

BEFORE THE NEBRASKA DEPARTMENT OF EDUCATION

)	Case No. 10-01 SE
)	
)	SEP 10 2010
Petitioners,)	<i>Richard A. Birch</i>
vs.)	HEARING OFFICER'S REPORT,
)	FINAL DECISION and ORDER
LANCASTER COUNTY SCHOOL)	
DISTRICT 0001,)	
)	
Respondent.)	

The following constitutes the Report, Final Decision and Order of the Hearing Officer, Richard A. Birch, Attorney at Law, 410 North Ash, P. O. Box 1006, North Platte, NE 69103-1006, (308) 532-3150, pursuant to Neb. Rev. Stat. § 79-1163; Title 92, Nebraska Administrative Code, Rule 55 of the Nebraska Department of Education and Hearing Officer's Notice of Assignment dated April 1, 2010, by the Nebraska Department of Education.

I. REPORT

This matter was assigned to Hearing Officer, Richard A. Birch, on April 1, 2010. Pursuant to previous orders of the Hearing Officer, the current deadline for completion of this case is September 10, 2010.

A hearing was held at the state Board Meeting Room at the State Office Building, 6th Floor, 301 Centennial Mall South, Lincoln, Nebraska beginning on July 20, 2010, and concluding on July 23, 2010.

Petitioners, _____ were present and represented by their attorney, Mark C. Laughlin, Fraser Stryker PC LLO, 409 South 17th Street, Suite 500, Omaha, NE 68102, (402)341-6000. The

Respondent, Lancaster County School District 0001, Lincoln Public Schools, 5901 "O" Street, Lincoln, NE 68510, was represented by its attorneys Gregory H. Perry and Jeanette Stull, of Perry, Guthery, Haase & Gessford, P.C. L.L. O., 233 South 13th Street, Suite 1400, Lincoln, NE 68508, (402)476-9200.

The hearing was recorded by Christine M. Salerno, Latimer Reporting, 528 South 13th Street, Suite 1, Lincoln, NE 68508, (402)476-1153. The exhibits offered at the hearing are in the possession of the Court Reporter.

The hearing was held pursuant to the Prehearing Conference Order contained in the file of this matter. The hearing was closed to the public. The admission of evidence at the hearing was pursuant to 92 NAC 55-007.02A.

At the conclusion of the hearing, the Hearing Officer took the matter under advisement. The parties were given until August 13, 2010, to mail written closing arguments and briefs. To accommodate this timeline the parties filed a written Stipulation to extend the deadline for completion of this case to September 10, 2010. That Stipulation was approved by an Order filed July 26, 2010. The Petitioners' closing argument was received by email August 13, 2010. After initially being mailed to the Department of Education, the hard copy was received and filed on August 23, 2010. The Respondent's written closing argument was mailed August 13, 2010, and received August 16, 2010.

EXHIBITS

The following exhibits were identified, offered and received pursuant to the stipulation of the parties except as indicated at Exhibit 92 and Exhibit 239 (the description of the exhibits is that provided by the party that offered the exhibit):

	DESCRIPTION
1	Special Education IEP Goals and Accommodations, dated 5/28/08
2	2006 standardized test scores
3	Notice of Change of Placement 5/11/2009 - Sheridan Elementary School
4	Email between _____ and Mary Ells @ LPS April 7, 2009
5	Multidisciplinary Evaluation Team MDT Report 06/06/2006
6	Psychological Evaluation Lorri E. Bryant, Ph.D. May 23 and 24, 2006
7	Letter from Eric V. Larsson, Ph.D. The Lovaas Institute Midwest June 6, 2006
8	Individual Education Program 06/15/2006
9	Transition Meeting Notes July 11, 2006
10	Behavior Data Totals
11	Progress Report October 24, 2006
12	Goals January 19, 2007 - Sheridan Elementary School
13	Progress Report April 6, 2007 - Sheridan Elementary School
14	Schedule and comments September 13, 14, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29, 2006

	DESCRIPTION
15	Progress Report October 19, 2007 - Sheridan Elementary School
16	Progress Report October 24, 2008
17	Progress Report January 11, 2008 - Sheridan Elementary School
18	Progress Report March 20, 2008 - Sheridan Elementary School
19	Individualized Education Program (IEP) January 15, 2000* - Sheridan Elementary School
20	Team Planning Memo from Mary Flory February 27, 2008
21	Inclusion Cadre Observation Report from Mary Flory August 27, 2007
22	Teacher Aggression Worksheets August 20, 21, 22, 23, 24, 27, 28, 29, 30, 31; September 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 25, 26, 27, 28; October 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19
23	Observational data October 18
24	Observational data October 29, 2007
25	Observational data October 30
26	Attendance forms (2 nd grade with peers; behavior procedure; out of classroom)
27	Report Card Third Grade 2008-2009
28	Report Card Second Grade 2007-2008
29	Report Card First Grade 2006-2007
30	Test of Oral Reading
31	Note by Debbie Marotz, Resource Teacher 2008-2009
32	DRA: Oral Reading Record Sheet May 20, 2008
33	Note by Debbie Marotz, Resource Teacher June 5, 2009
34	Math Grade 1 Quarter One 06-07
35	Individual Education Program (IEP) September 28, 2009

	DESCRIPTION
36	Individual Education Program (IEP) January 15, 2000
37	Behavior Intervention Plan September 28, 2009
38	Email from _____ regarding Corrected Follow up to IEP and Letter September 24, 2009
39	Behavior Intervention Plan Draft September 14, 2009
40	Behavioral Data September 17, 2009
41	Email from SungWoo Kahng September 17, 2009
42	Behavior Intervention Plan - Draft September 14, 2009
43	Letter from Mary Kanter and Barbara Peterson of Sheridan Elementary School to September 17, 2009
44	Emails between Mary Kanter and September 10, 2009, September 11, 2009
45	Email from September 15, 2009
46	Email from Mary Vogel September 10, 2009
47	Email from September 3, 2009
48	Letter from Kennedy Krieger Institute to Prairie Hill Learning Center August 28, 2009
49	Email between _____ and Barb Peterson August 14, 2009, August 17, 2009
50	Kennedy Krieger Call August 12, 2009
51	Questionnaire re: _____ last 3 weeks of school
52	Behavioral Data March 31 - April 8, 2009
53	Individual Education Program September 28, 2009
54	Notice of School District's Decision Regarding Requested Special Education Services October 1, 2009
55	Notice of School District's Decision Regarding Requested Special Education Services September 28, 2009

	DESCRIPTION
56	Curriculum Vitae of SungWoo Kahng June 2010
57	PowerPoint prepared by SungWoo Kahng
58	Pediatrics, Office Journal of the American Academy of Pediatrics October 29, 2007
59	The National Autism Center's National Standards Project Findings and Conclusions
60	National Institute of Child Health and Human Development Autism Overview: What We Know
61	Portions of Prairie Hill file
61A	Prairie Hill Records
62	Dr. Kahng video
63	KKI records
64	Statements for services rendered from: Prairie Hill, Paraprofessional Bills, Bills related to Johns Hopkins Stay, Johns Hopkins Bills
65	2009/2010 LPS entire records
66	Target Behaviors (2007-2008)
67	Various emails
68	Various LPS documents
69	Multidisciplinary Evaluation Team MDT reports, Individual Education Program and Progress Reports
70	Preliminary Behavior Plan; Letter from Kennedy Krieger Institute dated 8/28/09; Preliminary Treatment Protocol; Behavior Intervention Plan;
71	Draft LPS memo
72	Grade 1 Target Behaviors
73	Email and attachments from SungWoo Kahng dated September 17, 2009
74	Letter to _____ from Mary Kanter and Barb Peterson dated September 17, 2009
75	Letter from Kennedy Krieger Institute to Prairie Hill Learning Center dated August 28, 2009
76	Meeting Notes dated September 28, 2009
77	Email from _____ dated October 1, 2009 re: Behavior Plan
78	Emails dated September 15/16, 2009
79	Individual Education Program dated 1/29/2004

	DESCRIPTION
80	Individual Education Program dated 10/20/2003
81	Individual Education Program dated 06/05/2007
82	Individual Education Program - conference date 11/26/2007
83	Individual Education Program - conference date 05/28/2008
84	Draft Individual Education Program dated 09/28/2009
85	Individual Education Program - conference date 09/28/2009
86	May 09 information regarding intervention
87	Multidisciplinary Evaluation Team MDT Report dated 04/13/2009
88	Multidisciplinary Evaluation Team MDT Report dated 09/17/2009
89	LPS Data 9/15-10/10
90	Functional Behavior Assessment Process
91	Form
92	Email; this exhibit consists of pages 79 and 80 that were removed from Exhibit 239 and not received
93	Munroe-Meyer Institute Progress Note dated 3/19/2009
201	<u>MDTs and Evaluations</u> 9/17/09 MDT Report
202	4/13/09 MDT Report, including Notice That No Additional Information Is Needed To Determine Continued Eligibility
203	Notice and Consent for Reevaluation, 2/8/07
204	6/6/06 MDT Report
205	9/21/05 MDT Report
206	Notice and Consent for Initial Evaluation, 9/16/03
207	9/15/03 MDT Report
208	Notice of 9/15/03 MDT Conference with Verification Decision
209	Notice and Consent for Initial Evaluation, 8/21/03

	DESCRIPTION
210	<u>IEPs and Related Notices</u> 2009-2010 School Year Notices of 9/17/09 IEP Meeting (no IEP)
211	Notice of Change of Placement, 9/17/09
212	9/28/09 IEP with notices
213	9/28/09 IEP, draft with notes from meeting
214	9/28/09 IEP, draft (2) with notes from meeting
215	9/28/09 IEP, draft (3) with notes from meeting
216	9/28/09 IEP, draft (4) with notes from meeting
217	Notice of Decision 9/28/09 re: KKI program
218	Notice of Decision 10/1/09 re: para at Prairie Hill
219	Notice of Decision 3/1/10 re: para at Prairie Hill as settlement
220	<u>2008-2009 School Year</u> Notice of 4/13/09 IEP Meeting
221	Notice of Change of Placement, 5/11/09
222	<u>2007-2008 School Year</u> 11/26/07 IEP
223	5/28/08 IEP (2008-2009 IEP)
224	<u>2006-2007 School Year</u> 6/15/06 IEP with notices
225	Notice and Consent for Initial Placement in Special Education Services, 6/15/06
226	6/5/07 IEP
227	<u>2005-2006 School Year</u> Notice and Consent for Initial Placement in Special Education Services, 9/21/05
228	Notice of 10/20/05 IEP Meeting with signature page
229	Notice of Discontinuation of Special Education Services, 11/11/05

	DESCRIPTION
230	<u>2003-2004 School Year</u> Temporary Placement and IEP, 8/21/03
231	10/20/03 IEP with notices
232	1/29/04 IEP with notices
233	Notice of 3/15/04 IEP Meeting
234	Notice of 5/20/04 IEP Meeting
235	8/19/04 IEP
236	<u>Spring 2009 Transition to KKI</u> Emails 2/9/09-6/2/09 re: transition to KKI and updates while at KKI
237	Questions from KKI re: last 3 weeks at school, with LPS responses
238	<u>2009-2010 IEP Documents</u> Behavioral Data, March 31-April 8, 2009
239	Emails, correspondence, and notes 7/28/09-6/11/10 re: returning to Sheridan and incorporating KKI plan; except for pages 79 and 80 that were removed from that exhibit and now are Exhibit 92
240	Notes of Conference Call, 8/12/09
241	Notes of Meeting, 8/21/09
242	KKI letter to Prairie Hill 8/28/09, with Preliminary Behavior Plan 8/10/09, Preliminary Treatment Protocol, and example of daily schedule
243	Draft Behavior Intervention Plan, comparing KKI and LPS plans, dated 9/11/09
244	Draft Behavior Intervention Plan, comparing KKI and LPS plans, dated 9/14/09
245	. Schedule
246	9/14/09 Conference Call Agenda
247	Agenda for 9/17/09 IEP Meeting
248	Aggression info for 9/17/09 IEP meeting
249	Kahng (KKI) 9/17/09 email with aggression chart and comments to LPS's Behavior Plan

	DESCRIPTION
250	Kanter and Peterson 9/17/09 letter to
251	Behavior Intervention Plan, updated 9/28/09 – changes shown
252	IEP Meeting Notes, 9/28/09
253	Miscellaneous Documents re: 2009-2010 IEP Notes of Barb Peterson re: incorporation of KKI plan and timeline of events in 9/09
254	Training Schedule
255	Dates for Training—
256	CEC's Policy on Physical Restraint and Seclusion Procedures in School Settings
257	<u>Progress</u> <u>Early Childhood Special Education</u> Progress Report, 1/20/04
258	Progress Report, 4/1/04
259	Progress Report, 6/1/04
260	Progress Report, 8/19/04
261	Progress Report, 10/11/04
262	Progress Report, 11/1/04
263	Progress Report, 1/25/05
264	Progress Report, 5/2/05
265	<u>Kindergarten</u> Kindergarten Math Objectives
266	<u>First Grade (2006-2007)</u> First Grade Report Card
267	Grade Level 1 Writing Prompt, 9/06
268	Grade Level 1 Writing Prompt, 5/16/07
269	Math Grade 1 Quarters One-Four
270	Progress Report, 10/24/06
271	Progress Report, 1/19/07
272	Progress Report, 4/6/07

	DESCRIPTION
273	<u>Second Grade (2007-2008)</u> Second Grade Report Card
274	Grade Level 2 Writing Prompt, 8/07
275	Grade Level 2 Writing Prompt, 5/08
276	Vocabulary Word List, Grade 2 (Levels 8-11)
277	Math Grade 2 Quarters One-Four
278	Progress Report, 10/19/07
279	Progress Report, 1/11/08
280	Progress Report, 3/20/08
281	<u>Third Grade (2008-2009) and Cumulative Records</u> Third Grade Report Card
282	K-6 Cumulative Writing Record
283	Explanatory Writing Scoring Guide: Grade 2
284	K-6 Individual Literacy Record, End-of-Year Record
285	DRA: Oral Reading Record Sheet
286	3rd Grade 2nd Quarter Writing
287	K-5 Mathematics Record Card Folder
288	Math Grade 3 Quarters One-Three with 6/5/09 note from Marotz
289	Special Education IEP Goals and Accommodations, dated 5/28/08
290	Progress Report, 10/24/08
291	Progress Report, 1/21/09
292	Progress Report, 3/30/09
293	<u>2008-2009 School Year (Third Grade)</u> Assistive Technology Referral Form, dated 5/26/08
294	Transition Meeting, 8/08
295	Considering Summer ESY Options, with notes
296	Authorization for Release of Information to KKI
297	Triggers Practice Lists

	DESCRIPTION
298	Best Practices for Students with ASD: Program Review
299	Program Review, 3/19/09
300	"How Does Your Engine Run" Program
301	Inclusion Cadre Reports
302	Cadre Meeting Agenda, 1/21/09
303	Schedule
304	blank schedule and data forms
305	Circle of Friends
306	Program, 9/12/08
307	Sensory & Reinforcement Observations, 4/3/09-4/24/09
308	Stimulus/Response/Consequence Forms
309	Environmental Data Forms, 9/15/08-10/10/08
310	Daily Data Collection, 9/19/08-4/23/09
311	Emails 8/27/08-4/15/09
312	<u>2007-2008 School Year (Second Grade)</u> Inclusion Cadre Referral Form, 5/14/07
313	Authorization for Release of Information to MMI
314	OT/PT Progress Reports
315	Inclusion Cadre Reports
316	The Explosive Child—Notes
317	Riding the Bus to School
318	Day, various versions
319	Data Sheets, G/Y/W/SA/TA, 8/20/07-10/19/07
320	Daily Data Collection, 9/25/07-5/29/08
321	Choices Data, 9/17/07-5/23/08
322	A-B-C-R Chart: Anecdotal Behavior Chart
323	Environmental Data Forms, 8/20/07-5/23/08
324	IEP Data, 9/24/07-5/23/08

	DESCRIPTION
325	Teaching Refusing Requests, blank form
326	Refusals/Requests Data
327	Behavior Graphs
328	Outline beginning "Identifying Most problematic behaviors"
329	Emails
330	<u>2006-2007 School Year (First Grade)</u> Inclusion Cadre Referral Form
331	Psychological Evaluation by Lorrie Bryant, 5/06
332	Eric Larsson, Lovaas Institute, 6/6/06 letter to LPS
333	IEP Draft Proposal, 6/15/06
334	LM School Meeting, 6/15/06
335	ECSE 8th Grade—Summer Services Form
336	Transition Meeting Agenda and Program, 6/11/06
337	ASD Interventions & Treatments
338	OT/PT Progress Report
339	Behavior Data Totals
340	Keene's (Life Midwest) School Observations of 0/10/06, 12/11/06, 3/2/07, 4/4/07 & 5/14/07
341	1st Quarter Team Meeting Agenda, 10/25/06
342	Planning Meeting, 10/20/06
343	Inclusion Cadre Reports
344	Emails
345	Environmental Data Forms, 9/13/06-5/31/07
346	Daily Data Collection Forms, 9/5/06-5/31/07
347	Choices Charts, Kid Pix, etc.
348	Target Behavior Charts
349	IEP Data 9/5/06-6/1/07
350	Thank-you note from _____ to Mary Flory

	DESCRIPTION
351	<u>2005-2006 School Year (Kindergarten)</u> Elementary Student Census Information
352	Inclusion Cadre Referral Form
353	Inclusion Cadre Observation Report, 9/1/05
354	Inclusion Cadre Reports
355	Information re: paraeducator's responsibilities requested by
356	OT/PT Progress Report
357	Permanent Individual Record, 11/11/05
358	Transfer form to First Plymouth, 11/11/05
359	Testing Summary and Data
360	Goals and Objectives
361	LIFE School Observation, 5/10/04, and Individualized Treatment Plan
362	"Going to School" booklet and other visuals
363	Blank form beginning "intelligibility"
364	Blank form beginning "Social Stories"
365	IEP Information from _____, 10/13/05
366	Various hand-written notes
367	Emails
368	<u>2003-2004 School Year</u> Authorization for Release of Information
369	Student Services Documentation Log
370	OT/PT Progress Reports
371	Observation Report of Keery Wolf of Project Best-Case, 10/7/03
372	Permission slip for Stacy Apraez classroom visit
373	Note re: discontinuation of homebound services, 11/20/03
374	Inclusion Cadre Observation Forms
375	Inclusion Cadre Referral Form, 5/20/04
376	Inclusion Cadre Weekly Summaries

	DESCRIPTION
377	6/4/04 Letter from Safarik and Rauner with 8/5/04 Home Program Data Comparison
378	Special Education Summer Services Form, 4/20/04
379	<u>2002-2003 School Year</u> Psychoeducational Progress Report, 8/03
380	Confidential Psychological Report from Millard Public School, 3/21/02
381	Early Intervention Program, Nebraska Individualized Family Service Plan (IFSP)
382	Notice of 4/5/02 MDT and/or IFSP Team Meeting from Millard Public Schools, with 4/5/02 MDT Report
383	<u>Other Documents</u> Program, binder of home-based program records, ~2/03-8/04
384	Deb Rauner Service Documentation, notes, home program data, Inclusion Cadre reports, etc. (mostly ~2003-2004, some 2005 and 2007 at end)
385	ABLLS Assessment for 8/03
386	ABLLS Data, 8/03-8/04
387	Principal's Notes
388	Director's File
389	Mary Ells' File
390	Lesson Plans for 2008-209 School Year, with Daily Planner
391	<u>Documents from KKI File</u> Medical Discharge Summary
392	Attending Progress Notes, 4/28/09
393	Social Work/Care Coordination Progress Note, 8/26/09
394	Psychiatric Attending Progress Note, 9/1/09
395	Social Work/Care Coordination Progress Note, 9/2/09
396	Behavioral Psychology Progress Note, 9/3/09
397	Behavioral Psychology Progress Note, 9/9/09
398	Social Work/Care Coordination Progress Note, 9/10/09

	DESCRIPTION
399	Behavioral Psychology Progress Note, 9/16/09
400	Social Work/Care Coordination Progress Note, 9/18/09
401	Behavior Plan, 9/21/09
402	Behavioral Discharge Summary
403	Department of Occupational Therapy Discharge Summary
404	Social Work Summary
405	Initial Summary, Progress, and Discharge Report
406	<u>Resumes and Certificates</u> Mary Kanter Resume and Certificate
407	Barb Peterson Resume and Certificate
408	Mary B. Ells Resume and Certificate
409	Deborah J. Rauner Resume and Certificate
410	Mary Flory Resume and Certificate
411	Wendy Barry Resume and Certificate
412	Juliann Ramel Resume and Certificate
413	Robin Grotfeld Certificate, Mandt System Certificate and NDE letter re: certification as Certified Leisure Professionals
414	Joyce Cambridge Resume and Certificate
415	Cindy Paulsen Resume and Certificate
416	Cheri Thaller Resume, letter of recommendation and certificate of recognition for Sertoma award, Mandt training certificates, performance appraisals, thank you notes from
417	Gwen Rittgarn Resume and Certificate
418	Holli Long Resume and OT License
419	Patti Daberkow Resume and Certificate
420	Kris Reckeway Resume and Certificate
421	Mary Boyle Resume and Certificate
422	Deb Marotz Certificate
423	Tom Fortune Certificate

	DESCRIPTION
424	<u>Rules</u> Nebraska Department of Education Rule 51
425	Nebraska Department of Education Rule 55
426	Parental Rights in Special Education

During the course of the hearing, two issues rose regarding exhibits. The first issue related to Exhibit 239, an exhibit offered by the Respondent. Subsequent to Exhibit 239 being received, the Respondent moved to redact pages 79 and 80 of the Exhibit on the grounds that they were work product. This motion was objected to by the Petitioners. The motion was sustained by the Hearing Officer, and pages 79 and 80 were redacted from Exhibit 239. They are now marked as Exhibit 92.

The second issue related to Exhibit 93. Exhibit 93 is a progress report from the Munroe-Meyer Institute dated March 19, 2009. This Exhibit was offered by the Petitioners during the rebuttal testimony of [redacted]. The Exhibit was objected to by the Respondent on the grounds that it was not exchanged or submitted as required by the Pre-Hearing Conference Order. Receipt of the Exhibit was taken under advisement at the hearing. The Hearing Officer finds that while Exhibit 93 was not provided to the Respondent within the time required by the Pre-Hearing Conference Order, the Exhibit was offered during rebuttal and is cumulative to other evidence received during the course of the hearing. Therefore, the objection of the Respondent is overruled and Exhibit 93 is received.

WITNESSES

The following witnesses were called by the Petitioners:

- | | | |
|-----|-------------------|--|
| (1) | Dr. SungWoo Kahng | Senior Behavior Analyst, Kennedy Krieger Institute; |
| (2) | | Petitioner, |
| (3) | Elizabeth Thiele | Paraeducator, Prairie Hill Learning Center; |
| (4) | Debra Buck | Teacher, Prairie Hill Learning Center; |
| (5) | Ginger Jorgenson | Behavioral Therapist, Life MidWest; |
| (6) | Jill Hirschfeld | Paraeducator, for Petitioner and Prairie Hill Learning Center; |
| (7) | | Petitioner, |
| (8) | Mary Ells | Assistant Director of Special Education, Lincoln Public Schools; |

The following witnesses were called by the Respondent:

- | | | |
|-----|-------------------|--|
| (1) | Deborah J. Rauner | Behavior Specialist, Lincoln Public Schools; |
| (2) | Mary Flory | Inclusion Cadre and Special Education Teacher, Lincoln Public Schools; |
| (3) | Barb Peterson | Special Education and Gifted Coordinator for Sheridan Elementary School, Lincoln Public Schools; |
| (4) | Mary Kanter | Principal, Sheridan Elementary School, Lincoln Public Schools; |

II. FINAL DECISION AND ORDER

A. JURISDICTION

Jurisdiction is founded upon Chapter 55 of Title 92 of the Nebraska Administrative Code, the Nebraska Special Education Act, Neb. Rev. Stat. § 79-1110 et seq., and the Individuals with Disabilities Act, 20 U.S.C. § 1400 et seq.

B. ISSUE

Whether the Respondent, Lancaster County School District 0001, a/k/a Lincoln Public Schools, has provided a free appropriate public education to

C. FINDINGS OF FACT

The Petitioners in this case are

. At the time of the hearing the had been married for approximately 13 years, and had three children. All three children are and

The Petitioners reside within the boundaries of the Respondent, Lancaster County School District 0001, a/k/a Lincoln Public Schools.

At that time the Petitioners lived in Omaha, inside the Millard Public School District.

When was one year old, the Petitioners realized that had significant problems, and began seeking appropriate medical attention for In February of 2002, shortly after second birthday, was diagnosed with

autism. At that time, the Petitioners contacted the Millard Public Schools, and the school district began an Individualized Family Service Plan for [redacted]. This Plan provided in-home special education services of approximately one hour per week. The Petitioners continued to consult with various doctors, including a pediatric neurologist. They also continued to learn as much as they could about autism.

When [redacted] was approximately 2½ years old the Millard Public Schools enrolled [redacted] in Project Best Case at the Munroe-Meyer Institute. According to [redacted] this is an applied behavior analysis program and was paid for by the Millard Public Schools. The Petitioners testified that this program was very beneficial for [redacted] and helped [redacted] to develop. [redacted] remained in this program for approximately one year. During the summer of 2003 the Petitioner's moved to Lincoln and took up residence within the boundaries of the Respondent. They have resided within the Respondent from that time through the date of the hearing.

Shortly after moving to Lincoln in 2003, the Petitioners enrolled [redacted] with the Lincoln Public Schools and [redacted] was placed at Sheridan Elementary School in the Early Childhood Special Education Program. Sheridan Elementary School is a grade school operated by the Lincoln Public Schools. At that time [redacted] was 3½ years old. [redacted] remained in that program for the entire 2003-2004 school year. During this year the Respondent provided a special education program for [redacted] and also consulted with the Munroe-Meyer Institute.

Following the conclusion of that school year, the Petitioners were concerned about the progress made by [redacted]. During the summer of 2004, they contacted a private company to prepare an in home program designed for [redacted]. This program was developed through Life Midwest, now known as the Lovaas Institute. The program prepared for [redacted] by Lovaas was also an applied behavior analysis program, and provided in home services to the Petitioners of approximately 40 hours per week. [redacted] remained in the Lovaas program for one year.

In the fall of 2005 the Petitioners enrolled [redacted] in Kindergarten at Sheridan Elementary School. After approximately 2½ months, the Petitioners were not satisfied with the Respondent's program for [redacted] or the progress was making. At that time they removed [redacted] from Sheridan and sent [redacted] to a private preschool called Dimensions Educational Research, located at First Plymouth Church in Lincoln, Nebraska. [redacted] remained in that program for the balance of the 2005-2006 school year.

Following that school year, the Petitioners decided to again enroll [redacted] with the Respondent, and in the fall of 2006 [redacted] was again placed at Sheridan Elementary. This time for [redacted] first grade school year.

In preparation for that placement, on June 6, 2006, the Respondent did a multidisciplinary team evaluation of [redacted]. On June 16, 2006, an Individual Education Program was also prepared for [redacted] by the Respondent. That IEP covered first grade, the 2006-2007 school year.

At the request of the Petitioners, the Respondent allowed Ginger Buhl to accompany [redacted] at school. Ms. Buhl was one of [redacted] private therapists. The Petitioner's felt that she would be able to help [redacted] transition into Sheridan Elementary and that she could also help train the people that would be working with [redacted] while [redacted] was at Sheridan. This transition took place over the first few months of the school year. By Christmas Ms. Buhl was no longer accompanying [redacted] at school. [redacted] testified that [redacted] did well for most of [redacted] first grade year, but that by the end of the year [redacted] behavior was beginning to deteriorate. Academically, [redacted] passed the first grade.

At the end of [redacted] first grade year, there were discussions between the Petitioners and the Respondent regarding summer school options that were available for [redacted]. However, the Petitioners did not believe that any of the options offered by the Respondent were appropriate for [redacted] and arranged for their own summer program.

[redacted] second grade year was pursuant to an IEP dated June 5, 2007.

[redacted] began the second grade in the fall of 2007. The building was considered to be a part of Sheridan Elementary, but was at a separate location. This location was variously referred to as the Yankee Hill building or Sheridan Southside. That year there was construction at Sheridan Elementary. The Yankee Hill building is a temporary site that the Respondent uses when schools are undergoing construction. All of the Sheridan Elementary School second graders were at Yankee Hill.

The second grade year did not go as well for [redacted] from a behavioral standpoint. [redacted] started showing increasing levels of aggression, both at school and at home. These behaviors included banging [redacted] head on various objects and aggression toward others, including teachers and paraeducators. By the end of the school year, [redacted] behavior had substantially declined, although the Respondent's records show that academically [redacted] completed the second grade.

Following the conclusion of the 2007-2008 school year, [redacted] second grade school year, the Petitioners decided to enroll [redacted] in the Munroe-Meyer program at the University of Nebraska Medical Center in Omaha. The program was during the summer of 2008. Munroe-Meyer specializes in severe behavioral problems and primarily targets children with autism. The program for [redacted] was an out patient program where [redacted] initially spent approximately three hours per day. As the summer progressed, [redacted] program was increased to seven hours per day. The Munroe-Meyer program stressed the behavioral element for [redacted] and did not contain an academic component. According to the Petitioners, by the end of the summer [redacted] behavior was much better, although there were still behavior problems.

The Petitioners again decided to enroll [redacted] with the Respondent, this time for [redacted] third grade school year. This was the 2008-2009 school year. As with previous years, an IEP had been prepared for [redacted] This IEP was dated May 28, 2008, and placed [redacted] with [redacted] regular education peers at Sheridan Elementary School.

During its evaluation of [redacted] Munroe-Meyer had developed a behavior plan for [redacted]. This plan included the physical restraint of [redacted] as a consequence of aggressive behavior. The restraint recommended by Munroe-Meyer is known as the baskethold. At the request of the Petitioners, the Respondent implemented the Munroe-Meyer behavior plan, including the use of basketholds. Staff at Sheridan Elementary School received training by the Munroe-Meyer staff, including training on when and how to use the baskethold.

By November, 2008, [redacted] behavior problems were increasing. These problems became worse in January, and were getting worse both at school and at home. The Petitioners both testified that at this time they were becoming very concerned about [redacted].

During February the behaviors continued to escalate and the Petitioners began looking at medication issues. By March, 2009, [redacted] behaviors had become extremely disruptive both at school and at home. The problems included aggression toward others and toward [redacted]. Additionally, [redacted] was damaging property. At home, things had deteriorated to the point where the Petitioners were concerned for the safety [redacted].

On March 19, 2009, staff from the Munroe-Meyer Institute observed [redacted] at Sheridan Elementary in order to collect data regarding the high rates of aggressive and self injurious behaviors. The one day school observation resulted in two basic conclusions. First, that the baskethold was not being correctly utilized by some of [redacted] teachers. Second, that [redacted] should return to Munroe-

Meyer so the clinic could assist in modifying treatment so it could be better implemented by teachers.

Because of the increasing severity of problems, was spending less time in general education classroom, and more time in the calm down room away from general education peers. physical outbursts had resulted in injuries to four members of the staff at Sheridan Elementary. The injuries, which consisted of numerous bruises, were caused by being hit, kicked, and bitten by

The calm down room, also called the star room is a separate room at Sheridan Elementary. It is an area in the resource room that is used for a number of different purposes. These include instructional activity, structured learning, and as a place to calm down students. Use of the room is not restricted to special education students, and some general education students also use the room.

By April of 2009, the staff at Sheridan Elementary had decided to stop using the basket hold. It was their conclusion that the hold was no longer an effective intervention and that it may have been having the opposite of its intended effect.

By this same time, behavior at home had continued to deteriorate, and the Petitioners felt that as things stood they would not be able to keep at home. While trying to decide what to do with , they became aware of the Kennedy Krieger Institute, herein to referred to as KKI. KKI is located in

Baltimore, Maryland, and is affiliated with the Johns Hopkins University School of Medicine.

KKI provides functional behavior assessments to children at an in-patient hospital setting. Once the assessment is completed, the child is returned to his or her parents. KKI does not provide an academic program, does not do an educational evaluation, and is not a facility for the residential treatment of individuals with disabilities.

On approximately April 24, 2009, the Petitioners withdrew [redacted] from the Lincoln Public Schools and placed [redacted] at KKI. [redacted] was referred to KKI by the Petitioners for assessment and treatment because of [redacted] severe aggressive behaviors against others, [redacted] self injurious behavior, and property destruction. Over the next five months [redacted] remained at KKI. During that time KKI conducted a behavioral assessment and functional analysis of [redacted] [redacted] remained at KKI until September 23, 2009, when [redacted] returned home.

During the summer of 2009, the Petitioners also began exploring the availability of private schools for [redacted]. One of the schools they looked into was the Prairie Hill Learning Center. The Prairie Hill school is a private school that employs the Montessori method. It is located in rural Lancaster County, and for the 2009-2010 school year had approximately 25 students. The students are educated in an open room environment, in two classes. The first class consists of grades first through fourth, and the second class of students in grades fifth through eighth.

Prior to the time [redacted] was discharged, KKI prepared a behavioral intervention plan for [redacted] and sent it to the Petitioners. The Petitioners provided a copy of the plan to the Respondent. An integral part of the KKI plan was the use of basketholds as to help control [redacted] aggressive behaviors. On September 15, 2009, a meeting was held with the Petitioners and the Respondent to discuss

[redacted] IEP for the 2009-2010 school year. On September 17, 2009, an IEP meeting was held. That meeting was attended by the Petitioners and [redacted] IEP team. Prior to the meeting the Respondent had begun working on an IEP for [redacted]

At the request of the Petitioner's, the Respondent had also begun working on a behavioral intervention plan. Another IEP meeting was scheduled for September 28, 2009.

At the meetings, disagreements quickly developed between the Petitioners and the Respondent over the IEP and the behavioral intervention plan for [redacted]. Essentially, the Petitioners insisted that the KKI plan be adopted in its entirety, and the Respondent was not willing to do so. While there were a number of general areas of disagreement, the primary dispute related to when and how to use holds to control [redacted] negative behaviors. The baskethold was a central element of the KKI plan, and the Petitioners felt that an appropriate IEP for [redacted] could not be implemented without the baskethold. The Respondent was unwilling to agree to the baskethold, because they believed it had become counter productive during [redacted] third grade school year, and also because of safety concerns for school personnel and [redacted] when the baskethold was

implemented. The behavior plan proposed by the Respondent was based on the Mandt System Protocol.

Because the Respondent was not willing to implement the KKI plan in its entirety, the Petitioners withdrew [redacted] from the Respondent school district and did not agree to the IEP prepared for [redacted] fourth grade year. The Petitioners subsequently enrolled [redacted] at Prairie Hill where [redacted] remained throughout the fourth grade. The Respondent denied the request of the Petitioners that it pay the cost of [redacted] placement at Prairie Hill, on the grounds that [redacted] needs could be met at Sheridan Elementary.

On April 1, 2010, the Petitioners filed this action.

D. ANALYSIS AND CONCLUSION OF LAW

As stated above, [redacted] has been verified as having the disability of Autism under 92 NAC 51-006.04B. As such [redacted] has been, and continues to be, entitled to receive special education services.

The verification of [redacted] as a child entitled to receive special education services was made early in [redacted] life:

[redacted] was diagnosed with Pervasive Development Disorder, Not Otherwise Specified (PDD.NOS.) at 2 years of age by both Dr. Steenson in Omaha and Dr. Abraham Scheer in Lincoln. [redacted] has received intensive behavioral intervention through Lovaas Institute for

Early Intervention (LIFE) Midwest for 40 hours per week in home and/or school setting since August 2004.”

Exhibit 204, page 5.

This initial verification was made while the Petitioner’s resided in Omaha: was initially verified as a child with a Developmental Delay in April of 2002 through the Omaha Public Schools. subsequently received services through Project BEST-CASE in Omaha, Nebraska. family then moved to Lincoln, Nebraska and enrolled in Lincoln Public Schools in August 2003.”

Exhibit 207, page 3.

This verification continued when was enrolled with the Respondent. August 21, 2003, Multidisciplinary Evaluation Team Report found:

“The Multidisciplinary Team determined that meets the qualifying criteria in Rule 51 to be verified as a child with Autism. The Autism verification encompasses all Pervasive Developmental Disorders as defined in the Diagnostic and Statistical Manual (DSM-IV). Rule 51, Title 92, Nebraska Administrative Code, does not require nor allow for discrimination between specific Pervasive Developmental Disorders or Autism Spectrum Disorders. This decision is based on the presence of severe developmental and educational problems exhibited in varying degrees of atypical behavior and areas of cognitive processes, developmental rates and sequence, responses to sensory stimuli, communication, and relating to people, events and objects. In addition,

two physicians, Dr. Steenson in Omaha and Dr. Abraham Scheer, have diagnosed [redacted] with Pervasive Developmental Disorder.”

Exhibit 207, page 3.

This conclusion was again affirmed in the September 17, 2009, Multidisciplinary Evaluation Team Report prepared for [redacted] that concludes as follows:

“The Multidisciplinary Team determined that [redacted] continues to meet Nebraska qualifying criteria as a student with Autism. This decision is based upon a comparison of the state’s criteria for such designation with current assessment information.”

Exhibit 201, page 3.

A 2006 assessment of [redacted] intellectual abilities reached the following conclusions:

“PREVIOUS ASSESSMENT INFORMATION:

[redacted] was evaluated by Dr. Lorrie Bryant, Ph.D. on May 23 and 24, 2006.

COGNITIVE FUNCTIONING:

Stanford-Binet Intelligence Scale, Fifth Edition (SB5)

Scale/Standard Age Score/ Percentile/Range

Verbal Reasoning/ 76/ 5th/ Borderline

Nonverbal Reasoning/ 93/32nd/Average

Full Scale/ 84/ 14th/ Low Average

ACADEMIC ACHIEVEMENT:

Woodcock-Johnson III, Tests of Achievement

Scale/Standard Age Score/ Percentile Rank

Letter/Word Identification/ 137/99th

Passage Comprehension/ 115/ 85th

Calculation/unable to score

Applied Problems/ 78/7th

Spelling/ 129/ 97th

Academic Skills/ 124/ 94th".

Exhibit 201, pages 3-4.

autism affects in a number of ways both behaviorally and academically:

"The information indicates that displays varying degrees of significant disturbance in each of the following areas: (1) relating to people, events, and objects; (2) rate and sequence of development, with delays, arrests, or regressions in physical, social, sensory processing; (3) cognitive processes; (4) responses to sensory stimuli and; (5) communication."

Exhibit 201, page 3.

In the April, 2009 MDT report, the Respondent stated:

"Information Provided by Parent/Guardian

expressed concerns about behavior at home.
also shared that may be a patient at John Hopkins hospital.

Current Classroom Performance

In a 1-1 setting, [redacted] completed grade level work in all areas except math and written expression.

Student's Actual Achievement Level

In a 1-1 setting, [redacted] was on grade in reading comprehension and spelling. [redacted] was on second grade level math. [redacted] struggled with written expression and is on second grade level in this area.

Curriculum Base Measurement Performance Levels

[redacted] participated in grade level CRT's and classroom assessment.

Additional Observations by Staff

[redacted] enjoys learning and participating with same age peers in academic tasks.

Other Relevant Information

[redacted] enjoys animals and [redacted] hopes that [redacted] will be able to continue [redacted] work with horses."

Exhibit 202, page 10.

In summary, [redacted] is a child with autism in the mild to moderate range, and an overall mental capacity in the low average range. The behavioral problems that result from [redacted] autism have a negative effect on [redacted] ability to learn.

During the time that [redacted] was receiving [redacted] special education program from the Respondent, the Petitioners were as interested, concerned, and involved in that program and with [redacted] as any parents could be. That involvement was with the services [redacted] received at school from the Respondent,

and those received outside of school from other individuals and organizations. Over that period of time the Petitioners developed a growing dissatisfaction with the educational program received from the Respondent. That dissatisfaction resulted in their decision to withdraw from the Respondent in April of 2009, the evaluation of at KKI, and eventual enrollment in a private school, Prairie Hill.

This case involves numerous issues. At its core, it primarily involves the Petitioner's request to have receive schooling at Prairie Hill. They are also seeking reimbursement for certain expenses they incurred, including the cost of attendance at Prairie Hill, beginning with the 2009-2010 school year. These are appropriate subjects for a due process complaint under Rule 55 of the Nebraska Department of Education. 92 NAC 51-015.02B.

The rules and regulations adopted by the Nebraska Department of Education specify what the Petitioners must establish in order to prevail upon their Petition. Nebraska Department of Education rules provide:

015.02B1 If the parents of a child with a disability, who previously received special education and related services under the authority of the school district or approved cooperative, enroll the child in a nonpublic preschool, elementary or secondary school as a means of obtaining special education and related services without the consent of or referral by the school district or approved cooperative, a court or a

hearing officer may require the school district or approved cooperative to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the school district or approved cooperative had not made a free appropriate public education available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.

015.02B1a A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the school district or approved cooperative.

92 NAC 51-015.02B1.

As to the amount of the reimbursement, the rules state:

015.02C The cost of reimbursement described in 92 NAC 51-015.02B1 may be reduced or denied if:

015.02C1 At the most recent IEP team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the school district or approved cooperative to provide a free appropriate public

education to their child, including stating their concerns and their intent to enroll their child in a nonpublic school at public expense; or

015.02C2 At least 10 business days (including any holidays that occur on a business day), prior to the removal of the child from the public school or approved cooperative, the parents did not give written notice to the school district of the information described in 92 NAC 51-015.02C1; or

015.02C3 If prior to the parents removal of the child from the public school, the school district or approved cooperative informed the parents, through the notice requirements described in 92 NAC 51-009.05, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

015.02C4 Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

92 NAC 51-015.02C.

The burden of meeting each requirement of the above rules is on the Petitioners. *Shaffer v. Weast* 546 U.S. 49, 44 IDELR 150 (2005).

Therefore, in order to prevail on their complaint, the Petitioners must show the following:

1. That the Respondent did not make a free appropriate public education available to
2. That enrollment at Prairie Hill was appropriate; and
3. That the Respondent was properly informed by the Petitioners that they rejected the placement proposed by the Respondent and that they intended to place in a nonpublic school at public expense, in this case Prairie Hill.

Initially, it is noted that the requirements of the above-stated rules only apply if the placement of at Prairie Hill occurred "without the consent of or referral by" the Respondent. 92 NAC 51-015.02B1. Certainly the Respondent did not consent to the placement.

Accordingly, the initial, and primary determination that must be made is whether a free appropriate public education was made available to by the Respondent.

The Nebraska Special Education Act, Neb. Rev. Stat. § 79-1110 et seq., and the Individuals with Disabilities Education Act, 20 USC § 1400 et seq., together with their accompanying regulations require that all qualifying, disabled children be provided with a "free appropriate public education". This is an obligation that is imposed upon all school districts that accept Federal funds under the IDEA. *Blackmon vs. Springfield School District*, 198 F.3rd 648 (8th Cir. 1999).

The phrase "free appropriate public education" is defined 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 school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 USC 1401(9).

The goal is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes 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)(1)(A).

The United State Supreme Court has held that the requirement to provide an appropriate free public education is met, "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Hendrick Hudson Dist. Bd. Of Ed. vs. Rowley*, 458 U.S. 176, 203 (1982). This standard has been adopted in Nebraska. *Williams vs. Gering Public Schools*, 236 Neb. 722, 463 N.W.2d 799 (1990).

If an IEP was properly prepared, and [redacted] was receiving educational benefit from that IEP, then [redacted] was receiving an appropriate education:

The IDEA's legal obligations are fulfilled when the school district (1) complies with the law's procedures in developing an IEP, and (2) the resulting IEP is "reasonably calculated to enable the child to receive educational benefits [.]” *Rowley*, 458 U.S. at 207. “An IEP should be set aside only if procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of educational benefits.” *Indep. Scho. Dist. No. 293 v. S.D. by J.D.*, 88 F. 3d 556, 562 (8th Cir. 1996) (quotation omitted).

Lathrop R-II Sch. Dist. v. Gray ex rel. D.G., 54 IDELR 276 (8th Cir. 2010).

Challenges to a special education program, and whether it provides a free appropriate public education, can be made on both procedural and substantive grounds. In the present case, the Petitioners raise issues relating to each.

As to a procedural attack the Nebraska Department of Education rules provide as follows:

008.03 In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate education only if the procedural inadequacies:

008.03A Impeded the child’s right to a free appropriate public education;

008.3B Significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate education to the parents' child; or

008.03C Caused a deprivation of educational benefit.

92 NAC 55-008.03.

Courts have held that an IEP can be set aside when "procedural inaccuracies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits." *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d. 556 (8th Cir. 1996).

The key elements of the test are whether the parents received proper notices and were afforded a significant opportunity to be involved in the IEP process. A review of the record does not reveal any procedural violations that denied the Petitioners an opportunity to be involved in the IEP process. Notices were sent in a timely manner. IEP meetings and MDT meetings were scheduled as required. There were numerous contacts between the Petitioners and various members of IEP team. The Petitioners had numerous opportunities to be involved in IEP process, and took advantage of those opportunities. The Respondent reviewed information received from the Petitioners, including the KKI report. While the Petitioners disagreed with the IEP that was being developed for in September of 2009, there were no procedural violations that hampered their participation in the IEP process or caused a deprivation of educational benefits to

In addition to asserting that the Respondent did not follow the appropriate procedures in preparation of IEP's, the Petitioners also alleged that the school district did not follow the appropriate procedures in disciplining

During third grade year, as behavior deteriorated, was spending less time in general education classroom and more time in the calm down room, away from general education peers. The Petitioner's assert that this constituted a disciplinary removal of from school that required the Respondent to make a determination as to whether the punishment resulted from disability.

The discipline of student's with disabilities is governed by 92 NAC 51-016, and is subject to due process review under 92 NAC 51-016.01B1.

The Nebraska Department of Education rules in effect for the 2008-2009 school year provided:

016 Disciplinary Removal of Students with Disabilities

016.01 Change of Placement for Disciplinary Removals

016.01A For the purpose of removals of a child with a disability from the child's current educational placement under Section 016, a change of placement occurs if:

016.01A1 The removal is for more than 10 consecutive days; or

016.01A2 The child is subjected to a series of removals that constitute a pattern

because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and proximity of the removals to one another.

92 NAC 51-016.01.

When there is a disciplinary removal of a student with a disability, the school district is required to make a manifestation determination.

The Department of Education rules relating to a manifestation determination review provide as follows:

016.02E Manifestation Determination

016.02E1 Except as provided in 92 NAC 51-016.02B, within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the school district or approved cooperative, the parent, and relevant members of the IEP Team (as determined by the parent and the school district or approved cooperative) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine:

016.02E1a If the conduct in question was caused by or had a direct and substantial relationship to, the child's disability; or

016.02E1b If the conduct in question was the direct result of the school district's or approved cooperative's failure to implement the IEP.

* * *

016.02E3 If the school district or approved cooperative, the parent, and relevant members of the IEP Team determine that either 92 NAC 51-016.02E1a or 92 NAC 51-016.02E1b is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

92 NAC 51-016.02E.

If the conduct is not a manifestation of the child's disability, the rules provided as follows:

016.02C If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to 92 NAC 51-016.02E, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the

same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in 004.01, although it may be provided in an interim alternative educational setting.

91 NAC 51-016.2C.

For purposes of the present hearing, the key element of the above stated rules is whether there was a change of placement as defined by 92 NAC 51-016.01.

Clearly behavioral problems at school were caused by and had a direct and substantial relationship to autism. That includes the injuries caused to teachers. However, it is equally clear that was not disciplined for those behaviors, and that there was not a change of placement as described by 92 NAC 51-016.01. was not suspended from school, nor was expelled. Neither was there an in school suspension. While the amount of time spent in the general education classroom varied, and as the semester went on decreased, remained in a placement provided for by IEP. was never removed from that placement, and variations in the amount of time spent at each location was done in an effort to provide with educational program. It was not a disciplinary removal.

was not accused by the Respondent of a violation of the code of student conduct. Nor was disciplined for behaviors. That being the case,

the Respondent was not obligated to make a manifestation determination under 92 NAC 51-016.02E.

From a substantive standpoint, in order to provide a free appropriate public education a school district must prepare an IEP reasonably calculated to enable a child to receive educational benefit. The Petitioners assert that the Respondent did not do this.

To receive a free appropriate public education, it is necessary that a student receive his or her educational program in the least restrictive environment. The Petitioners assert that under this requirement must be placed at Prairie Hill. In support of this argument they point out that while was at Sheridan, and particularly during third grade year, progressively spent more of time outside of the general education classroom, and that at Prairie Hill received schooling in the general education classroom.

Both State and Federal statutes and rules express a strong preference for educating children in the school they would attend if not disabled. The Nebraska rules provide as follows:

008 Placement of Children with Disabilities

08.01 Least Restrictive Environment (LRE) Requirements

008.01A The school district shall establish policies and procedures to assure that, to the maximum extent appropriate, children with disabilities including children in public or nonpublic schools and approved service agencies are

educated with children who are not disabled, and that 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 is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

008.01G Unless a child's IEP or IFSP requires some other arrangement, the child must be educated in the school which he or she would attend if not disabled.

92 N.A.C. 51-008.01.

As a general proposition, children with disabilities are only to be educated outside of their residential school only when it would not be possible to provide them with a free appropriate public education at that school. The test for removal of a child from his or her residential school or removal from the general education classroom turns on whether the student can be educated satisfactorily in such school or classroom with the use of supplementary aids and services. *Oberti v. Board of Education*, 995 F.2d 1204 (3rd Cir. 1993). It is a goal of the Individuals with Disabilities Education Act to enable disabled children to be educated alongside their non-disabled peers rather than to be shut off from them. Disabled students are to be educated in a mainstream classroom

whenever possible. *Board of Education v. Rowley*, 458 U.S. 176, 202, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982); *Gill v. Columbia 93 School District*, 2000 WL 914155 (8th Cir. July 10, 2000); *Fort Zumwalt School Dist. v. Clynes*, 119 F.3d 607,612 (8th Cir. 1997).

There are two basic elements of the requirement that a school provide an education in the least restrictive environment. The first element comes from the requirement, under 92 NAC 51-008.01G, that a child must be educated in the school he would attend if not disabled, unless a different arrangement is required for his IEP. In this case that school is Sheridan Elementary. The second issue, the extent to which a child is educated with regular education peers, only arises after it has first been determined whether or not the IEP can be provided at the school the student would attend if not disabled. Under the definitions provided by the Department of Education rules, Prairie Hill is a more restrictive environment than Sheridan Elementary School, even if spends a greater portion of time at Prairie Hill with non-disabled students. Accordingly, the initial assessment must be the educational program provided to at Sheridan Elementary.

While there is disagreement regarding how to quantify the severity and number of aggressive behaviors while at Sheridan Elementary, it can be generally summarized that as each school year progressed behavior became more problematic. This was particular true during third grade year.

There undoubtedly were numerous causes for this. However, at least in third grade one of the causes was the lack of consistency in reacting to

behavior. This inconsistency existed not only between the Respondent and the Petitioners, but among the Respondent's teachers.

All parties recognized that consistency was important with In the April 13, 2009, MDT report the Respondent stated:

"Consistency is essential: Provide a safe and predictable environment where transitions can be minimized; provide a consistent daily routine; prepare for changes in routine and new activities.

 requires a learning environment where sees as competent.

Teachers and staff should minimize affect in their voices. Be calm, predictable, and matter-of-fact with dealing with

Exhibit 202, page 5.

A element of the lack of consistency related to when and how the basket holds were administered. This problem was noted by Munroe-Meyer during its March 19, 2009, evaluation, was a concern to the Petitioners during the 2008-2009 school year, and recognized by the Respondent in March, 2009.

By the end of March 2009, all parties were in agreement that modifications needed to be made to special education program. Even the Munroe-Meyer Institute acknowledged that program needed to be modified so that it could be more consistently and easily implemented by teachers. A modification being considered by the Respondent, and of particular concern to the Petitioners, was to stop the use of the baskethold and begin a different type of hold.

Any potential modification of special education program in March or April 2009, was put on hold when the Petitioners withdrew from the Respondent and admitted to KKI. The issue again resurfaced when the parties began working on an IEP for in September 2009.

A substantial portion of the Plaintiff's objection to the educational program proposed for in September 2009, relates to the refusal of the Respondent to accept in full the recommendations of KKI.

Certainly, KKI and its staff were well qualified to evaluate and prepare a behavioral plan for. The KKI staff was very experienced in evaluating autistic children. Dr. Kahng's qualifications are outstanding, and the methods and procedures utilized over the five months was at KKI are very impressive. It is hard to imagine that there is an institution better qualified than KKI to conduct an evaluation of an autistic student in a structured setting.

At the same time, the staff at the Respondent, including IEP team at Sheridan Elementary School, was also well qualified and very experienced in dealing with autistic students and the provision of their IEP in a public school setting.

As to and IEP, the issue is whether the failure of the Respondent to incorporate the entire behavioral intervention plan prepared by KKI denied a free appropriate public education.

Department of Education rules do not require that a school district automatically accept the recommendations of an independent evaluation such as

that performed by KKI. However, neither can a school district automatically reject the evaluation:

006.07G If the parent obtains an independent educational evaluation at public expense or shares with the school district or approved cooperative an evaluation obtained at private expense, the results of the evaluation:

006.07G1 Must be considered by the school district or approved cooperative, if it meets school district or approved cooperative criteria, in any decision made with respect to the provision of a free appropriate public education to the child; and

006.07G2 May be presented by any party as evidence at a hearing under 92 NAC 55 regarding that child.

92 NAC51-006.07G.

In *Lathrop R-II Sch. Dist. v. Gray ex rel. D.G.*, 54 IDELR 276 (8th Cir. 2010), the 8th Circuit Court of Appeals has recently weighed in on the issue stating:

"The IDEA does not however require an IEP to create specific goals with regard to behavior. If a behavior impedes a child's learning, the IEP team need only "*consider*, when appropriate, strategies, including positive behavioral interventions, [*13] strategies, and supports to address that behavior [.]" 20 U.S. C. § 1414 (d) (3) (B) (i) (emphasis applied).

* * *

In CJN, we concluded that even if “more positive behavior interventions could have been employed, that fact is largely irrelevant” where the school district made a “good faith effort” to help the student achieve the educational goals outlined in his IEP.”

Lathrop R-II Sch. Dist. v. Gray ex rel. D.G., supra.

When the KKI plan was prepared, it was forwarded to the Petitioners. They in turn forwarded it to the Respondent. Upon receipt of the plan, the Respondent reviewed it, discussed it, and began to incorporate portions of it into proposed IEP for the 2009-2010 school year. The Respondent accepted portions, and rejected others. They stated legitimate reasons for their decisions, including the safety of staff and effectiveness with and concerns over the use of some of the recommended methods in a public school setting. The Respondent’s efforts were in good faith and from the standpoint of the above cited rule, the Respondent met its obligation to consider the KKI evaluation.

In support of placement of at Prairie Hill, the Petitioners argued that Prairie Hill was a better place for behaviorally, that made better progress educationally, and that was better integrated with non-handicapped students. In support of these arguments they point to a number of factors regarding schooling at Prairie Hill. These arguments, however, overlook the very basic premise that the provision of a free appropriate education is not a comparative test, and not based upon a standard of where a student can receive the best education. The initial issue is not whether Prairie Hill is a better place for to

receive special education services, or even if it is an appropriate place for to receive those services. Before the Respondent can be required to pay for

schooling at Prairie Hill, the Petitioner's must first show that was not provided a free appropriate public education by the Respondent at Sheridan Elementary.

There is no requirement that a school district seek to maximize a student's educational benefits. Instead, the student must receive a "basic floor of opportunity, or access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Rowley*, 458 U.S. at 200-01.

As with other issues involved in this case, the *Lathrop R-II Sch. Dist. v. Gray ex rel. D.G.*, 54 IDELR 276 (8th Cir. 2010) case addressed the question of what is meant by an educational benefit:

"The IDEA entitles students with disabilities to a FAPE. Because each child's needs and abilities are unique, however, the law does not mandate the acquisition of specific knowledge or "strict equality of opportunity or [*9] services." *Bd of Educ. v. Rowley*, 458 U.S. 176, 198, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). "[T]he IDEA does not require that schools attempt to maximize a child's potential, or, as a matter of fact, guarantee that the student actually make any progress at all." *CJN v. Minneapolis Pub. Sch.*, 323 F. 3d 630, 642 (8th Cir. 2003); see also 34 C.F. R. § 300.350.

* * *

While academic progress alone does not prove that the child received a FAPE, it "is an important factor in ascertaining whether a disabled student's IEP was reasonably calculated to provide educational benefit[,]" especially where, as here, the student's learning ability is hampered by continual behavioral issues *CJN*, 323 F. 3d at 638 (quotation omitted).

* * *

The IDEA does not mandate the inclusion in an IEP of a behavior plan, see *Renollett*, 440 F. 3d at 1011, let alone behavioral improvements.

* * *

The IDEA "does not require that a school either maximize a student's potential [*18] or provide the best possible education at public expense." *Clynes*, 119 F. 3d at 612. A school district fulfills its legal duty when, as here, it "provides individualized education and services sufficient to provide disabled children with 'some educational benefit'". *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F. 3d 648, 658 (8th Cir. 1999) (quoting *Rowley*, 458 U.S. at 200).

Lathrop R-II Sch. Dist. v. Gray ex rel. D.G., 54 IDELR 276 (8th Cir. 2010) supra.

In *Rowley*, the Supreme Court held that children entitled to receive special education services need to receive personalized instruction with sufficient support services to permit them to receive an educational benefit. The *Rowley* case answered many questions, but also raised others, including that of the quantity of educational benefits a special education student was entitled to receive. That question was answered by determining that the student was

entitled to receive "some" benefit, which inevitably raised the further question of how much is "some".

In *Lathrop*, and other 8th Circuit cases, the Court has answered that question by concluding, in essence, that sometimes "some" is not much and sometimes "some" is not any. The *Lathrop* case basically requires a school district to attempt to provide some educational benefit, but further states that the attempt does not necessarily need to result in the student making any progress at all.

In the present case, there is a great deal of disagreement between the Petitioners and the Respondent over the amount of educational progress was making. However, clearly was making some progress and receiving some educational benefit. advanced from grade to grade, was meeting to some extent the district assessments, and in the third grade made enough progress that the Respondent was going to advance to fourth grade. Whether was making the progress could have made, or even making the progress should have made, does not appear to be a standard relative under the *Lathrop* case.

The Respondent elicited testimony from a number of its employees regarding whether or not had been provided with a free appropriate public education while at Sheridan Elementary School. These witnesses included Deborah J. Rauner, a behavioral specialist, Mary Flory, a special education teacher, Barb Peterson, the Special Education Coordinator for Sheridan Elementary, Mary Kanter, the Sheridan Elementary School Principal, and Mary

Ells, the Assistant Director of Special Education. Each of these witnesses testified that [redacted] made educational progress while at Sheridan Elementary, that [redacted] IEP's provided [redacted] with appropriate support services, and that a free appropriate public education was made available to [redacted] while [redacted] was a student of the Respondent, including the IEP that was being developed in September of 2009.

The Petitioners disputed that [redacted] was receiving an educational benefit, at least during the later part of [redacted] third grade year, and also disputed that [redacted] would receive an educational benefit under the draft of the IEP proposed for fourth grade year. In addition, Dr. Kahng testified that he did not believe that [redacted] would receive an educational benefit from the Respondent during [redacted] fourth grade year. This opinion was not based on [redacted] proposed IEP, which Dr. Kahng had not read. One basis for this opinion was the Respondent's proposal to continue with use of the calm down room. Dr. Kahng felt that the use of the calm down room was counter productive, because it was a place [redacted] desired to be. He concluded that since bad behavior resulted in the calm down room, the use of the room encouraged [redacted] bad behavior. Dr. Kahng felt that [redacted] bad behavior could better be controlled with the use of the baskethold.

While Dr. Kahng's credentials regarding autism and behavioral programs are above question, whether or not the behavioral interventions proposed by the KKI plan are better than those proposed by the Respondent is not the issue. Nor is the issue whether the KKI plan would do a better job than the Respondent's plan of controlling [redacted] negative behaviors. The *Lathrop* case makes it clear

that the test is whether or not the IEP provides with an opportunity to receive some amount of educational benefit. The evidence in this case shows that had received some educational benefit while at the Respondent and that had remained a student would have continued to receive some education benefit.

The Petitioners placed : at KKI from approximately April 24, 2009, through September 23, 2009. The Petitioners request reimbursement for the cost of this placement, in the amount of \$430,184.05. As a basis for this request, they cite general tort law regarding the measure of damages.

General tort principles do not apply in a special education case. Rather, the Petitioners are entitled to recover against the school district only those amounts authorized by state and federal laws and regulations relating to special education.

The Nebraska regulations do provide for certain circumstances under which a Respondent school district can be required to pay for an independent educational evaluation, even if the district was providing a free appropriate public education.

An independent educational evaluation is defined as follows:

“Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the school district or approved cooperative responsible for the education of the child in question.”

92 NAC 51-003.33.

The rules relating to a respondent's payment for an independent evaluation provide as follows:

- 006-07A A parent of a child with a disability has the right to obtain an independent educational evaluation of the child at public expense if the parent disagrees with the evaluation obtained by the school district or approved cooperative, subject to the provisions of 92 NAC 51-006.07.
- 006.07B Each school district or approved cooperative shall provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the school district's or approved cooperative's criteria applicable for independent educational evaluations.
- 006.07C A parent is entitled to only one independent educational evaluation at public expense each time the school district or approved cooperative conducts an evaluation with which the parent disagrees.
 - 006.07C1 Public expense means that the school district or approved cooperative either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.

006.07D If a parent requests an independent educational evaluation at public expense, the school district or approved cooperative must, without unnecessary delay, either:

006.07D1 Initiate a hearing under 92 NAC 55 to show that its evaluation is appropriate; or

006.07D2 Ensure that an independent educational evaluation is provided at public expense, unless the school district or approved cooperative demonstrates at a hearing under 02 NAC 55 that the evaluation obtained by the parent did not meet school district or approved cooperative criteria.

92 NAC 51-006.07A-D.

Even assuming that the KKI evaluation constituted an educational evaluation, an assumption that would be subject to dispute, the evaluation at KKI was not carried out pursuant to the above referenced procedures. While the Petitioners were dissatisfied with the progression of schooling at the Respondent, at no time did the Petitioners request that the Respondent provide with an independent educational evaluation or that such an evaluation be performed by KKI. Nor was there any discussion regarding possible locations for an independent educational evaluation or the criteria for such an evaluation. The Petitioners unilaterally withdrew from the Respondent and unilaterally admitted to KKI. The procedures of 92 NAC 51-006.07 not having been

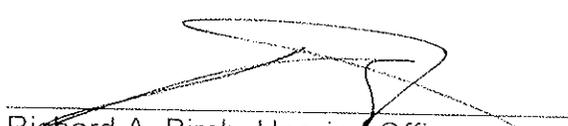
followed, the Respondent can not be ordered to pay for the cost of KKI as an independent educational evaluation.

Under the standard established by *Lathrop R-II Scho. Dist. v. Gray ex rel. D.G.*, 54 IDELR 276 (8th Cir. 2010), the Hearing Officer finds that the IEPs prepared for _____ with the involvement of the Petitioners, provided individualized education and services sufficient to provide _____ with some educational benefit. Accordingly, the Respondent has met its obligations to _____ and the Petitioners both procedural and substantively.

IT IS THEREFORE ORDERED as follows:

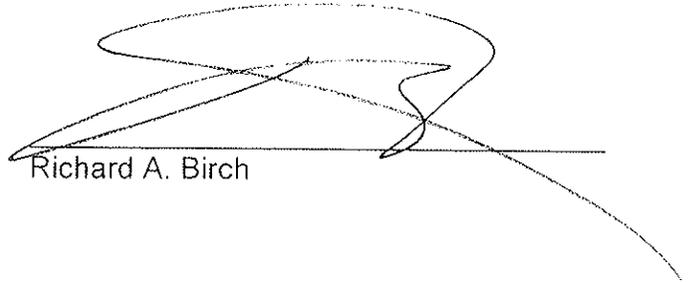
1. The Respondent has made available to _____ a free appropriate public education in accordance with Federal and State law and the applicable regulations.
2. The Petitioner's Special Education Petition is dismissed with each party to pay their own costs.
3. The Hearing Officer's findings of fact and conclusions of law are hereby adopted in all respects and made a part of this Order by reference to the same extent and with like effect as if such findings of fact and conclusions of law were fully set forth herein.

Dated this 10 day of September, 2010


Richard A. Birch, Hearing Officer
410 North Ash – P. O. Box 1006
North Platte, NE 69103-1006
(308) 532-3150

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served upon Mr. Mark C. Laughlin, Attorney for Petitioner, 409 South 17th Street, Suite 500, Omaha, NE 68102; Mr. Gregory H. Perry, Attorney for Respondent, 233 South 13th Street, Suite 1400, Lincoln, NE 68508; and upon the Nebraska Department of Education, Attn: Margaret E. Worth, Special Education Branch, P.O. Box 94987, Lincoln, NE 68509, by placing in the U.S. First Class Certified Mail, return receipt requested, postage prepaid, on September 10, 2010.



Richard A. Birch