which includes more time working on tasks. This includes going to a full school day. [Tr. p. 2175 line 14 through p. 2176l 2].

[Name] testified the District requires training on designing environments, curriculum, responding to behavior, addressing a crisis situation. How to create a positive education setting. [Tr. p. 2176 line 22 through p. 2177 line 10].

[Name] made specific recommendations to address Students educational needs. (PE 184).

V. The Law

1. The District's obligation under the IDEA is to provide the Student a "free appropriate public education." The IDEA defines a "free appropriate public education" as follows:

The term "free appropriate public education" means special education and related services that - -

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program ("IEP") required under section 1414(d).

20 U.S.C. §1401(8) (2003)

2. The IDEA defines the term "special education" as

specifically designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including-

- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (B) instruction in physical education.

20 U.S.C. § 1401(25) (2003)

3. The IDEA defines "related services" as

transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and included the early identification and assessment of disabling conditions in children.

20 U.S.C. § 1401(22) (2003)

4. The IDEA requires that a State ensure the "least restrictive environment" to provide FAPE for a child with disabilities.

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A) (2003)

5. The requirements of the least Restrictive Environment are as follows:

(a) General.

(1) Except as provided in 300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and 300.115 through 300.120.

(2) each public agency must ensure that – (i) To the maximum extent appropriate, children with disabilities, including children in public or private institutes or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. 1412 (a)(5); 34 C.F.R. § 300.114(a)(2)

6. (a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must –

(1) Include the alternative placements listed in the definition of special education under §300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

20 U.S.C. 1412 (a)(5)

7. If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

8. The regulations to the IDEA define an individualized education program as follows:
 - a. General. As used in this part, the term individualized education program or IEP means a written statement for each child with a disability that is developed, reviewed, and revised in a meeting in accordance with [34 C.F.R.] §§300.320 through 300.324, and that must include –
 - (1) A statement of the child’s present levels of academic performance, including –
 - (i) How the child’s disability affects the child’s involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or
 - (ii) For preschool children, as appropriate, how the disability affects the child’s participation in appropriate activities;
 - (2) (i) A statement of measurable annual goals, including academic and functional goals designed to –
 - (A) Meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum; and
 - (B) Meet each of the child’s other educational needs that result from the child’s disability;
 - (ii) For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
 - (3) A description of –
 - (i) How the child’s progress toward meeting the annual goals described in paragraph (2) of this section will be measured; and
 - (ii) When periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
 - (4) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports of school personnel that will be provided to enable the child –
 - (i) To advance appropriately toward attaining the annual goals;
 - (ii) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
 - (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;

- (5) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section;
- (6)
 - (i) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district wide assessments consistent with section 612 (a)(16) of the Act; and
 - (ii) If the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or district wide assessment of student achievement, a statement of why –
 - (A) The child cannot participate in the regular assessment; and
 - (B) The particular alternate assessment selected is appropriate for the child; and
- (7) The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those.

34 C.F.R. § 300.320; 20 U.S.C. § 1414(d)(1)(A) and (d)(6).

In Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176 (1982), the United States Supreme Court discussed the meaning of a “free appropriate public education”. Therefore, a courts inquiry is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Acts’ procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by congress and the courts can require no more.

Further, the Court noted;

Implicit in the congressional purpose of providing access to a “free appropriate public education” is the requirement that the education to which access is provided be sufficient to confer some education benefit upon the handicapped child.

In Endrew J. v. Douglas City School District Re-1, 798 F. 3d 1329 (10th Cir. 2015) “some educational benefit” mandated by IDEA is interpreted to mean it must merely be “more than de minimus”.

In the Daniel RR v. State Board of Education 874 F. 2d 1036 (5th Cir. 1989) the Court devised a two part test in determining if the least restrictive environment mandate in the IDEA has been violated by a school district.

First, we ask whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child. See § 1412 (5)(B). If it cannot and the school intends to provide special education or

to remove the child from regular education, we ask, second, whether the school has mainstreamed the child to the maximum extent appropriate. A variety of factors will inform each stage of our inquiry.

In Couture v. Bd. Of Educ. Of Albuquerque Pub. Schs. 535 F. 3d 1243, 1252 (10th Cir. 2008) citing ex rel. Van Duym v. Baker School District 5J, 502 F. 3d 811, 819 (9th Cir. 2007; Neosho R-V Sch. Dist. V. Clark, 315 F. 3d 341, 349 (5th Cir. 2000) held material failure to implement an IEP are violations of the IDEA and IDEA is violated when a school fails to implement an “essential” element of an IEP. Couture v. Bd. Of Educ. Of Albuquerque Pub. Schs.

Yates v. Washoe County School District, 51 IDELR 7, U.S. District Court Nev., 2008. The Court held that there is no provision in the IDEA requiring a behavioral intervention plan to be included in the IEP, however, the IEP must include the various intervention supports and strategies deemed necessary to address the Student’s behavior that impede his or her learning or that of other children.

VI. Discussion and Rationale

Petitioners contend the District failed to provide Student a Free Appropriate Education (FAPE) during the 2014-2015 school year and the fall of 2015 semester because the District failed to educate the Student in the Least Restrictive Environment and in conformity with the Student’s IEPs thereby resulting in Student failing to achieve academically.

Petitioners further contend the District failed to provide Student a Free Appropriate Education during the 2014-2015 school year and the fall of 2015 semester because the District failed to provide related services (speech therapy) in conformity with the Student’s IEPs.

Petitioners further contend Student is entitled to out-of-state placement at [Name], a residential placement facility, due to Districts failure to provide FAPE.

Petitioners further contend they are entitled to an award of monetary damages based on retaliation by the District against Student and Parents.

District contends Student received a FAPE. Student was educated in the Least Restrictive Environment and received a meaningful benefit from the special education and related services provided to Student at the District.

District further contends Student can be educated in the public school district and therefore out-of-state placement is inappropriate.

1. The Student is not receiving an education because his challenging behavior interferes with his ability to attend to academic work or remain in any environment which is “overstimulating”.
2. The Student controls what academic work he will do and where he will spend his school day.
3. Pursuant to the IEPs in place during the operable time period (12-1-13 to 12-1-15) Student was to receive direct instruction in the Special Education classroom with the Special Education Teacher as the responsible person.
4. The 12-13-13 IEP, amended on 8-20-14, provided for 3 hours daily of direct instruction in the Special Education classroom with the Special Education Teacher the responsible person and 30 minutes daily for social interaction in the Regular Education classroom with both the Regular Education and Special Education teacher responsible.
5. The 12-11-14 IEP continued direct instruction in the Special Education classroom for 3 hours a day and social interaction in the Regular Education classroom for 30 minutes a day.
6. During the 2014-2015 school year and Fall 2015 semester Student never received 30 minutes a day in the Regular Education classroom.
7. The female paraprofessional testified if she saw markers or cues Student was overstimulated or having a melt down, she would not force him to go into the Regular Education classroom. Nor would she force him to stay in the classroom if Student showed he was ready to leave by going towards the door or acting out.
8. Students third grade 2014-2015 Special Education teacher testified Student could not remain in the regular education classroom for 30 minutes because he could not tolerate the classroom.
9. During the Fall of the 2015-2016. The longest time Student was able to stay in the Regular Education classroom was between 10-15- minutes.
10. Likewise, Student did not receive the majority of his academic instruction in the Special Education classroom.
12. During the 2014-2015 school year Student spent the majority of the school day in the sensory room with his two paraprofessionals. The amount of time was not recorded. This continued through the 2015 Fall semester.
13. The IEPs in place during the operable time period (12-1-13 to 12-1-15) provided speech therapy two times per week for twenty minutes each.
14. During the 2014-2015 school year and Fall 2015 semester the Student did not receive speech therapy in conformity with the IEPs.
15. The SLPA’s written log referenced she missed 17 sessions with Student and an additional 7 sessions in the 2015 Fall semester due to the SLPA’s absence, training

schedule or behavior of Student; i.e. asleep or upset. These 24 Speech Therapy sessions were never made up.

16. Student's communication skills are a major road block in Student's learning to control his behavior by communicating his wants and needs.
17. An Assistive Technology Communication device has been recommended since 2011. Student's IEPs state Student will use a Dynavox. District never provided any training to the special education or regular education teacher or Student's two paraprofessionals. The SLPA testified she had previously received training on the Dynavox yet she referenced in her session notes she used the talker with Student four times during the 2014-2015 school year and three times during the 2015 Fall semester.
18. Student's inability to communicate results in a great deal of frustration and acting out. The reason for Student's shortened school days was his behavior.
19. Several behavior plans were initiated by the IEP team to address Student's aggressive, acting out behavior. Project PEAK consulted with District on two occasions in March, 2013 and December, 2014. The District adopted some of Project PEAK's recommendations but Student's negative behavior continued.
20. Other than Project PEAK, District never provided for an outside Behavioral Intervention Plan. The Functional Behavior Assessments performed by District did not contain any data collection or any indication that any meaningful observation took place over any period of time. [PE 68; Tr. p. 1758 line 15 through p. 1761 line 6]. [Parents expert Name] testified the behavior plan prepared by the team indicated no clear knowledge of what a functional assessment is and what a behavior plan needs to include. [Tr. p. 2178 lines 1-25].
21. The March 2013 Project PEAK consultation clearly states "you do not want [Student] to learn that he stops work by having challenging behavior." [PE 8 at CF 299].
22. During the 2014-2015 school year and Fall semester of 2015 Students academic skills showed no improvement and even regression.
23. The testimony of the female paraprofessional was the 2015 Special Education Teacher from the beginning of school to October left the teaching of Student to the paraprofessionals with little or no direction. This was confirmed by the same teacher in the teacher parent conference.
25. While the 2014-2015 Special Education Teacher may have provided more oversight of the paraprofessionals and more direct instruction of Student, the amount of time each day was extremely limited and rarely in the Special Education classroom.
26. No meaningful records were kept by District regarding Students ability and frequency of completing goals and objectives.
27. In April of 2015, Student completed a portfolio test indicating he was in the emerging level, the lowest possible level on every section. The Special Education

Director did not know if the test was completed with full hand-over-hand assistance. [Tr. p. 1981 line 4 through 1984 line 3].

28. Upon this hearing officer's review of the video/audio tapes it is obvious that Parent Mother's testimony that Student never received more than five to ten minutes a day of academic instruction is correct. The majority of time recorded reflects either the paraprofessionals talking amongst themselves with some low moaning in the background that seems to be largely ignored or nothing happening at all. If Student and paraprofessionals were gone from the room at the quiet times, obviously Student's communications device did not accompany him.
29. The District's Special Education Director testified she believed Student had plateaued. [Parent expert name] disagrees and testified it is highly likely Student will continue to progress given the appropriate services.

VII. Decision

Issue 1.

Whether the District provided FAPE to Student during the 2014-2015 school year and the Fall 2015 semester.

The District denied a FAPE to the Student during the 2014-2015 school year and 2015 Fall semester.

Academic Instruction

Speech Therapy

The District failed to comply with the procedures set forth in the IDEA by failing to provide a base line of Student's present performance making it impossible to calculate a measurable goal.

The Student's IEPs in place during the operable time period, 12-1-2013 to 12-1-2015, failed to contain appropriate measurable goals and objectives based on present levels of performance.

Student received no measurable educational benefit during the operable time period, not even a de minimus educational benefit.

Issue 2.

Whether District abided by Student's IEPs in place during the 2014-2015 school year and the Fall 2015 semester.

The District failed to abide by Student's IEPs during the 2014-2015 school year and 2015 Fall semester.

1. The failure to implement the IEP as to time spent in the regular education classroom denied Student the ability to advance appropriately toward attaining his socialization goals.
2. The failure to implement the IEP as to academic instruction denied Student the ability to achieve academic progress.
3. The failure to provide training to District personnel on the use of Students communication devices denied Student the ability to achieve increased communication skills.
4. The failure to provide speech therapy as set forth in Student's IEPs denied Student the ability to achieve increased communication skills.
5. The failure to implement behavior intervention plans to address Students acting out, aggressive behavior denied Student the ability to achieve academic and socialization goals.

Issue 3.

Whether Student's placement was Least Restrictive Environment during the 2014-2015 school year and the Fall 2015 semester.

The District failed to educate Student in the least restrictive environment.

1. The continuum of alternative placement go from placement full-time in a regular education classroom where a child receives his education more than 80% of the day through the child receiving special education for at least 21% of the school day to receiving special education full time in a special education classroom for more than

60% of the school day. Public/Private Residential Placement includes a more restricted environment for the placement of a child. Where a child receives Home Instructions, such a placement may be less restrictive than Residential Placement.

2. The continuum of services identifies the location and time where the child receives his academic instruction and socialization with peers.
3. The Special Education classroom was found to be Student's least restrictive environment. However, Student did not receive his educational instruction or socialization with peers in the special education classroom. Student was placed alone in the sensory room with two para-professionals where he received academic instruction approximately ten minutes per day and any socialization with his peers in the special education classroom was happenstance, i.e., taking him to the bathroom.
4. It is hard to fathom a more restrictive environment for Student. Even residential placement would put him in an environment with other children and an academic setting where Student would receive academic instruction.
5. During the spring semester of the 2013-2014 school year, Student's second grade year, no records were kept on the amount of time each day spent in the sensory room.
6. During Student's third and fourth grade years and 2014-2015 and 2015-2016 school years at Charles Evans, he received the vast majority of his educational instruction in the sensory room. Educational instruction or time spent in the special education classroom was almost nothing.

Issue 4.

Residential Placement

Whether Residential Placement is appropriate.

Residential placement is not an appropriate placement for Student.

1. Pursuant to the IDEA a student with a disability must be educated in the least restrictive environment.
2. Both [School Expert] and [Parent Expert] testified the public school district's special education environment was the least restrictive environment to educate Student as long as proper services were in place.

Issue 5.

Whether the District retaliated against Student and parents.

Retaliation

Petitioners allege the District retaliated against Parents by filing numerous police reports regarding Parents use of an audio/visual device during the Fall of 2015 and refusing to let Mother accompany Student to and from his classroom in the Fall of 2015.

Pursuant to the IDEA a hearing officer has subject matter jurisdiction to consider matters related to the identification, evaluation, or educational placement of the child, or the provision of a free, appropriate, public education to such child. 20 U.S.C. sec. 1415(b)(6)(A). It is not within the jurisdiction of the hearing officer to rule on a violation of the American with Disabilities Act. 42 U.S.C. § 12203.

This hearing officer does not have jurisdiction to determine if a violation of the American with Disabilities Act occurred and shall not rule on this issue or the awarding of compensatory damages to the Petitioner’s parents against the District.

Issue 6.

Whether the hearing officer can award monetary damages.

This hearing officer only has jurisdiction to award compensatory damages.

Issue 7.

Whether District personnel mocked Student.

Petitioners allege the SLPA was caught on video mocking Student by hitting words on Student’s talker to state “I want to go away”. [Video File 2015_1103102001691]. The SLPA testified she had no idea if it was her or not who caused the talker to state “I want to go away”. [Tr. p. 3581 line 1 through p. 359 line 9 (Forrester)]. While difficult to determine who is hitting the talker, upon further review of the video file 2015_110310200169, this hearing officer finds it is credible the SLPA’s did make the talker state “I want to go away” due to the proximity of the

SLPA's face to the talker and the laughing smile appearing on her face while the words were said.

This hearing officer finds there is credible evidence District staff purposely mocked student. However, this hearing officer does not find the actions of the SLPA resulted in a violation of FAPE to Student.

Issue 8.

Seclusion Room

Whether seclusion of Student can be considered since it occurred outside the operable time period.

Placement of Student in the seclusion/cool-off room occurred prior to the operable time period and will not be considered by this hearing officer.

The testimony of the parties is conflicting as to when Petitioner, Mother learned of Student's placement in the seclusion room. Further, no evidence was presented regarding the placement of Student in the seclusion room resulting in Student's being afraid to attend class in the special education classroom, and therefore resulting in Student's placement in the sensory room for the majority of the day.

District Requirements

1. District shall obtain a full evaluation of Student's communication ability conducted by an Augmentative Communication Specialist. This should occur in conjunction with a Speech Language Pathologist who has expertise in augmentative communication.
2. Student shall receive speech therapy from a licensed Speech Language Pathologist.
3. District shall provide Student compensatory speech therapy equaling 24 twenty minute sessions.
4. District shall obtain a Functional Behavioral Assessment from a board certified behavior analyst or psychologist with behavioral training. The Specialist will design a behavior intervention program for the District.
5. The Specialist who designs the behavior intervention program will also be responsible for the training of the teachers, paraprofessionals and Special Education Director in the skills and knowledge necessary to work with Student. This

Specialist will have specific knowledge and background in working with older children.

6. The Parents shall be involved in the training provided by the Specialist to the District.
7. The Specialist shall provide ongoing oversight and consultation with the District for a minimum of two years or as frequently as the Specialist determines it to be necessary based on the competency of the District staff.
8. Both the Parents and the District shall choose three individuals to perform each of the assessments ordered. If a common name appears on each list, that person will be retained to provide the evaluation. If no common name appears, then District shall choose one of parents' names. The evaluations are to be scheduled within fourteen (14) days from the date of this Order, and completed as quickly as the evaluators can complete them but not later than forty-five (45) school days from the date of this Order.
9. District shall be responsible for all costs associated with any requirements herein.
10. Student shall spend the remainder of the 2016-2017 school year in a homebased setting run by a professional who may be the Specialist or a person chosen by the Specialist.
11. Student shall be returned to a full day of educational instruction in the special education classroom in the 2017-2018 school year or as soon as recommended by the behavioral Specialist in conjunction with any other Specialist she/he deems necessary to determine the program of the IEP.

VIII. Appeal Statement

Unless appealed, this decision is binding upon all parties. Either party may appeal this decision by filing a written notice with Special Education Section, State Department of Education, 2500 N. Lincoln Blvd., Oklahoma City, OK 73105. The appeal must be made within 30 days of the receipt of this decision.

IT IS SO ORDERED this _____ day of February, 2017.

Lucy S. Kroblin
Hearing Officer

Attached Exhibits:

1. IEP 3-11-11
2. IEP (12-13-14) Correct date 12-13-13
3. IEP 12-11-14

CERTIFICATE OF EMAILING AND MAILING

This is to certify that on the ___ day of _____, 2017, a true and correct copy of the above and foregoing Due Process Hearing Decision was sent by e-mail and was also mailed, postage pre-paid to the following:

[Parents and Parent Attorney]

[School district Attorney]

[SERC]

Signature _____
Lucy S. Kroblin