

BEFORE THE NEBRASKA DEPARTMENT OF EDUCATION

)	Case No. 19-05 SE
)	
)	
)	
Petitioner,)	HEARING OFFICER'S REPORT,
)	FINAL DECISION, AND ORDER
vs.)	
)	
LINCOLN PUBLIC SCHOOL DISTRICT)	
5905 O Street)	
Lincoln, NE 68510)	
)	
Respondent.)	

The following constitutes the Report, Final Decision, and Order of the Hearing Officer, Dennis C. Tegtmeier, Attorney at Law, 250 The Apothecary Building, 140 North 8th Street, Lincoln, Nebraska, 68508, (402) 476-1829, pursuant to *Neb. Rev. Stat.* §79-1163 (Reissue 2014), Title 92, Nebraska Administrative Code, Rule 55 of the Nebraska Department of Education effective September 9, 2012 (Revised) and Hearing Officer's Notice of Assignment dated May 8, 2019 by the Nebraska Department of Education. This is a special education matter involving

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 Education Act, 20 U.S.C. § 1400 et seq.

B. BACKGROUND

Petitioner, "Petitioner"), on behalf of

filed a Due Process Petition with the Nebraska Department of Education on May 8, 2019.

The hearing was held on June 10 and 11, 2019 pursuant to the Prehearing Conference Order which are contained in the filings of this case. Witnesses were not sequestered. The hearing was recorded by JS Wurm & Associates, 233 S. 13th Street, Suite 1712, Lincoln, Nebraska 68508.

Petitioner, was present throughout the entire hearing. was not represented by an attorney and proceeded pro se. The Respondent, Lincoln Public School District was represented by Attorneys Gregory H. Perry and Haleigh B. Carlson, Perry, Guthery, Haase & Gessford P.C. L.L.O. 233 South 13th Street. Lincoln, Nebraska, (402) 434-3000.

The hearing was held pursuant to the Prehearing Conference Order which is contained in the filings in this matter. The hearing was open to the public. The hearing was conducted informally as neither of the parties requested that the Nebraska Rules of Evidence be invoked.

The hearing was completed on June 13, 2019, at approximately 2:15 p.m. At that time, the Hearing Officer closed the record, took the matter under advisement and entered a Post Hearing Order in which he directed the parties to submit simultaneously, on July 29, 2019, legal briefs, proposed findings of fact, and conclusions of law to the Hearing Officer and to mail a copy to each other. As a part of the Post Hearing Order, the Hearing Officer ordered the record of the hearing to be transcribed, by the court reporter, and the parties were to be furnished with a copy of the transcript of the hearing. Post Hearing Order dated June 13, 2019.

The parties were furnished a copy of the transcript of the hearing by e-mail attachment. The Hearing Officer's deadline to render a decision in this matter was extended by written stipulation of the parties to August 29, 2019.

The parties submitted legal briefs, proposed findings of fact, and conclusions which were received by the Hearing Officer.

At the hearing, [redacted] claimed Lincoln Public Schools denied [redacted] a FAPE during the 2018-2019 school year at McPhee Elementary (“McPhee”) and that [redacted] was subject to physical and sexual abuse while in the care and custody of Lincoln Public Schools. [redacted] testified that

[redacted] is seeking an order for the staff at McPhee to get additional training on children with Down Syndrome and appropriate discipline. [redacted] also wants cameras in all of the classrooms at McPhee, including special education classrooms and disciplinary rooms. [redacted] also seeks McPhee and the IEP team to reconsider [redacted] alleged change of placements for 17:1-18:5.

Petitioner argues that as a result of Respondent’s procedural and substantive IDEA violations, [redacted] has suffered serious setbacks that require significant compensatory education. Petitioner argues further that Respondent must: immediately hold an IEP meeting to revise goals and supplementary aids and services; conduct a new functional behavioral assessment (FBA) to determine [redacted] behavioral needs; implement a new behavioral intervention plan (BIP) to support [redacted] behavioral needs; return [redacted] to the least restrictive environment of the regular classroom; and provide [redacted] with compensatory services to remedy the harm inflicted upon [redacted] due to Respondent’s actions and inaction. (Petitioner’s Post-Hearing Brief at pages 2 and 3).

Ex. 1 through 32, 101 through 113, 115 through 122, 125 through 128, and 130 through 143 were received into evidence. The following exhibits were identified, offered, and received into evidence during the hearing (except as indicated). After the record was closed, at the request of the Hearing Officer for clarification, the parties entered into a Stipulation Regarding Ex. 113 which is made part of the record. The Stipulation states: “The parties stipulate that Ex. 113 is [redacted] IEP

originally developed on or about January 31, 2018 for the period of time indicated in the document as the start date and end date, that this IEP was amended on May 11, 2011 at an IEP meeting held on or about May 11, 2018 only to additionally provide for Extended School Year services, and agree that this stipulation made be made part of the record.” The Hearing Officer has considered the weight and probative value to be given to all the exhibits in making his Findings of Fact and Conclusions of Law.

EXHIBIT	PAGES	DESCRIPTION
1		Chapter 51 sections
2		Daily Schedule
3		Letter to Seth Lutz
4		Daily sheets
5		Notice of Change of Placement, 4/4/19 with note
6		E-mail from Seth Lutz
7		E-mail from Christine Boden
8		Notice of District Decision Regarding Requests, 11/28/18
9		Daily Schedule
10		Notice of District Decision Regarding Requests, 12/11/18
11		Photographs
12		Police reports
13		Photographs
14		Photographs with documentation
15		Handwritten notes
16		Meeting Request, 12/13/18, and agenda
17		Letter from Joseph Wright, Director of Security Lincoln Public Schools

18		Letter from Aubrey Yost, Child Advocacy Center
19		Notice of Change of Placement, 1/17/19
20		Letter from Tara Goesch, Children's Hospital
21		Daily Schedule
22		Meeting Request, 4/1/19, with note
23		Daily sheets
24		Seclusion/Restraint Student Profile
25		Call log
26		E-mail chain
27		E-mail chain
28		E-mail chain
29		E-mail chain
30		E-mail chain
31		IEP, 1/31/18
32		IEP, 11/12/18
33		Internet article not received objections sustained
34		Internet article not received objections sustained
35		Internet article not received objection sustained
101		Jenny Fundus resume and certificate
102		Scott Eckman resume and certificate
103		Amy Lyons resume and certificate
104		Christine Boden resume and certificate
105		Seth Lutz resume and certificate
106		Derek Johnson resume and certificate
107		Rose Trudell resume and certificate
108		Rule 51 Effective Date January 1, 2017 (Revised)

109		Rule 55 Effective Date September 9, 2012 (Revised)
110		Parental Rights in Special education
111		MDT, 2/7/17
112		MDT, 11/12/18
113		IEP,1/31/ IEP with Amendment 5/11/18
114		*withdrawn*
115		Meeting minutes, 4/2/19
117		Report cards
118		Graphs Aug-Nov 2018
119		Graphs Nov 2018 to May 2019
120		Time back to class data
121		Functional Behavior Assessment
122		Behavior Intervention Plan
123		*withdrawn*
124		*withdrawn*
125		BIP Planning, 2/8/19
126		BIP Meeting Agenda, 2/12/19
127		Daily documentation sheets
128		Daily documentation sheets
129		*withdrawn*
130		Incident report, 4/2/19
131		Child Abuse/Neglect Reports
132		Police report
133		Student Discipline Profile
134		Declinations
135		Notice of District Decision Regarding Requests, 11/28/18

136		PPC Complaint vs. Derek Johnson
137		Dismissal of PPC Complaint
138		Notice of District Decision Regarding Requests, 4/12/19
139		Contact log
140		Flash drive of emails
141		E-mail chain
142		E-mail chain
143		Letter from Joseph Wright
144		Stipulation of no Agreement
145		Notice of Hearing
146		Prehearing Conference Order
147		Letter to hearing officer from

C. WITNESSES

The Petitioner called the following witnesses in case-in-chief:

- 1.
2. Rose Trudell, General Education Teacher, Fifth Grade, 945 D Street, Apartment 14,
Lincoln, NE 68502
3. Derek Johnson, Special Education Teacher at McPhee Elementary, 3525 Pawnee Street,
Lincoln, NE 68506

The Respondent called the following witnesses in its case-in-chief:

1. Alyssa Novotny, Special Education Para, 1730 Prairie Lane, Lincoln, NE 68521
2. Amy Lyons, School Psychologist, 1416 Imperial Drive, Lincoln, NE 68506

3. Derek Johnson, Special Education Teacher at McPhee Elementary, 3525 Pawnee Street, Lincoln, NE 68506

4. Christine Boden, Principal at McPhee School, 2809 Jackson Drive, Lincoln, NE

5. Seth Lutz, Assistant Principal at McPhee School, 7644 Rutledge Avenue, Lincoln, NE

6. Jennifer Fundus, Director of Special Education, 5905 O Street, Lincoln, NE 68510

The witnesses who testified and their qualifications are presented in the order in which they testified:

1.

2. Rose Trudell was 5th Grade classroom teacher during the 2018-2019 school year. She holds a current Nebraska Department of Education educator's certificate. (Ex. 107). She is endorsed in the areas of Elementary K-6 and Special Education Deaf/Hard of Hearing, PK-6 and 7-12. Ms. Trudell was a member of IEP team in the 2018-2019 school year. (Ex. 110, 111, 112, 114-116).

3. Alyssa Novotny was one of Paraeducators during the 2018-2019 school year. She is Mandt trained 231:24-232:2.

4. Derek Johnson was Special Education teacher and IEP Case Manager during the 2018-2019 school year. He holds a current Nebraska Department of Education educator's certificate. Ex. 106. He is endorsed in the areas of Special Education Generalist K-6 and Elementary K-6. He is Mandt trained Ex. 106 and 211:4. Mr. Johnson was a member of IEP team in the 2018-2019 school year. Ex. 110, 111, 112, 114-116.

5. Amy Lyons was School Psychologist during the 2018-2019 school year. She holds a current Nebraska Department of Education educator's certificate. Ex. 103. She is endorsed in the areas of Speech Language Pathology PK-12, School Counselor 7-12, and English Language Arts

7-12. Ms. Lyons was a member of IEP team in the 2018-2019 school year. Ex. 110, 111, 112, 114-116.

6. Christine Boden is the Principal of McPhee. She holds a current Nebraska Department of Education educator's certificate. Ex. 104. She is endorsed in the areas of Principal PK-8 and Elementary K-6. Ms. Boden was a member of IEP team in the 2018-2019 school year. Ex. 110, 111, 112, 114-116.

7. Seth Lutz has been the Assistant Principal of McPhee since 2013. He holds a current Nebraska Department of Education educator's certificate. Ex. 105. He is endorsed in the areas of Principal 7-12 and Special Education Generalist 7-12. Mr. Lutz was a member of IEP team in the 2018-2019 school year. Ex. 110, 111, 112, 114-116.

8. Dr. Jenny Fundus has been the Director of Special Education at Lincoln Public Schools since January 2012. She holds a current Nebraska Department of Education educator's certificate. Ex. 101. She is endorsed in the areas of Superintendent PK-12, Special Education Generalist K-12, Principal PK-8, and Elementary K-6. Dr. Fundus was a member of IEP team in the 2018-2019 school year. Ex. 110, 111, 112, 114-116.

D. ISSUES

The issues of law (as of the relevant date June 13, 2019) are substantive and procedural.

92 NAC 55 – 008.02 provides:

Subject to Section 008-03, a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education or early intervention services, see ex 109.

92 NAC 55-008.03 provides:

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

008.03A. Impeded the child's right to a free appropriate public education or early intervention services;

008.03B. Significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education or early intervention services to the parents' child; or

008.03C Caused a deprivation of educational benefit.
See Ex. 109.

SUBSTANTIVE ISSUES

The main substantive issue is whether [redacted] was denied a free appropriate public education at McPhee during [redacted] fifth-grade year. Within this issue, the following sub-issues are raised:

- a. Whether the location where [redacted] ate breakfast was the least restrictive environment;
- b. Whether the location where [redacted] had recess was the least restrictive environment;
- c. Whether [redacted] instruction took place in the least restrictive environment;
- d. Whether [redacted] was subject to molestation and sexual abuse by [redacted] special education coordinator, Derek Johnson;
- e. Whether [redacted] was subject to physical injury at McPhee;
- f. Whether [redacted] personal property was damaged at McPhee;
- g. Whether any placements for [redacted] breakfast, recess, and classroom were not appropriate because any marginal benefits received from another placement are far outweighed by the benefits to be gained from services at the locations selected which could not feasibly be provided in the chosen setting;

h. Whether a placement at _____ preferred locations for breakfast, recess, and instruction were not appropriate because _____ a disruptive force in those settings.

i. Whether Respondent made a pre-determination placement decision to change placement and _____ BIP without having an IEP meeting and without providing the opportunity for _____ to provide input.

I find that whether _____ was subject to molestation and sexual abuse by _____ special education coordinator, Derek Johnson; whether _____ was subject to physical injury at McPhee; and whether _____ personal property was damaged at McPhee are not covered by the Individuals with Disabilities Education Act "IDEA." Courts that have considered the issue have found that the IDEA does not pertain to these types of situations involving physical assault against a student who happens to have an educational disability. *See, e.g., F.H. ex rel. Hall v. Memphis City Sch.*, 764, F.3d 638, 644 (6th Cir. 2014) (Denying motion to dismiss §1983 claim for failure to exhaust administrative remedies under IDEA, stating: "We are not persuaded that Appellant's alleged injuries under the 42 U.S.C. §1983 claims relate to the provision of FAPE. As we discussed above, Appellants allege that F.H. was verbally, physically, and even sexually abused by his aides. These injuries are non-educational in nature and cannot be remedied through the administrative process."); *McCormick v. Waukegan Sch. Dist. No. 60*, 374 F.3d 564, 569 (7th Cir. 2004) (Where gym teacher disregarded student's IEP and forced him to exercise, causing kidney damage, the court found that such injury was not covered by the IDEA, stating "The nature of his claim is not educational, no change in his IEP could remedy, even in part, the damage done to Eron's body After closely examining the 'theory behind the grievance' in Eron's complaint, we are convinced that it would be futile for Eron to exhaust the administrative process under the circumstances of this case because IDEA does not provide a remedy for his alleged injuries, which are non-educational in nature."). *See also Doe v. E.*

Irondequoit Cent. Sch. Dist., 2018 U.S. Dist. LEXIS 76798, at *21-22 (W.D.N.Y. 2018) (listing all up to date cases determining physical harm to a child with special education needs does not require administrative exhaustion under the IDEA because such claims are not related to a child's education).

I find that like the cases cited above, the alleged injuries claims to person are not educational in nature. As such, I find that I do not have the authority to determine whether was physically harmed by the staff at McPhee, whether was sexually abused, and likewise whether personal property was damaged at McPhee.

PROCEDURAL ISSUES

The procedural issues raised in the Petition include (1) the alleged change of placement for breakfast, (2) the alleged change of placement for recess, (3) the alleged change of placement for classroom time, (4) the alleged predetermination for any of the alleged change of placements, (5) the alleged failure to give prior written notice for any of the alleged change of placements, and (6) Whether restrictions on communications with McPhee denied parental rights.

FINDINGS OF FACT

In accordance with Nebraska Department of Education Rule 55.007.02G, the Hearing Officer takes official notice of cognizable facts, of general, technical, or scientific facts within his specialized knowledge and the rules and regulations adopted and promulgated by the Department of Education.

The Hearing Officer makes the following Findings of Fact:

1. Facts relating to Classroom Placement

is the parent and next friend of a student with an Intellectual Disability and Hearing Impairment according to Nebraska Department of Education Rule 51 guidelines. Ex. 32, page 3.

has been diagnosed with Downs syndrome as well as ADHD. 152:4-12.

At the commencement of the 2018-19 school year, was attending 5th grade school at McPhee Elementary School, which is part of the Lincoln Public Schools Ex. 32, page 1, and was in the regular education classroom full-time the first quarter of the school year. 107: 17-18

Specifically, struggles with understanding how things function together. 154:2-6.

does not have the ability to put cause and effect together. 154:16-17. This intellectual disability manifests itself by the way impulsively reacts to a situation that wants to get out of. 155:2-4. To avoid these situations, will run, flee, or become combative. 155:4-5. These behaviors can put at risk for physical safety. 157:3-7.

The IEP was originally developed for fifth grade year at McPhee on or about January 31, 2018, Ex. 31 indicated: “ will receive special instruction within the general education classroom and in the special education resource classrooms. *To the fullest degree appropriate, will participate in general education classes with accommodations as needed.*” Ex. 31 (emphasis added). This IEP was developed with the entire IEP team, including Ex. 31.

JANUARY 31, 2018 IEP

January 31, 2018 IEP is contained in Ex. 31 and provides positive behavior

interventions and strategies for if behavior impedes learning as follows:

If behavior impedes learning, consideration of the use of positive behavioral interventions and strategies:

This was considered by the IEP team and was deemed necessary.

may benefit from the use of behavioral interventions and strategies when demonstrates difficulty following directions, staying in area and/or following daily schedule. tends to benefit from the use of visuals, including a daily schedule. School adults can use verbals and non-verbals to reinforce positive and appropriate behaviors at school Adults also use wait time and distraction when is struggling to follow schedule and/or directions. See BIP for further details and strategies.

AREA OF NEED: Behavior

Progress on Prior IEP Goal/Objective/Benchmark

Goal Name	Annual Goal	Progress	Level Achieved
Prosocial Behaviors	Given visual supports, will increase prosocial behaviors (stays in Seat/Area and Follows Instructions) from a baseline of 65% to 80%, as measured by daily behavior chart scores by August 31, 2018.	Other - specify	66%

Present Level of Performance (from assessment, observation, work samples and/or progress on prior goals)
Educational Impact Statement:

difficulty with behavior impacts ability to progress in the general education curriculum without accommodations.

Strengths	Needs
average for transitions was 80% or more from October 18-December 8. enjoys picking reinforcing items for breaks.	continues to work on following adult directions and staying in area.

Goals needed: Yes

Goal # 6 Start Dated 01/31/2018 End Date 01/30/2019

Goal Name: Prosocial Behaviors

Annual Goal: Given visual supports and adaptations as needed, will increase procial behaviors (Stays in Seat/Area and Follows Instructions) from a baseline of 66% to 80%, as measured by daily behavior chart scores by January 30, 2019.

Evaluation Procedures/Instruments - Teacher observation/data

Evaluation Progress Report Schedule; Quarterly

Person Responsible: General Education Teacher, Special Education Teacher, and Occupational Therapist

In August, September, and October of 2018, schedule was followed one hundred percent of the time, meaning that while was not in the general education classroom one hundred percent of the time, anytime that schedule called for to be in the general education classroom, spent that time in the general education classroom. Ex. 120; 188:11-15.

The most recent IEP developed for is dated November 12, 2018 (the "IEP"), which is to end on November 11, 2019. Ex. 32.

NOVEMBER 12, 2018 IEP

November 12, 2018 IEP is contained in Ex. 32 and provides positive behavior interventions and strategies for if behavior impedes learning as follows:

Alternate Assessment Criteria #8?

The decision about participate in alternate assessment was NOT EXCLUSIVELY based on the following factors:

disruptive behavior administrator decision
impact of student scores for accountability system
Recent Supporting Evidence:

These factors are not the exclusive reason the alternate assessment is appropriate for this student.
Does the student meet this criterion? Yes

The student meets all above criteria and qualifies for alternate assessment (student must meet all of the above criteria in ELA, math, and science to qualify for alternate assessment in any area). - Yes

If behavior impedes learning, consideration of the use of positive behavioral interventions and strategies: This was considered by the IEP team and was deemed necessary.

may benefit from the use of behavioral interventions and strategies when demonstrates difficulty following directions, staying in area and/or following daily schedule. tends to benefit from the use of visuals, including a daily schedule. School adults can use verbals and non-verbals to reinforce positive and appropriate behaviors at school Adults also use wait time and distraction when struggling to follow schedule and/or directions. See BIP for further details and strategies.

AREA OF NEED: Behavior

Progress on Prior IEP Goal/Objective/Benchmark

Goal Name	Annual Goal	Progress	Level Achieved
Prosocial Behaviors	Given visual supports and adaptations as needed, will increase prosocial behaviors (stays in Seat/Area and Follows Instructions) from a baseline of 66% to 80%, as measured by daily behavior chart scores by January 30, 2019.	Has not shown growth in this area.	58%

Present Level of Performance (from assessment, observation, work samples and/or progress on prior goals)

Educational Impact Statement:

difficulty with behavior impacts ability to progress in the general education curriculum without accommodations.

Strengths	Needs
is a very social loves helping younger students and is a good role model for them.	continues to work on following adult directions and staying in area.

Goals needed: Yes

Goal # 6 Start Dated 11/12/2018 End Date 11/11/2019

Goal Name: Prosocial Behaviors

Annual Goal: Given visual supports and adaptations as needed, will increase prosocial behaviors (Stays in Seat/Area and Follows Instructions) from a baseline of 66% to 80%, as measured by daily behavior chart scores by November 11, 2019.

Evaluation Procedures/Instruments - Teacher observation/data

Evaluation Progress Report Schedule; Quarterly

Person Responsible: General Education Teacher, Special Education Teacher, student, and Occupational Therapist

The IEP states that is a “very social and has only one behavior goal, which is directed at having stay in seat/area and follow instructions. Ex. 32, page 10

The IEP states that “will receive special instruction within the general education classroom and the special education resource classrooms” and specifies that will receive Occupational Therapy in the general education classroom and participate in PE activities with peers. Ex. 32, page 12.

The IEP states that the services to be received outside the general education classroom include Hearing Impaired Services 2 x per quarter, 20 minutes each session; Special Instruction 14 x per month, 40 minutes per session; Speech/Language 4 x per month, 20 minutes per session, and Transportation.

Respondent admits that the IEP, as designed, was to provide [redacted] with “meaningful educational benefit in light of [redacted] circumstances.” 186: 14-16.

[redacted] evidenced progress and growth on [redacted] IEP goals while [redacted] was being served in the regular education program. 187: 6-8.

Respondent was aware that [redacted] was engaging in inappropriate behaviors including kissing, inappropriate touching, bodily exposure, and self-harm, prior to the creation of the IEP on November 12, 2018. 67:2-22; 68:10; 69:11.

Respondent was aware that [redacted] exhibited “very physical” behaviors prior to the creation of the IEP on November 12, 2018. 175: 8-12; 176: 8-11; 177: 4-6.

Respondent was aware that [redacted] used inappropriate language prior to the creation of the IEP on November 12, 2018. 178:1-16.

Respondent was aware that [redacted] struggled with transitions and elopement prior to the creation of the IEP on November 12, 2018. 191: 16-21.

[redacted] engaged in the same or similar inappropriate behaviors at school after November 13. 70:20-24; 71: 2-5 and 17-21. and continued “throughout the entire school year.” 76:15; 177:10-11; and 178:20.

The IEP references and incorporates [redacted] Behavior Intervention Plan (“BIP”) Ex. 32, page 4, stating “[redacted] may benefit from the use of behavioral interventions and strategies...[s]chool adults can use verbals and non-verbals to reinforce positive and appropriate behaviors...[and] also

use wait time and distraction when struggling...[s]ee BIP for further details and strategies.” Ex. 32, page 4.

BIP Ex. 122 is based on a Functional Behavior Assessment (“FBA”) Ex. 121, which sets a specific intervention plan that describes what staff will do to support alternative behaviors.

Respondent was aware, at the time the FBA was done and the BIP was created, that did not understand cause and effect and the impact that it has on the safety of and others. 156: 1-25, and 157: 1-25.

The BIP’s specific interventions include increasing opportunities for peer interactions, structured opportunities for peer interaction, allowing to work with and assist younger students, and earning tokens as awards for desired behavior. Ex.122.

Respondent admits that during the first quarter of 2018, the intervention of *earning* tokens for positive behavior was a successful intervention. 194:6-7.

Neither the FBA, the BIP nor the IEP make any mention of inappropriate language or the exhibiting of sexual behaviors by however, such was documented extensively by the Respondent in daily documentation sheets Ex 127 and 128. The record shows that the Respondent shared this information with through emails, telephone calls and at IEP meetings. 196:23 – 197:4; 255:25 – 256:10

Beginning on or around November 13, 2018, was removed from the general education classroom and entire schedule was performed in Mr. Derek Johnson’s classroom, Room 202A. Ex. 120; 179:10-16; 188:16-20. The reason for removal from the general education classroom was because it was not appropriate for to be in the general ed classroom or the general ed activities. At that time, began to display serious sexual behaviors and became extremely disruptive to general education class. 179:13-24.

As far as sexual behaviors, on November 6, 2018, [redacted] “pulled on [redacted] dress and tried looking up [redacted] dress . . . then kissed [redacted] leg a couple of times . . . then grabbed [redacted] bottom and poked [redacted] bottom.” Ex. 127. Later that same day, [redacted] began pulling pants down and rubbing [redacted] bottom on the wall.” Ex. 127. [redacted] continuously pulled down pants and rubbed [redacted] bottom on [redacted] boots and on the desk. Ex. 127. [redacted] also attempted to put a computer charger up [redacted] bottom, tokens up [redacted] bottom and in [redacted] vagina, and a timer up bottom. Ex. 127. [redacted] also put [redacted] fingers in [redacted] privates. Ex. 127. [redacted] also laid naked on the floor with [redacted] legs spread. Ex. 127.

The following day, November 7, 2018, [redacted] put tape on [redacted] left breast and patted it a few times.” Ex. 127. On November 8, 2018, [redacted] “began to place hands in the front area . . . showing [redacted] butt. Rubbing butt on [redacted]. Pulling pants all the way to expose privates.” Ex. 127. On November 15, 2018, [redacted] pulled [redacted] pants up and down to expose [redacted] bottom for a period of at least 15 minutes. Ex. 127. [redacted] rubbed [redacted] butt on the wall and attempted to put various objects in [redacted] butt. Ex. 127. [redacted] testified to the type of language [redacted] would use in the general education classroom:

Q. Were you – at any time during the school year were you with [redacted] when [redacted] was in the general ed classroom with [redacted] peers?

A. Yes.

Q. Did you observe whether or not [redacted] was a disruptive force to the other students within the general ed classroom?

A. Yes.

Q. And what was your – what were your observations?

A. [redacted] was very disruptive, sometimes throwing things and putting other children in harm’s way, getting underneath desks, destroying things, taking objects from children, very loud and sometimes combative.

Q. And did [redacted] also have – as far as being very loud, did [redacted] have language – use language that was concerning?

A. Yes.

Q. What kind of language?

A. would – I apologize in advance. say things like, “Shut up you fucking bitch. I’m going to hit you in the face with my goddamn fucking shoe.” refers to a gentleman as a nigger, so would scream that a lot. really liked cussing. And using obviously language that we’d prefer not to use in McPhee or at all.

Derek Johnson also testified to the types of increased behaviors exhibited around November, 2018:

Q. And then as of November, was there enhanced physical behaviors?

A. Can you clarify? What do you mean?

Q. Like, more concerning?

A. Yes

Q. And what kind of behavior – physical behaviors did engage in?

A. would be yelling and running around the classroom. would be drawing all over the walls, the floors, students’ chairs. would be under the chair and desk while Ms. Trudell was teaching. And at that – at those times, we would redirect to my room so wouldn’t be disruptive to the class. would throw things.

Mr. Johnson testified that the move out of the general education classroom was not meant to be a permanent change in schedule. Rather, Mr. Johnson believed behaviors would improve and would return to the general education classroom within two to three weeks.

193:24-194:11. However, behaviors did not improve, and continued to demonstrate sexual behaviors. On November 28, 2018, began to pull pants off and put fingers in bottom. Ex. 127. also spread legs with pants down. Ex. 127. continued to put fingers in bottom. Ex. 127. also put an eraser on behind and was rubbing it through legs to Ex. 127. also pulled pants down and tried to rub front region on the edge of the desk. Ex. 127. On November 29, 2018, attempted to show Mr. Johnson underwear. told Mrs. Ryba that underwear was cute and that a gentleman named “Mikey” bought them for Ex. 127. also made a concerning statement: “Mikey! At

my house in my noisy bed.” Ex. 127. began to move body forwards and back in a jumping type motion while was sitting on knees in the chair while discussing Mikey in noisy bed. Ex. 127.

As a result of continued increased behaviors, a notice of an IEP meeting was sent out on December 13th. Ex. 16; 194:12-18. The meeting was scheduled for January 15, 2019. Ex. 16. There were approximately 15-20 school days between the November 13, 2018 decision to adjust schedule and the December 13, 2018 notice for the IEP meeting. 195:19. There were twelve school days between the December 13, 2018 notice and the January 15, 2019 IEP meeting. 196:16-22.

At the January 15, 2019 IEP meeting, was present, and was represented by an attorney. 100:21-25; 234:1-19. The IEP team agreed that the temporary change in schedule would need to continue as long as behaviors continued to increase. 196:23-197:4. At the January 15, 2019 IEP meeting, the team determined that every time had three “80 percent days,” would be able to earn back one of subjects originally scheduled to take place in the general education classroom. 196:5-10. Derek Johnson described an “80 percent day” utilizing Ex. 120:

So as goes throughout days, you can see where it says point system. A smiley face is one to two reminders. A straight face is three to four. And a sad face is four or more reminders. So during math could earn a happy, straight, or sad face. A happy face was 2 points. A straight face is 1 point. And a sad face is zero points. So if had a 100 percent day, would have a total of 36 points out of 36 points.

197:11-198:3. could earn two sets of points for each of subjects for (1) staying in area or in seat and (2) for following instructions. 198:9-12. could earn 18 points in the morning and 18 points in the afternoon. 198:16-19. The IEP team decided that if could have 80 percent

days where [redacted] was able to stay in [redacted] area and follow directions that it would be appropriate for [redacted] to earn more time back in the general education class. 199:1-11. At the request of [redacted] attorney, the decision was confirmed on January 17, 2019 in a Notice of Change of Placement or Discontinuation. Ex. 19; 255:25-256:10. The notice indicated that [redacted] requires a more restrictive environment in order to meet [redacted] IEP goals” and that the option of continuing placement “was rejected because the placement no longer meets [redacted] educational needs.” Ex. 19. The notice was drafted because initially, in November, it was thought that the change of placement would be brief, but it became apparent that the change was going to be for the long term. 256:6-7.

Throughout the remainder of the 2018-2019 school year, [redacted] was able to earn back more time with [redacted] peers in the general education classroom. Ex. 15, 120. By the end of the school year, [redacted] participated with the general education class for specials, reading group, writing, math, and unit studies. Ex. 120. However, even when [redacted] was in the general education classroom, [redacted] continued to be a disruption. Ms. Rose Trudell testified regarding a few specific examples in the classroom:

Q. Okay. Can you talk about, like, what kind of distractions was to the – to [redacted] peers?

Yes, [page] 132. So one example is that [redacted] was continuing to throw clothing out of my cupboard. I have a cupboard that has clothing for other students in case they need it, and [redacted] was throwing the clothes out of the cupboard. [redacted] found shoes and was also throwing those across the room, and they almost hit one of my other students. [redacted] started to bang the cupboard doors, and it was very loud and distracting for my students. They couldn’t focus. Would you like another example?

Q. Sure.

A. On page 133 in there as well, on May 7th at 9:40 a.m., there was an incident where [redacted] crawled over to the cupboard and began to throw the clothes out again. And one of the shoes hit the adult in the nose. [redacted] then crawled into the cupboard and started banging the doors. And our class was testing at this time. The adults held the

doors open so that [redacted] couldn't bang on them while they were testing. I have another incident, if you would like it.

Q. Okay. Yeah.

A. On page 138, this was in April. Or actually – excuse me. It's May but it's just marked as April. But this was at 10:20. [redacted] got an alphabet game from one of my cupboards and started taking everything out. And [redacted] ended up crawling under the desks.

104:14-106:9

Alyssa Novotny also testified regarding [redacted] behavior in the classroom:

Q. Were you – at any time during the school year were you with [redacted] when [redacted] was in the general ed classroom with [redacted] peers?

A. Yes.

Q. Did you observe whether or not [redacted] was a disruptive force to the other students within the general ed classroom?

A. Yes.

Q. And what was your – what were your observations?

A. [redacted] was very disruptive, sometimes throwing things and putting other children in harm's way, getting underneath desks, destroying things, taking objects from children, very loud and sometimes combative.

Q. And did [redacted] also have – as far as being very loud, did [redacted] have language – use language that was concerning?

A. Yes.

Q. What kind of language?

A. [redacted] would – I apologize in advance. [redacted] say things like, "Shut up you fucking bitch. I'm going to hit you in the face with my goddamn fucking shoe." [redacted] refers to a gentleman as a nigger, so [redacted] would scream that a lot. [redacted] really liked cussing. And using obviously language that we'd prefer not to use in McPhee or at all.

140:15-141:17.

Amy Lyons testified regarding the extent of [redacted] educational benefit from being in the general education classroom:

Q. [W]hen [redacted] was in the general ed classroom, to what extent did [redacted] have direct interactions with [redacted] peers?

A. You know, kids would try to partner in and help [redacted]. Or, you know, motivate [redacted] to maybe do [redacted] tasks. Other than that, you know, [redacted] was not on the same grade level as the other kids. So [redacted] was

really defined – you know, it was trying to do some of the same things that the kids were doing, but more on _____ level.

Q. So _____ was basically on _____ own doing _____ own work?

A. Yeah.

165:22-166:9.

Several witnesses testified regarding the appropriate placement for _____ class time during the 2018-2019 school year. Amy Lyons confirmed that in her professional opinion as a school psychologist _____ was, in accordance with _____ IEP, in general education classes and activities to the fullest extent appropriate. 167:16-20. She also confirmed that _____ significantly impaired the learning and safety of other students. 167:21-25. Ms. Lyons also testified that _____ was a disruption to the general education classroom and to general education activities. 168:1-10. Ms. Lyons explained that _____ was with the general education class to the fullest degree appropriate throughout the 2018-2019 school year because there were times throughout the school year when _____ could not participate with the general education classroom due to _____ behaviors and disruptions. 170:13-16.

Derek Johnson also testified that during the 2018-2019 school year, _____ participated to the fullest extent appropriate with the general education class. 200:3-7. Mr. Johnson testified that in his professional opinion, _____ placement was in accordance with _____ IEP at all times during the 2018-2019 school year as far as _____ placement. 200:12-15, 201:23-202:2. Mr. Johnson was also of the professional opinion that _____ was a disruptive force in the general education and general activity setting and that any marginal benefits _____ received from the general education classroom were far outweighed by the benefits gained from the more restrictive environments where _____ spent _____ time in the 2018-2019 school year. 201:14-22, 201:23-202:2.

Christine Boden, the principal at McPhee, testified that, in professional opinion, participated in the general education classes and activities throughout the 2018-2019 school year to the fullest extent appropriate, in accordance with IEP. 222:10-15. Ms. Boden was also of the professional opinion that any marginal benefit would receive from participating in the general education classroom was far outweighed by the benefits received from services provided in the more restrictive locations and that was a disruptive force in the general education classroom who significantly impaired the learning and safety of other students. 222:16-223:2.

Seth Lutz, the assistant principal and special education coordinator at McPhee, was called to testify as an expert witness. Mr. Lutz testified that participated in the general education classes and activities during the 2018-2019 school year to the fullest extent appropriate, in accordance with IEPs. 239:10-15. Mr. Lutz testified that McPhee attempted to keep in the general education classroom as much as possible, but when behaviors escalated, it was no longer appropriate for to be with the general education classroom on a regular basis. 239:18-240:2. Mr. Lutz's professional opinion was that was a disruptive force in the general education and activity setting, and that significantly impaired the learning and safety of other students in the mainstream setting. 240:2-9. Mr. Lutz also believed that any marginal benefits from having in the general education classroom were far outweighed by the benefits gained from providing services in the more restrictive settings. 240:9-14.

Dr. Jennifer Fundus also testified as an expert witness in her role as the director of special education for Lincoln Public Schools with a doctorate in educational administration with an emphasis in special education. 246:17-19, 247:11-13. Dr. Fundus testified that, in her professional opinion, participated in the general education classroom during the 2018-2019 school year to the fullest extent appropriate in accordance with IEP. 250:3-8. Dr. Fundus explained that during

the time frame when [redacted] was moved to a more restrictive classroom setting in November 2018, that [redacted] was exhibiting behaviors that were not appropriate for the general education classroom.

Dr. Fundus explained that if other students who did not have a disability behaved in the same way as [redacted] that they would also be removed from the general education classroom. 250:14-22. Dr.

Fundus testified that her opinion was that if [redacted] had been in the mainstream classroom, [redacted] would have significantly impaired the learning and safety of other students:

Fifth grade students should not be exposed to the sexual behavior that [redacted] was displaying, nor the inappropriate language. They are there to learn and to meet their standards that they have within the curriculum. And we try to minimize all distractions within the classroom, and having one student crawl on desks, get into cupboards, throw things, endanger the students' safety is not something that we want districtwide. In any of our classrooms.

251:1-16. Dr. Fundus agreed that [redacted] was a disruptive force in the general educational setting.

251:17-21. She also testified that in her professional opinion, any marginal benefit from mainstreaming [redacted] would be outweighed by the benefits [redacted] gained from the services which were provided in the more restrictive settings during the 2018-2019 school year.

2. Facts related to recess placement

On September 17, 2018, McPhee implemented a new plan for [redacted] recess where [redacted] would have [redacted] first recess of the day indoors and [redacted] second recess outside with [redacted] class. Prior to this decision, staff at McPhee struggled with safety and behavior concerns they had for [redacted] while [redacted] was outside. Alyssa Novotny described the issues:

Refusing to come inside, and sometimes that would be [redacted] just playing on the equipment and refusing to come in, but oftentimes it was getting very physical, spitting bodily fluids, kicking, hitting. [redacted] would climb on the exterior of the bridge on the equipment, and obviously that's scary because we didn't want [redacted] to fall, but if someone came to try and assist [redacted] would get very combative and kick and hit. [redacted] hit other students, threw gravel. There were times

that it lasted up to an hour trying to get [redacted] back in the building to get back to academics.

144:3-23. Additionally, Ms. Novotny testified that [redacted] would run from adults during recess when they attempted to have [redacted] come inside. 145:8-9.

Ms. Lyons, the school psychologist, also testified to a personal account when she attempted to get [redacted] to come inside from recess for approximately 40 minutes. 166:12-18.

Derek Johnson also testified that he had difficulty with [redacted] during recess because [redacted] would refuse to come inside:

It was difficult because [redacted] would run from one playground structure to the other, and it kind of turned into a chasing game. So we needed multiple adults to get at different points on the structures so [redacted] couldn't run. Once we had [redacted] able -- I mean, I don't want to say trapped, but you know, stuck so [redacted] couldn't run from us, [redacted] would often plop on the ground and cry and hit, kick, slap, bite, whatever [redacted] could to get away, throw gravel and things like that. It often took a long time to get [redacted] back inside. Sometimes up to an hour to go back inside.

191:22-192:8. Mr. Johnson testified that [redacted] behavior caused a safety concern because McPhee is near the Lincoln Capital and surrounded by roads on all four sides. The team was concerned [redacted] could run and be hit by a car. 192:9-21 [redacted] behavior outdoors also led to safety risks for other students:

One time [redacted] wouldn't come inside after leaving the building at the playground, and preschool was outside having recess. So there was a play structure, and a preschooler was behind [redacted] so [redacted] turned around to run the other way. And because the preschooler was behind [redacted] and blocking [redacted] pushed them down the steps . . . the preschool student started crying and [redacted] teacher was right there and picked up and was comforting [redacted]

192:25-194:7.

After the initial change, continued to exhibit behaviors which were unsafe and difficult during outdoor recess. On September 26, 2018, had a particularly difficult time outside. According to the daily documentation:

The whistle blew to come in from noon recess. was playing on the monkey bars at big equipment and didn't want to get down. was told "it's time to eat lunch." got mad and said "Shut up, bitch." then said "Time to go see what mommy picked out." said "no." Two students came over and asked to walk in with them and said "No bitch" to one student and "Shut up, bitch" to the other. then kicked and tried to climb the monkey bars again. jumped down, ran to the little equipment and threw jacket at said, time to go in for lunch. When you don't go in right way you don't get to eat with your class." said "shut up, bitch." started running across the bridge and swinging on the bridge. , "If you can't come in by the count of 3 then the adults have to help you." counted and tried to climb on the bars but a 1st grade student was there so kicked the 1st graders arm. then got to help. came down the slide and hit and said "shut up, bitch." plopped on the ground, tried to throw jacket at again. said, "If you throw your jacket an adult will carry it inside." decided to keep jacket and walk in with

Ex. 127. This encounter apparently lasted 20 minutes. According to the documentation, on this day staff at McPhee spoke with about staying indoors for both recesses. Ex. 127. However, according to the documentation, continued to have outdoor recess at times. Ex. 127. Sometime in November 2018 spent all of recess times indoors. Ex. 4. continued to struggle with behaviors even during indoor recess. Ex. 127-128.

After the January 15, 2019 IEP meeting, the team decided they would reconvene on February 12, 2019 to go over the Behavioral Interventional Plan. Ex. 125. The February 12, 2019 meeting was canceled because had the flu and attorney was unable to attend the meeting. 55:4-6. The February 12, 2019 meeting was rescheduled for April 2, 2019. Ex. 28. There were 28 school

days between the February 12, 2019 meeting and the April 2, 2019 meeting. Ex. 28. At the April 2, 2019 meeting raised concerns with not going outside for recess. Ex. 115. Mr. Seth Lutz explained to that transitions were still difficult for and that as recently as April 1, 2019 tried to run from the building. Ex. 115.

On April 2, 2019, wrote a letter stating, "I would like something in writing saying that my child is having indoor recess." Ex. 5. On this same day, had an incident where refused to come inside, ran away from adults, and "aggressively pushed an Early Childhood student down off the stairs." Ex. 130. On April 9, 2019, engaged in email correspondence with McPhee Principal, Christine Boden, regarding indoor recess. Ex. 30. again requested that have more time outdoors. Ex. 30. Ms. Boden wrote explaining again that posed too high of a safety threat when went outdoors but would work to see that had more equipment could play with indoors. Ex. 30. Ms. Boden also explained that had been afforded the opportunity for outdoor recess just the previous week, but that continued to exhibit unsafe behaviors outdoors. Ex. 30. continued to have recess time indoors due to unsafe behaviors. Ex.127.

Derek Johnson, Amy Lyons, Christine Boden, Seth Lutz, and Jennifer Fundus each testified that participated to the fullest degree appropriate as per IEP in general education activities such as recess and that any marginal benefit may have received from mainstreaming was far outweighed by the benefits received from being in the more restrictive settings for general education activities. 167:16-20; 200:12-15, 201:23-202:2; 222:10-15; 239:10-15; 250: 3-8.

3. Facts related to mealtime placement

During the November 12, 2018 IEP team meeting, a decision was made for to eat breakfast and lunch in the classroom instead of in the cafeteria. 207:7-17. Like in the general

education classroom and during recess, struggled with behaviors during meal times. Alyssa Novotny testified that during meal times would spit out food, throw food on the floor, dump fluids on the floor, spit food at adults, swing food, and dump tray. 145:22-146:2. Ms. Novotny also witnessed being physical with other kids during meal times. 146:3-7.

Derek Johnson, Amy Lyons, Christine Boden, Seth Lutz, and Jennifer Fundus each testified that participated in general education activities such as mealtimes, to the fullest degree appropriate, in accordance with IEP and that any marginal benefit may have received from mainstreaming was far outweighed by the benefits received from being in the more restrictive settings for general education activities.

No evidence was presented to show that missed any days of school as a result of the alleged changes of educational placement for class, recess or meals.

4. Facts related to communication

On December 15, 2018, Joseph Wright, Director of Security for Lincoln Public Schools, drafted a letter to stating:

I have been informed by staff members at McPhee that you have been directed on several occasions to check in with office personnel prior to going to other locations within the school. Staff also indicate that you have chosen not to follow those instructions and you have made visits to classrooms without obtaining prior staff approval. This type of behavior is not allowed in our schools.

When visiting McPhee Elementary, please check-in with the Secure Entrance Monitor and then proceed to the office. At the office, please speak with Mrs. Boden to obtain permission to go elsewhere in the school. You may only go to areas which have been approved for that specific visit and you may only stay for a predetermined amount of time.

If you do not follow these guidelines or if you cause any type of disturbance while at McPhee you will be asked to leave. I will then

determine if you will be allowed to make any further visits to the school.

Ex. 17. Ms. Boden testified that this letter was sent pursuant to the policy for visits to school by parents:

When a parent or any other visitor comes, they check in with the secured entrance monitor and receive a badge. And then they are to go to the office for whatever their business is. And then the only places they can go in the building are the places where their business is. _____ wasn't doing that and was going where _____ wanted to go. Without permission.

216:7-14. Mrs. Boden explained that the purpose of the policy is for safety. 216:21-23. The school needs to know where parents are and who is in the building at all times and what their business is. 216:23-25.

After this letter was issued to _____ by Mr. Wright, the school issued a Notice of District Decision Regarding Requests to _____ on April 12, 2019. Ex. 138. The notice indicated that _____ requested _____ should not communicate directly with the health office and cafeteria staff without first communicating with Mrs. Boden and that from that point on _____ main point of contact at the school was to be Mrs. Boden. Ex. 138. Christine Boden, Principal of McPhee, testified that she hand-delivered Ex. 138 to _____ on or about April 12, 2019. I find her testimony in this regard to be credible. 217:10-218:6; 228: 2-10. _____ testified that _____ did not receive Ex. 138 - that Ms. Boden did not hand it to _____. I find _____ testimony in this regard to not be credible. 227:10-22. I find that _____ did receive Ex. 138 on April 12, 2019.

At the hearing, Mrs. Boden explained the decision:

A decision was made that from this point on, from the point of this form on, I would be _____ point of contact at the school. So when _____ wanted to reach Mr. Johnson or Ms. Trudell or anybody in the building, _____ was advised that _____ needed to contact me first, and then the call would be passed on if it was necessary, or I could manage

it. And [redacted] was not adhering to that request, so a district decision was made that we were doing that.

...

Around that time, in October or November when behaviors started to escalate, we were seeing just a tremendous increase in [redacted] demand for communication from staff. So [redacted] was calling Derek on the daily or stopping in to school to meet with Seth without appointments. And also trying to reach Amy, the psychologist, or Bridgette, the speech pathologist.

So it was around that time that we really started to tighten up on our documentation of how frequent the contacts were. The average number of contacts a day was three, up to seven. And so we made the decision that I would be the contact, because I have more flexibility in my schedule than any of those people. And I could be available to con - -- talk with [redacted]. And I could also eliminate some need to have so many contacts, because I could just answer for Derek instead of calling and leaving the message, Derek calling or being interrupted from class. So it presented a consistent method of communicating.

217:10-21, 219:2-25.

Seth Lutz also testified that the restriction placed on [redacted] to always check into the office before going into the building was an expectation of all visitors and was not unique to [redacted].

241:9-16. Mr. Lutz also explained that the benefit of having Mrs. Boden serve as [redacted]

[redacted] main point of contact was that it "allowed one person disseminating the same message. So there wasn't any confusion as to what was being asked or what was needed." 242:6-8.

5. Facts related to procedural issues

Dr. Fundus testified that in her expert opinion, [redacted] IEPs were reasonably calculated to provide [redacted] with meaningful educational benefit in light of [redacted] circumstances. 249:12-18. Further,

Mrs. Boden testified that [redacted] IEPs were reasonably calculated to provide [redacted] with meaningful educational benefit in light of [redacted] circumstances and that [redacted] did in fact make that level of educational progress. 233:3-10.

Under cross examination, [redacted] testified that she could not answer whether the limitation that [redacted] have a main point of contact with Mrs. Boden or the limitation that [redacted] check into the office prior to roaming the building denied [redacted] a free appropriate public education. 97:18-98:16. [redacted] also testified that [redacted] did not know how to answer whether the two limitations on [redacted] communications restricted [redacted] ability to participate in the IEPs for 98:17-21. Mrs. Boden testified in her opinion that neither of the restrictions on communication denied [redacted] the right to a free appropriate public education. 218:15-18. Mrs. Boden's opinion was also that the restrictions did not restrict in any way [redacted] ability to participate in the IEP meetings or in [redacted] opportunity to participate in decision-making regarding the provision of a free appropriate public education for [redacted] 218:7-14, 19-23. Further, Mrs. Boden testified that neither of the restrictions caused a deprivation of any educational benefit to [redacted] 218:24-219:1.

Mr. Lutz testified that in his expert opinion the restrictions placed on communications actually benefitted [redacted] educational program. 242:9-14. Dr. Fundus also testified that in her expert opinion the restrictions placed on [redacted] communication with the school did not impede [redacted] right to a free appropriate public education and that the restrictions did not significantly impede [redacted] opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to [redacted] and also that these rules did not cause a deprivation of educational benefit. 252:4-22.

ANALYSIS AND CONCLUSIONS OF LAW

The Hearing Officer makes the following conclusions of law and determines as to mixed questions of fact and law based on the stipulations of the parties made on the record and the evidence presented during the hearing:

I. Standards of Law

1. Burden of Proof. [redacted] had the burden of proof in this proceeding: “The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this case, that party is [redacted] as represented by [redacted].” *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). See also *Lathrop R-II School District v. Gray*, 611 F.3d 419 (8th Cir. 2010) (“the burden of persuasion remains with Gray as the party challenging the IEP,” citing *Sch. Bd. v. Renollett*, 440 F.3d 1007, 1010-11 (8th Cir. 2006)).

2. Free Appropriate Public Education Standard. The ultimate issue in this case is whether a free appropriate public education (“FAPE”) has been provided or made available to [redacted]. The United States Supreme Court has rejected a “merely more than *de minimis* test” for a FAPE standard. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017). Instead, the Court has set forth the following FAPE standard: “[redacted] educational program must be appropriately ambitious in light of [redacted] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” *Id.* [redacted] is to be provided with “an educational program reasonably calculated to enable [redacted] to make progress appropriate in light of [redacted] circumstances.” *Id.* at 1001.

3. Procedural Issues. The IDEA has both procedural and substantive components. With regard to alleged procedural violations of the IDEA, a hearing officer may find a violation of the IDEA only if the violation “(I) impeded the child’s right to a free appropriate public education; (II) significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents’ child; or (III) caused a deprivation of educational benefits.” *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525-26

(2007). *See also* Ex. 109, 92 NAC 55-008.03; *W.K. v. Harrison Sch. Dist.*, 509 F. App'x 565, 566 (8th Cir. 2013) (*citing Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006) ("in determining that school district provided free appropriate public education, noting that individualized educational program should be set aside only if procedural inadequacies compromised student's right to appropriate education, caused deprivation of educational benefits, or seriously hampered parents' opportunity to participate in formulation process"); *Fort Osage R-1 Sch. Dist. v. Sims*, 641 F.3d 996, 1002-03 (8th Cir. 2011).

II. Placement Issues

claims that McPhee engaged in three changes of educational placements for : 1) a change of placement from the general education classroom; 2) a change of placement from the general education outdoor recess; and 3) a change of placement from the general education cafeteria for meals.

The IDEA nor does Nebraska Department of Education Rule 55 define the term "educational placement." A change in educational placement is a fact specific issue. In determining whether there has been a change in a disabled child's educational placement the impact of the changes on the disabled child's education is controlling. *Hale ex rel. Hale v. Poplar Bluffs R-I School Dist.*, 280 F. 3rd 831, 36 IDELR 61 (8th Cir. 2002), Appeal from U.S. District Court, Eastern District of Missouri 33 IDELR 268.

"The term 'educational placement' refers only to the general educational program in which the handicapped child is placed and not to all the various adjustments in that program that the educational agency, in the traditional exercise of its discretion, may determine to be necessary." *Concerned Parents & Citizens for Continuing Education at Malcolm X (P.S. 79) v. New York City Bd. of Educ.*, 629 F.2d 751, 756, EHLR 552:147 (2d Cir. 1980), *cert. denied* 449 U.S. 1078 (1981).

In order to determine whether there has been a change in a student's educational placement, the focus must be on whether the modification resulted in a fundamental substantive change in or elimination of a basic element of the child's educational program. *Hale ex rel. Hale v. Poplar Bluffs R-1 School Dist.*, 280 F. 3d 831, 36 IDELR 61 (8th Cir. 2002), Appeal from U.S. District Court, Eastern District of Missouri 33 IDELR 268.

In determining educational placement from the continuum of alternative placements, the IEP team considers the concept of "mainstreaming" or "least restrictive environment." 34 CFR § 300.114 provides:

- (2) Each public agency must ensure that –
 - (i) 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 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.**

34 CFR § 300.114. (emphasis added).

On January 31, 2018, IEP team met to develop an IEP for fifth grade year at McPhee. Ex. 31. The IEP team decided, will receive special instruction within the general education classroom and in the special education resource classrooms. *To the fullest degree appropriate, will participate in general education classes* with accommodations and modifications, as needed." Ex. 31. (emphasis added). This is the same decision the IEP team came to on November 12, 2018. Ex. 32. The evidence adduced at the hearing shows that beginning on or

around November 13, 2018, the fullest degree appropriate which [redacted] could participate with general education classroom was very limited.

Around the middle of November, 2018, [redacted] began to exhibit serious sexual behaviors. Ex. 120; 179:10-16-24; 188:16-20. These behaviors included [redacted] removing [redacted] pants and underwear, sticking various objects inside of [redacted] body through [redacted] buttocks and genitals, rubbing [redacted] bare buttocks on [redacted] paraeducators, and verbally expressing sexual behavior such as talking about underwear and a man named Mikey who likes “booty.” Ex. 127. Dr. Fundus, the director of special education, testified that fifth grade students at McPhee should not be exposed to the sexual behaviors exhibited. 251:7-9. Even [redacted] agreed that it would not have been appropriate for [redacted] to be around other students when [redacted] was exhibiting sexual behaviors. 58:9-25, 70:6-25, 71:17-23, 72:24-73:7.

In addition, around this time frame, [redacted] began using inappropriate language for fifth graders regularly. [redacted] would use phrases such as “shut up you f**cking b**ch” or “n**ger” or “I’m going to hit you in the face with my g***amn f**cking shoe.” 141:5-17. Ms. Novotny described [redacted] use of language as the type of language that McPhee does not want anyone to use. 141:14-17. Dr. Fundus also testified that fifth grade students should not be exposed to inappropriate language of the type used by [redacted] 251:7-9. While [redacted] was using this type of language in fifth-grade classroom, [redacted] also exhibited other destructive behaviors such as throwing objects, taking things from other children, climbing on top of and underneath desks, and running around the classroom. Ex. 127; 140:19-141:4; 104:14-106:9. Dr. Fundus testified that when [redacted] exhibited these types of behaviors it was not appropriate for [redacted] to be around fifth graders because fifth graders do not understand that type of disruptive behavior and it is the general education teacher’s job to focus on providing certain educational standards to the students. 251:1-16. Dr. Fundus

explained that during these disruptive times, it was not safe for [redacted] to be in the general education classroom. 251:1-16.

Like in the general education classroom, [redacted] struggled with behaviors during meal times. During mealtimes [redacted] would spit out food, throw the food on the floor, spit food at adults, swing food, and dump [redacted] tray. 145:22-146:2. [redacted] would also be physical with other kids during mealtimes. 146:3-7. Thus, during the November 12, 2018 IEP team meeting, a decision was made for [redacted] to eat breakfast and lunch in the classroom instead of in the cafeteria. 207:7-17.

In addition to behavioral issues in the classroom and during mealtimes, [redacted] also exhibited unsafe and disruptive behaviors during recess. Staff members who worked with [redacted] during recess discussed multiple incidents of running, hitting, kicking, throwing, and screaming in an attempt to get [redacted] to come back inside after recess. 144:3-23. Additionally, there were multiple accounts of [redacted] harming other children during recess in these attempts. Ex. 127; 192:25-194:7. Staff members received injuries as well during these encounters. Ex. 127 and 134. The decision for [redacted] not to go outside for recess was premised on the safety concerns for [redacted] Ex. 30; 192:9-21.

As the school year proceeded, the fullest degree appropriate for [redacted] to be in the general education classroom began to increase. As [redacted] inappropriate and disruptive behaviors declined and [redacted] demonstrated [redacted] was capable of following staff directions, [redacted] earned more time back in the general education classroom. Ex. 15 and 120. By December, [redacted] participated in specials with [redacted] class and by January [redacted] participated in reading group. Ex. 120. In February, [redacted] also participated in writing, and by the end of the school year [redacted] also participated in math and unit studies with the general education class. Ex. 120. In addition, [redacted] periodically went outside for recess. Ex. 127. Several witnesses testified that during the 2018-2019 school year, [redacted] participated with the general education class, to the fullest degree appropriate, in accordance with

IEP. 167:16-20; 200:12-15, 201:23-202:2; 222:10-15; 239:10-15; 250: 3-8. Therefore, based on the evidence in the record I find that [redacted] was never subject to a change of educational placement.

To be adequate under the IDEA, the educational placement must provide an IEP “reasonably calculated” to enable a child to make progress “appropriate in light of the child’s circumstances”; the IEP must prospectively aim to enable the child to make progress; and the educational program must be “appropriately ambitious in light of the child’s circumstances.” *Endrew F. v. Douglas Cnty. Sch. Dist. RE-I*, 137 S.Ct. 988, 1000-1001 (2017). Dr. Fundus and Ms. Boden both testified that IEP was reasonably calculated to provide [redacted] with meaningful educational benefit in light of circumstances. 223:3-7; 249:12-18. And, [redacted] did in fact make strides in [redacted] education in light of [redacted] circumstances. Ex. 116-119. [redacted] progress reports indicate that [redacted] met [redacted] goals and grew in [redacted] educational development from the beginning to the end of the 2018-2019 school year. Ex. 116-120. Mr. Johnson, Mr. Lutz, and Dr. Fundus all testified that [redacted] made meaningful progress in [redacted] educational goals under [redacted] IEP. 184:3-186:2; 186:22-25; 187:24-188:2; 202:8-11; 240:15-25; 249:6-11. Dr. Fundus testified that even though the progress reports occasionally show drops in progress, that is to be expected of a student with [redacted] needs. 186:18-21.

Dr. Fundus also testified and explained that even though some of [redacted] goals looked similar, the conditions would be different. 253:16-25. Dr. Fundus explained that the goal was always to push [redacted] towards the general educational curriculum. 253:16-25. I find that [redacted] IEP was reasonably calculated to enable [redacted] to make appropriately ambitious progress in light of [redacted] circumstances. I find that [redacted] education program was reasonably calculated to enable [redacted] to make educational progress in light of [redacted] circumstances, and [redacted] IEP enabled [redacted] to actually make educational progress. This includes the period where [redacted] was not with [redacted] general education

classroom because during those times it was not appropriate for [redacted] to participate with general education class.

I find that the location where [redacted] spent [redacted] time or class, recess, and meals was not only appropriate under [redacted] IEP but was also appropriate under settled special education law concerning mainstreaming. Mainstreaming is not appropriate where it would not benefit the child. Removing a child from the mainstream setting is permissible when “the handicapped child would not benefit from mainstreaming,” when “any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting,” or when “the handicapped child is a disruptive force in the non-segregated setting.” *Parrish v. Bentonville Sch. Dist.*, 2017 U.S. Dist. LEXIS 41149, at 36-37 (W.D. Ark. 2017) citing *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983). *See also Pacht v. Seagren*, 453 F.3d 1064 (8th Cir. 2006). A student may also be removed from the regular classroom if it is necessary for the safety of other students or for the disabled child. *M.M. v. Lancaster County Sch.*, 702 F.3d 479 (8th Cir. 2012).

Furthermore, the Department of Education has observed the following in 71 Fed. Reg. 46589 (2006):

The courts have generally concluded that, if a child with a disability has behavioral problems that are so disruptive in a regular classroom that the education of other children is significantly impaired, the needs of the child with a disability generally cannot be met in that environment. However, before making such determination, LEAs [(local education agency)] must ensure that consideration has been given to the full range of supplementary aids and services that could be provided to the child in the regular educational environment to accommodate the unique needs of the child with a disability. If the group making the placement decision determines, that even with the provision of supplementary aids and services, the child's IEP could not be implemented satisfactorily in the regular educational environment, that placement would not be the LRE [(least restrictive environment)] placement for that child at that particular time, because her or his unique educational needs could not be met in that setting.

James R. Rapp, 4-10C EDUCATION LAW § 10C.07 (2017). (See also *Roncker*, 700 F.2d 1058; *Devries v. Fairfax County School Bd.*, 882 2d 876, 879 (4th Cir. 1989); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989); *A.W. v. Northwest R-1 School Dist.*, 813 F.2d 158, 163 (8th Cir. 1987)).

The record shows [redacted] disruptive behavior ranged from running around the classroom, throwing things in the classroom, swearing at staff in the classroom, to displaying graphic sexual behaviors. Ex. 127. At recess, [redacted] exhibited dangerous behaviors such as kicking, running, screaming, and throwing things at other students and Respondent's staff. Ex. 127. [redacted] also harmed other children and staff during recess. Ex. 127 and 130. [redacted] general education teacher, paraeducator, [redacted] case manager, the school psychologist, the director of special education for the school, and the director of special education for the school district all agreed that [redacted] was a disruption to the general education setting. 104:14-106:9; 107:3-21; 168:1-10; 201:14-16; 222:21-23; 240:2-5; 251:17-21. Each of them gave specific details of how [redacted] disruptions impacted the other students, teachers, and staff, and each of these disruptions are also documented in [redacted] daily documentation under Ex. 127-128.

Each of these witnesses also agreed that any marginal benefit [redacted] received in the mainstream setting was far outweighed by the benefits [redacted] received in the more restrictive setting. 165:21-166:11; 201:17-22; 222:16-20; 240:10-14; 251:22-252:3. Ms. Lyons, the school psychologist, demonstrated this by explaining that [redacted] time in the general educational setting mainly consists of [redacted] working individually with a paraeducator on [redacted] own activity that is separate from the rest of the class. 165:21-166:11. The record shows that [redacted], even when [redacted] was in the classroom, [redacted] did not engage with [redacted] peers; rather, [redacted] continued to work on the same activities

that [redacted] would work on in the safer and more restrictive environment. Even [redacted] agreed that it would not have been appropriate for [redacted] to be around the general education classrooms when [redacted] was exhibiting sexual behaviors. 68:19-24; 70:6-18; 70:19-25; 71:17-23; 72:24-73:7.

A case with facts similar to the case before me which illustrates this principle is *Parrish v. Bentonville Sch. Dist.* 2017 U.S. Dist. LEXIS 41149, at 15-22 (W.D. Ark. 2017). In that case a student, L.P., had severe behavioral issues that included hitting other students and teachers, kicking over furniture, throwing objects, refusing to do work, running around the school, and attacking a pregnant teacher. L.P. was taken out of the classroom setting for the safety of the students and teachers. The court followed the reasoning in *Roncker*, stating that educating students in a separate environment is not prohibited, where education in an integrated environment cannot be accomplished and that education in a segregated setting is warranted. *Id.* at 37. The record shows similarly, [redacted] had exhibited some of these same behavior issues by throwing objects, swearing, and demonstrating sexual behavior. [redacted] original removal from the general education class was not discussed with the IEP team, and rather was decided by [redacted] paraeducators and case manager, because it was believed the removal would be temporary and short term; approximately two weeks. Ex. 16; 193:24-194:18; 196:23-197:4 "The term 'educational placement' refers only to the general educational program in which the handicapped child is placed and not to all the various adjustments in that program that the educational agency, in the traditional exercise of its discretion, may determine to be necessary." *Concerned Parents & Citizens for Continuing Education at Malcolm X (P.S. 79) v. New York City Bd. of Educ.*, 629 F.2d 751, 756, EHLR 552:147 (2d Cir. 1980), *cert. denied* 449 U.S. 1078 (1981).

Once [redacted] continued to demonstrate disruptive behaviors even in the segregated classroom, the IEP team convened and decided that [redacted] would spend [redacted] day in the segregated classroom and

would earn back time in general education classroom. Ex. 16; 196:23-197:4. The IEP team also agreed to continue placement for recess and meals. Ex. 16 and 19. Importantly, the record shows that while was in the segregated classroom, behaviors improved such that was able to earn back significant time with peers, and made progress on IEP goals. Ex. 120.

While the IDEA evidences a preference for mainstreaming, this preference is not absolute. *N.L. Special Sch. Dist.*, 2010 U.S. Dist. LEXIS 27382, at 33 (E.D. Mo. 2010) citing *A.W. by and Through N.W. v. Northwest R-1 School Dist.*, 813 F.2d 158, 162-63 (8th Cir. 1987). In determining whether private placement is appropriate, it should be determined “whether the services which make the placement superior could feasibly be provided in a non-segregated setting.” *Id.* It is clear in case that the services could NOT be provided in the general education classroom. Even after moving to an isolated learning environment, continued to exhibit behaviors that were harmful and disruptive to and others. Ex. 127.

A question is whether the Respondent could meet “educational needs” in the general education setting. *McComish v. Underwood Publ. Schs.*, 2008 U.S. Dist. LEXIS 17492, at 32 (D.N.D. 2008) citing *Roncker on behalf of Roncker v. Walter*, 700 F.2d 1058, 1063 (1983). I find that the evidence establishes that the IEP team correctly assessed disruptive behavior in the general education setting. The record shows that disruptive and concerning behavior were not refuted by behavior is described in detail in the exhibits and in the testimony. I find that given the disruptive behavior of a continued educational placement in the general education setting was not appropriate to provide with a FAPE. Each of the staff members from McPhee who testified that, based on their professional opinions, the segregated classroom was the appropriate educational placement and the least restrictive environment for

to receive an education. 167:16-20; 200:12-15, 201:23-202:2; 222:10-15; 239:10-15; 250: 3-8. All of the members of IEP team, besides expressed this same opinion at the IEP team meeting on January 15, 2019. Ex. 16. I find that the evidence shows that because of behaviors McPhee was not able to meet “educational needs” in the general education setting during part of the 2018 – 2019 school. I find that a segregated classroom was the appropriate educational placement and the least restrictive environment for to receive an education during those times.

PROCEDURAL ISSUES

1. Alleged Change of Educational Placements for Classroom, Recess, and Meals

A change of educational placement must be a removal “from the child’s current educational placement.” (NDE Rule 51.016.01A). As I found and discussed in the other sections herein was never removed from educational placement. According to IEPs, educational placement was, “to the fullest degree appropriate, will participate in the general education classes.” Ex. 31 and 32. I find that at all times during the 2018-2019 school year, participated to the fullest degree appropriate in the general education classroom and with peers. Further, the record shows that no change of educational placement occurred related to location for class, recess, or meals because missed no school days as a result of the alleged change of educational placement.

I find that the removals from the general education setting did not impede right to a FAPE or cause a deprivation of educational benefits. I find that, the removals from the general education setting were necessary for the safety of and the other students at McPhee as could be physically violent with other students and staff. I find that, it was inappropriate for to be around general education peers when was exhibiting sexual behaviors and using

inappropriate language. Even [redacted] agreed that it would be inappropriate for [redacted] to be around the general education classroom when [redacted] exhibited these sexual behaviors. 68:19-24; 70:6-18-25; 71:17-23; 72:24-73:7. Moreover, the evidence shows that in the more restrictive settings, [redacted] continued to make progress on [redacted] IEP goals. Ex. 116-119. Additionally, the removal from the general education setting was not permanent as [redacted] was able to earn back time with [redacted] general education peers as [redacted] showed improvements in [redacted] behaviors. Ex. 120.

I find no violation of federal or state law as it relates to the issues involving the alleged changes of educational placement. I find that [redacted] was not subject to any changes of educational placement.

Petitioner argues that Respondent's alleged change of educational placement of [redacted] resulted in [redacted] losing access to supplemental services required by [redacted] IEP, including occupational therapy, speech language therapy, and hearing-impaired services. I am not persuaded by this argument as the record does not show that [redacted] was denied access to such supplemental services.

I find that the time [redacted] spent in a more restrictive environment did not impede [redacted] right to a FAPE or cause a deprivation of [redacted] educational benefits. I find that the restrictive environments were necessary for the safety of [redacted] and the general education students at McPhee.

2. Alleged predetermination of the educational placements for the classroom, recess, and meals

[redacted] alleged that [redacted] was not involved in the decisions to remove [redacted] from the general education settings for [redacted] time in class, recess, and meals. The Eighth Circuit Court of Appeals defined the standard for predeterminations in the IEP setting in a case involving a Nebraska school district. The court stated: "The IDEA requires that the parents of a child with a disability either be 'present at each IEP meeting or [be] afforded the opportunity to participate.' *Gray*, 611

F.3d at 427 (citation omitted). A school district cannot refuse to consider parents' concerns when drafting an IEP. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005). The IDEA explicitly requires school districts to include the parents in the team that drafts the IEP, to consider 'the concerns of the parents for enhancing the education of their child,' and to address 'information about the child provided to, or by, the parents.' 20 U.S.C. § 1414(d)(3)(A)(ii), (d)(4)(A)(ii)(III).

A school district cannot predetermine the educational program for a disabled student before meeting with parents. *Deal*, 392 F.3d at 859. Such a predetermination could amount to a procedural flaw in the IEP because it could deprive parents of a meaningful "opportunity to participate in the formulation process." *Lathrop R-II Sch. Dist.*, 611 F.3d at 424 (citation omitted); *M. v. Lancaster Cty. Sch.*, 702 F.3d 479, 488 (8th Cir. 2012).

The court in *M.M.* determined that a prohibited predetermination had not occurred where the parents "were given notice of IEP meetings, attended them, and shared their views about [their son's] behavior intervention plan." *Id.* The court recognized that while the parents disagreed with a component of the school's behavior plan, the "IDEA does not mandate that parental preferences guide educational decisions." *Id.*

The court further determined that "[t]he District did not predetermine [the student's] IEP or behavior intervention plan, and it did not refuse to listen to suggestions from L.M.'s parents or the [the student's private therapist.] To the contrary, the District participated in numerous meetings with KKI and L.M.'s parents and adopted a behavior intervention plan for L.M. that included almost all of the institute's recommendations. See *Fort Osage R-1 Sch. Dist. v. Sims ex rel. B.S.*, 641 F.3d 996, 1005 (8th Cir. 2011). We therefore conclude that L.M.'s parents were given a meaningful opportunity to participate in the creation of his fourth grade IEP." *Id.* at 488-89.

I find that, there could be no predetermination of a change of placement for [redacted] because [redacted] was not subject to a change of placement. Furthermore, the record shows, [redacted] was given notice of all of the IEP meetings, attended all of the IEP meetings, and shared [redacted] views about placement. The record shows the school members of the IEP team had not predetermined the decisions in question and listened to the input of the [redacted]. I find that [redacted] was not deprived of a meaningful opportunity to participate in the process of formulating the educational program for [redacted]. I find that the alleged predetermination did not deny a FAPE to [redacted] or cause a deprivation in [redacted] education. The records shows that [redacted] still received all of [redacted] education minutes, just in a different and more safe setting. Further, [redacted] continued to make progress on IEP goals. I find that the time that [redacted] spent solely in a restrictive setting was appropriate and that the record shows that [redacted] began to earn more time with [redacted] peers.

3. Prior written notice of the alleged change of educational placements

[redacted] claims [redacted] was not made aware of the decisions to place [redacted] in a more restrictive environment. As I found and discussed in the previous sections herein, [redacted] was not subject to any change of educational placements and McPhee followed [redacted] IEP for the entire 2018-2019 school year. Mr. Johnson testified that [redacted] removal from the general education setting was intended to be temporary and to only last for a few weeks. Once the IEP team realized that [redacted] behaviors were not improving, a meeting request was sent to [redacted] on December 13, 2018. Mr. Johnson testified that there were approximately 15 to 20 school days between the November 13, 2018 decision to place [redacted] in a more restrictive environment to the December 13, 2018 meeting notice. 195:17-19. The meeting took place on January 15, 2018. [redacted] attended that meeting. 234:1-15. [redacted] was represented by an attorney at this meeting. 234:16-19. On January 17, 2018 McPhee sent [redacted] a Notice of Change of Placement or Discontinuation

stating that requires a more restrictive environment in order to meet IEP goals and objectives. Ex. 19. The Notice stated further:

The school district considered the following option(s) prior to reaching the decision to change placement or discontinue service, and rejected those option(s) because:

Continuing placement: This option was rejected because the placement no longer meets educational needs.

The proposed change of placement or discontinuation of special education services is based upon the following evaluation procedures, tests, records. Or reports:

Input from teacher(s) and parents(s), formative/ summative assessment results and available records.

“In general, [a prior written] notice must be given to parents a reasonable time before the agency implements that action, but after the agency’s decision on the proposal or refusal has been made.” OSEP Response, 16 EHLR 550 (1990). In the circumstance here, where the parents’ attorney attended the meeting at which the decision to change the student’s educational placement was made, and where the needs of the student were not being met at the current educational placement, I find a notice given the day before the change of the educational placement is to occur, is reasonable. *See Jones v. Bennington Public Schools*, Case No. 17-02 SE (Neb. Dep’t of Educ. Aug. 14, 2017) (“In general, [a prior written] notice must be given to parents a reasonable time before the agency implements that action, but after the agency’s decision on the proposal or refusal has been made. In the circumstances here, where the parents’ attorney attended the meeting at which the decision to change the student’s placement was made, where the needs of the student were not being met at the current placement, where an extended period of time, practically the entire semester, had passed with little or no progress made to provide [the student] with the education to which he is entitled, and where the parents has sufficient time in which to effectively to challenge the decision and trigger the

stay put, a notice given the day before the change of placement is to occur, is reasonable.”) (internal citation omitted).

The concept of harmless error for an alleged procedural violation in the context of notice to parents has been addressed by courts as follows:

[T]he IDEA contains a notice provision, requiring prior written notice to parents whenever an agency proposes or refuses to initiate or change ‘the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.’ 20 U.S.C. § 1415(b)(3). These procedures are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions. *See id.* § 1415(a). Thus in cases where a violation of a notification requirement does not actually impair the parents’ knowledge of, or participation in, educational decisions, the violation is not a substantive harm under the IDEA. *See, e.g., Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 956 (4th Cir. 1997) (noting that parents received late notice with ample time to respond and holding that ‘[b]ecause any violation of the notice provisions did not interfere with the provision of a free appropriate public education to [the child], these violations cannot subject [the district] to liability for reimbursement of [private school] tuition’).

C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 70 (3d Cir. 2010) (emphasis added). I find that prior written notice of the alleged change in educational placement was not necessary in this case, since I found herein, that there was no change in educational placement by the Respondent. Moreover, the record shows that as soon as the IEP team recognized that removal from the general education setting would be longer than a few weeks, the IEP team convened and listened to input. Despite any alleged error, participated in the IEP meeting which preceded the notice of change of placement and was accompanied by an attorney.

I find that any alleged procedural violation, if any, by Respondent related to giving of prior written notice did not amount to substantive harm under the IDEA, since the record shows, such alleged violation did not impair the Petitioner’s knowledge of or participation in the educational

decisions for [redacted] and did not interfere with the provision of a free appropriate public education to [redacted]

Therefore, I find that there is not a basis for imposing any liability against the Respondent that would relate to the giving of prior written notice

4. Restrictions on Ms. Ureste's Communications

Petitioner argues in [redacted] in [redacted] Post-Hearing Brief and states in [redacted] Proposed Findings of Fact and Conclusions of Law that [redacted] was not given an opportunity to give input to discuss changing

[redacted] time with [redacted] general education peers in classroom, at recess, or at lunch, prior to making such changes to [redacted] educational environment. I find that [redacted] was not denied the

opportunity to participate in the decision making for [redacted] IEP due to the restrictions placed on [redacted] communication by McPhee. [redacted] was informed on December 11, 2018 that [redacted] was to

direct all communication through Mrs. Boden. Ex. 10. Prior to this notice, [redacted] attended [redacted] IEP meeting on May 11, 2018 and [redacted] MDT/IEP meeting on November 12, 2018.

After this notice was sent to [redacted] [redacted] was still able to attend the January 15, 2019 IEP team meeting. 234:1-15. Moreover, the record shows that [redacted] was offered the opportunity to

participate in a Behavioral Intervention Plan meeting scheduled for February 12, 2019, but [redacted] canceled that meeting. The meeting was rescheduled for April 2, 2019 and [redacted]

attended that meeting. When asked, [redacted] did not know whether limitations on [redacted] communications denied [redacted] the opportunity to participate in the IEPs for [redacted] 98:17-21.

[redacted] was able to attend these meetings despite the fact [redacted] claims [redacted] did not receive Ex. 138. [redacted] 227:14-228:11.

I find that the restriction in communication placed on [redacted] did not deny [redacted] FAPE and did not cause a deprivation in [redacted] educational development. Even with the restriction in place, [redacted] made progress in [redacted] IEP goals. Mr. Lutz testified that the restriction was actually a

benefit to educational development because teachers and paraeducators were able to focus more of their time directly onto instead being distracted by constant questions, emails, and phone calls from When questioned, did not necessarily believe that the limitations placed on communications denied a FAPE in the 2018-2019 school year. I find that the restrictions placed on communication with McPhee did not deny parental right to participate in educational planning for

I find that the restriction placed on communication with McPhee did not deny with the opportunity to participate in the decision making for IEP. Nor did the restriction impede on right to a FAPE or cause deprivation in educational benefits.

With regard to alleged procedural violations of the IDEA, a hearing officer may find a violation of the IDEA only if the violation “(I) impeded the child’s right to a free appropriate public education; (II) significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents’ child; or (III) caused a deprivation of educational benefits.” *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525-26 (2007). *See also* Ex. 109, 92 NAC 55-008.03; *W.K. v. Harrison Sch. Dist.*, 509 F. App’x 565, 566 (8th Cir. 2013) (*citing Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006) (“in determining that school district provided a free appropriate public education, noting that an individualized educational program should be set aside only if procedural inadequacies compromised student’s right to appropriate education, caused deprivation of educational benefits, or seriously hampered parents’ opportunity to participate in formulation process”); *Fort Osage R-1 Sch. Dist. v. Sims*, 641 F.3d 996, 1002-03(8th Cir. 2011).

I find that the alleged procedural violations did not result in any of the foregoing just described.

IT IS THEREFORE ORDERED

1. 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 this reference to the same extent and with like effect as though such Findings of Fact and Conclusions of Law were fully set forth verbatim herein

2. Petitioner failed to meet burden of proving that Respondent failed to provide a free appropriate public education to in accordance with federal and state law and applicable regulations.

3. The Petitioner's Special Education Petition is dismissed.

4. The parties shall pay their own costs.

5. The Hearing Officer does not have authority to determine or award attorney's fees and, therefore, does not make any determination as to attorney's fees.

RIGHT TO APPEAL

The Petitioner has the right to Appeal the Hearing Officer's Decision under 20 U.S.C. § 1415(e)(4)(B) 92 NAC 55-009 009. Appeals to state or federal court; enforcement, which provides:

009.01. Any person aggrieved by the findings, conclusions, and final decision in a special education contested case is entitled to judicial review under the Nebraska Special Education Act or the Individuals With Disabilities Education Act.

009.02. Under the Nebraska Special Education Act (Neb. Rev. Stat. §79-1167), parties desiring to appeal a hearing officer decision must file a petition for review in the district court of the county in which the main administrative offices of the school district are located within two (2) years after service of the final decision and order by the hearing officer on the party seeking such review. The two (2) year period for appeal commences to run from the date of mailing of the notice of order and decision to the parties or their attorneys of record. Service of the petition and summons must be made in accordance with Nebraska law.

009.03. The provisions of Neb. Rev. Stat. §79-1167 specify the procedure for and effect of taking an appeal to state district court under the Nebraska Special Education Act.

009.04. Under the Nebraska Special Education Act (Neb. Rev. Stat. §79-1167), any party of record may seek enforcement of the final decision and order of the

hearing officer by filing a petition for appropriate relief in the district court of the county in which the main administrative offices of the school district are located within one (1) year after the date of the hearing officer's final decision and order.

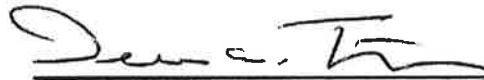
009.05. Under Section 1415(I)(2) of the Individuals With Disabilities Education Act (20 U.S.C. 1415), any party aggrieved by the findings and decision made under this Chapter shall have the right to bring a civil action with respect to the complaint presented pursuant to this Chapter, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. Under Section 1415(I)(3)(B) of the Individuals With Disability Education Act (20 U.S.C. 1415), in any action brought under section 1415 of the Act, the United States District court, in its discretion, may award reasonable attorney's fees as part of the costs to the parents of a child with a disability who is the prevailing party.

009.06. The provisions of 20 U.S.C. 1415(I)(2)(B) and 1439(a)(1) specify the requirements applicable to state or federal court in a civil action appealing a special education due process case under the Individuals With Disabilities Education Act.

009.07. The provisions of 20 U.S.C. 1415(I)(3)(B)-(G) govern the availability and amount of attorney's fees that may be awarded by the United States District Court under the Individuals With Disabilities Education Act (20 U.S.C. 1401 to 1487).

009.08. The party bringing a civil action under subsection 009.05 shall have ninety (90) days from the date of the decision of the hearing officer to bring such action; or, if the state has an explicit time limitation for bringing such action under Part B of the Individuals With Disabilities Education Act (20 U.S.C. 1411 to 1444), in such time as the state law allows.

Dated August 27, 2019.



DENNIS C. TEGTMEIER,

Hearing Officer

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Hearing Officer's Report, Final Decision, and Order was duly served by U.S. certified mail, return receipt requested upon:

Petitioner

Gregory H. Perry
Perry, Guthery, Haase & Gessford, P.C., L.L.O.
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and via email upon:

Petitioner

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on the 27th day of August, 2019.


DENNIS C. TEGTMEIER, Hearing Officer