

BEFORE THE NEBRASKA DEPARTMENT OF EDUCATION

)	CASE NO. 17-02 SE
)	
)	
Petitioners,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
vs.)	AND ORDER
)	
BENNINGTON PUBLIC SCHOOLS,)	
)	
Respondent.)	

INTRODUCTION

This case was heard on July 11, 12, and 13, 2017, in the Nebraska State Bar Association meeting rooms in its offices in Lincoln, Nebraska. Bill Morris, the duly qualified and appointed Fair Hearing Officer, presided. Petitioners _____ parents of minor child, _____ were present and represented by attorneys, Leigh Ellis and Ann Mangiameli. Petitioner _____ was not present. Respondent appeared by its representative, Chad Boyes, and legal counsel, Gregory H. Perry and Jeanette Stull. Witnesses were sequestered at the request of petitioners. The case was adjourned on July 13, 2017, the record closed, written arguments scheduled and the case taken under advisement. The hearing was recorded by Jody J. White, Registered Merit Reporter. The parties stipulated to good cause for the extensions of deadlines, (e.g., the provision to the reporter of sufficient time to transcribe the lengthy record, to the parties to prepare written argument, and to the hearing officer to prepare his decision). (The record is comprised of 840 pages of transcription and 136 exhibits.) Final deadline for this decision was first set for Friday, August 11, 2017, and on the hearing officer's own motion extended to Monday, August 14, 2017.

Jurisdiction is premised upon NAC Title 92 Ch. 55, § 005.01, and the Nebraska Special Education Act, Neb. Rev. Stat. § 79-1110 et seq., which confers on the hearing officer exclusive original jurisdiction of the case.

are the parents and next friends of

The respondent is Douglas County School District 59, referred to as Bennington Public Schools (BPS). It is an accredited Class III school district and political subdivision under Nebraska law.

was born multidisciplinary evaluation team (MDT) most recently confirmed as a student with autism on September 21, 2016. attended kindergarten at Bennington Elementary School during the 2016-2017 school year, during which received special education services. individualized education plan (IEP) team, including mom and dad, developed an IEP for on September 21, 2016.

Throughout the course of the 2016-2017 school year, engaged in challenging behaviors that impeded learning and the learning of other students. BPS hired Childhood Autism Services (CAS), a private company, to help provide services to CAS personnel observed on February 6, 2017, developed a behavior intervention plan, and began providing services to.

At an IEP meeting on March 29, 2017, the team proposed placing with the Boys Town Day School program. Scott Butler, principal of the program, was present at the meeting and offered program information to the team. After the meeting, the IEP team decided placement should be changed to the Boys Town Day School program. The disagreed with this change and insisted remain at BPS.

On March 30, 2017 at 3:28 p.m., via email BPS provided and received written notice that the change in educational placement would occur the following day, March 31, 2017, at 8 a.m.

On March 31, 2017, the filed a due process petition with the Nebraska Department of Education which allowed to stay put at BPS pending the outcome of the hearing on the petition.

In no significant order, these witnesses testified at the hearing:

- Scott Butler is the principal of the Boys Town Metro Intervention Center (MIC) and the Boys Town Day School. He has a doctorate in educational administration. He holds Nebraska Department of Education educator's certificates in several areas, including school administration, and has a mental health license. He was a public school educator for 28 years before coming to Boys Town. Based on his education and experience, he has "a good understanding of . . . the continuum of autism and how it impacts kids in educational settings and what educational settings can do to support kids. "37:23-38:1.
- petitioner, is mother and a member of MDT and IEP teams.
- , petitioner, is father and a member of MDT and IEP teams.
- Terri Newton is the owner and clinical director of CAS and is a board certified behavior analyst. Ms. Newton attended the IEP meeting for on March 29, 2017.
- Tara Mattson is a psychologist for BPS. She holds a current Nebraska Department of Education educator's certificate and is endorsed as a school psychologist, PK-12. Ms. Mattson was a member of MDT and IEP teams in the 2016-2017 school year. Exs. 102, 104, 106, 108, 110, 111, 112, 114-116.
- Sarah Ihrig was the Director of Student Services of BPS. She holds a current Nebraska Department of Education educator's certificate. Her endorsements include elementary K-6, special education inclusion and special education supervisor K-12. Ms. Ihrig was a member of IEP team in the 2016-2017 school year.

- Chad Boyes is the principal of BPS. He holds a current Nebraska Department of Education educator's certificate and endorsements in elementary K-6 and principal PK-8. Mr. Boyes was a member of _____ MDT and IEP teams in the 2016-2017 school year.
- Lyle Brayton is a school bus driver for BPS. He transported _____ to school during the 2016-2017 school year.
- Cindy Pichler was _____ kindergarten teacher. She holds a current Nebraska Department of Education educator's certificate and is endorsed in elementary K-6. Ms. Pichler was a member of _____ MDT and IEP teams in the 2016-2017 school year.
- Heather Krejci was _____ speech language teacher during the 2016-2017 school year, until Megan Kruse began serving _____ in February 2017. She holds a current Nebraska Department of Education educator's certificate and is endorsed in speech language pathology B-21. Ms. Krejci was a member of _____ MDT and IEP teams in the 2016-2017 school year.
- Megan Kruse is employed by BPS as a speech language pathologist. She was _____ speech language teacher beginning in February 2017. She holds a current Nebraska Department of Education educator's certificate and is endorsed in the areas of speech language pathology PK-12 and K-12. Ms. Kruse was a member of _____ IEP team in the 2016-2017 school year.
- Shelli Oborny was the special education teacher for _____ in the 2016-2017 school year. Ms. Oborny holds a current Nebraska Department of Education educator's certificate, endorsed in the areas of elementary K-6 and mild/moderate disabilities K-9. Ms. Oborny was a member of _____ MDT and IEP teams in the 2016-2017 school year.

Exhibits 1 through 15 and 101 through 237 were received into evidence without objection. Copies of the parties' exhibit lists are attached hereto and incorporated herein for reference.

FINDINGS OF FACT

PLACEMENT

1. _____ started the 2016-2017 school year in the regular education classroom with special education supports. _____ behaviors escalated throughout the first semester of the 2016-2017 school year. _____ behaviors included biting and kicking students, teachers and para-

educators, shoving, slapping, spitting, hitting, pinching, pushing students, stepping on the feet of students, throwing objects, hitting head on a table, putting hands in pants, and general disruptiveness.

2. Behaviors continued to escalate at the beginning of the second semester of the 2016-2017 school year. There were several placements considered for [redacted] On January 18, 2017, the Boys Town Metro Intervention Center was suggested to the [redacted] as an option for [redacted] in order to provide [redacted] with more expertise in the area of social behaviors. 363:25; 364:1-2; 441:15-22. Other options that the IEP team explored were Brook Valley, Heartland School, and Alpha School. 442:13-16. Each of these options was decided to not be appropriate for [redacted] for the following reasons: Alpha School was allowed to be more physical than was thought to be appropriate for a kindergartner; Brook Valley does not have programs that can be specialized to each student as [redacted] needed; and Heartland was more for students whose behaviors initiate from emotional issues and that did not apply to [redacted] 442:8-23; 443:1-7; 444:13-18; 445:17-24. A tour of the Metro Intervention Center was scheduled for the [redacted] but the tour was cancelled when the [redacted] sent an email to Sarah Ihrig stating that they did not want to take the tour. 363:25; 364-365; 366:1-19; 449:1-9.

3. [redacted] IEP team next agreed to place [redacted] on a shortened day. 458:6-459:-16; Ex. 106. The team felt it would be helpful because it would allow them to work more closely with [redacted] to help [redacted] become successful with at least part of [redacted] day. 270:7-25; 271:1-10; 458:15-25; 459:1-3. The morning was selected for [redacted] school day because that was when the math and reading instruction happens. The afternoons were for specials (P.E., art and music), which are less structured activities. 331:22-25; 332:1-23; 711:21-25; 712:1-8.

4. The shortened day did not solve the problems with behaviors. IEP team met again on February 2, 2017 and decided that should be served in a therapy room outside of the regular classroom. Ex. 109; 271:16; 272:1-25; 466:6-8. It was also decided at that meeting that BPS would contract with CAS to provide services to in the therapy room. 274:22-25; 275:1-6. CAS is a private educational service which focuses on kids with autism who have accompanying behavior issues. behaviors were too extreme for BPS staff to deal with in the usual classroom setting with other students. They required that they be addressed one-on-one by specially trained teachers in a private room.

5. IEP team met again on March 29, 2017. One of the items on the agenda was a level III placement. Ex. 114. There was concern that was not responding sufficiently to CAS services in the therapy room and that other placements should be considered. They discussed Boys Town Day School. The student-teacher ratio at Boys Town is five kids to one teacher and all of the teachers are trained in the Boys Town social skill model. 39:10-18. The program also aligns the classroom instruction to the same state standards that public education settings align to. 40:7-9. Classes are multi-grade and the teachers individualize the instruction to each student's academic needs and state standards for providing education. 40:10-14. would be in a classroom with peers and would be able to participate in specials such as art, physical education, and music, which was not able to participate in at Bennington Public Schools because of behaviors. 532:15-25; 533:1-25; 534:1-3. If were to be schooled at Boys Town Day School program, would receive both the behavior and academic components needed for to succeed. 40:15-18. At the meeting, the team decided to place at the Boys Town Day School. parents did not agree with this conclusion.

6. A notice of change of placement and a School District Decision notice were sent to the on March 30, 2017. Exs. 117, 118. The notices state in part:

...To the maximum extent appropriate, your child will be educated with other children in the general education environment. Your child will be moved from the general education environment only when the nature or severity of needs are such that the education in general education classes with supplementary services cannot be achieved satisfactorily.

...The IEP team met and the team decided that attend Boys [Town] Day School. School at Boys Town starting on Friday, March 31, 2017.

...The current placement is not the least restrictive environment in which may receive a free appropriate public education and causes a disruption to the learning of other students when attempts are made to include with other students and personal safety is at risk.

Services since January 2017 in the placement have had to be scaled back due to behaviors, including:

- a. No recess
- b. No breakfast with peers in the lunchroom
- c. No therapy swing – has to walk through hallways
- d. Had to put all the activities in tubs – so wouldn't throw them
- e. Behaviors in therapy are increasing
- f. Two bus suspensions
- g. Change of Placement IEP sta[t]e[s] "gradually return to classroom," this is not occurring.
- h. Goals for now, compared to when was at OPS, are not as high...thus regressions...setting is not working

The placement at Boys Town Day School will provide:

1. Instruction from a certified sped teacher all day
2. School is designed to have students there all day
3. Small classroom size, typically 4-6 students
4. Positive reinforcements are used consistently
5. Social skills are learned
6. PE, lunch and recess with peers
7. Staff is trained to work with and through behavior outbursts
8. Least restrictive environment in which may receive a free appropriate public education with less disruption to the learning of other students and better protection of personal safety

(3.) To determine the appropriate placement for your child, the school district considered the following option(s) prior to reaching the placement decision, and rejected those option(s) because:

1. Placement in the regular classroom at Bennington Elementary.
2. Continuing the current placement at Bennington Elementary in a small room using a therapy model on a shortened daily schedule.
3. Placement at Boys Town Day School.

The first and second options were rejected for the reasons set forth in section 2.

(4.) The proposed change of placement is based upon the following evaluation procedures, tests, records, or reports:

1. Daily data sheets
2. Speech data
3. ABA daily data and graphs
4. Behavior letters from Bennington Elementary office
5. Accident reports from staff
6. Behavior information in SIMS
7. Behavior Plan
8. Ihrig observation notes
9. Permanent file

There was no evidence that a placement of [redacted] in a general education classroom at Bennington Public Schools would have been appropriate as of March 29, 2017.

7. Psychologist Tara Mattson testified that the therapy room in particular was not appropriate "...[p]rimarily because of how removed [redacted] was from all the other children [redacted] age.

[redacted] -- had gone from -- when we first decided -- you know, decided that CAS was going to work with [redacted] was going for the cafeteria in the morning. [redacted] had recess with [redacted] peers.

[redacted] had times built in that [redacted] still had access to being around other kids [redacted] age, but those were slowly getting removed from -- from [redacted] day. And by the time that we decided to change placement, [redacted] didn't see kids [redacted] age anymore at all." 287:13-23.

8. Ms. Mattson created a graph to illustrate changes in behaviors while [redacted] was in the therapy room from February 6, 2017 to March 29, 2017, using data that had been compiled during that time. 288:6-25; 289:1-17; Exs. 143, 145. This graph was given to the IEP team at the March 29th IEP meeting. 289:18-20. The graph did not require expertise either to create or interpret. The educator in the room with [redacted] counted and recorded the number of times per day she observed certain behaviors. Ms. Mattson merely plotted the number of those behaviors occurring on sequential days. The resulting graph illustrated that [redacted] “behaviors toward the last -- later part of March really kind of exploded and increased in frequency considerably.” 289:21-25; 290:1-2.

9. Ms. Mattson testified that, in her opinion as a school psychologist, a reasonable amount of time in which to try a behavior intervention before doing something different is six to eight weeks, and that [redacted] had been in the therapy room with CAS for approximately seven or eight weeks. 298:16 to 299:12.

10. As of March 29, 2017, the continuum of placements had moved from the regular education classroom, to a proposed placement at the Metro Intervention Center at Boys Town, to a shortened day, to other Level III placements, to the therapy room with CAS, and none of them had worked or been deemed appropriate. Ms. Mattson testified:

Q. Based on your experience and training, have you reached an opinion to a reasonable degree of educational certainty as to whether [redacted] placement at Bennington Public Schools in the therapy room was an appropriate placement for [redacted] on March 29th of 2017?

A. Yes.

Q. And what is that opinion?

A. I felt that [redacted] needed to be in a setting that was -- included more of peers.

Q. So -- and then backing up a little bit, as of February 2nd of 2017, when the decision was made to hire CAS and have [redacted] in [redacted] therapy room, did you think that was an appropriate placement at the time?

A. Yes.

Q. Did you -- did you think it was worth a try?

A. Yes. ABA therapy is very well research-based. It's documented in countless studies of its effectiveness with not only students with autism but lots of students that exhibit behavior problems.

Q. But then as you went down the line -- and we were about two months later here on March 29 -- did you feel like [redacted] was receiving the appropriate level of educational benefit in light of his circumstances in that therapy room with CAS?

A. I felt like -- no. I felt like [redacted] - the way that [redacted] was being removed from more and more of the general ed environment wasn't appropriate for anymore.

Q. Based on the data that you looked at, was [redacted] a disruptive force in the Bennington Public Schools environment at that time?

A. Yes.

Ms. Mattson gave her professional opinion that a placement at the Boys Town Day School program was appropriate:

Q. Do you believe that [redacted] would have benefited more from a placement at Boys Town rather than continuing [redacted] placement at the therapy room at Bennington Public Schools with CAS?

A. I felt that [redacted] social deficits could have been addressed better.

Q. Okay. And turning to that issue of the Boys Town Day School program, did the IEP team discuss the Boys Town Day School as a possible placement during the March 29th meeting?

A. Yes.

Q. Did everybody on the team except for the express their -- and -- and maybe with regard to Ms. Newton as well -- express their agreement that Boys Town was the least restrictive environment in which to educate at that time?

A. As I recall, yes.

Q. Why did you think that the Boys Town Day School program was the most appropriate placement for at the time?

A. My understanding of Boys Town and their model -- I actually was employed by Boys Town. I forgot to mention that to you. When I was in undergrad, I was a behavioral health technician; so I'm well familiar with their program and the social skills training that they do.

I've -- we've had another student who has autism in Bennington who has been placed in that program, and then he's now back in our school district, and I've seen the positive changes that happened with him. I've observed -- I've gone out to evaluate students in their programs; so I -- I just -- I intimately know that program, and I felt that it was worth a shot to try there.

Q. And would the Boys Town Day School program allow to be educated in a classroom with 20 peers?

A. Yes.

Q. And do you think that's important?

A. Yes.

294:8-25; 295:1-24. Ms. Mattson further testified:

Q. And based on your expertise and training, have you formed an opinion to a reasonable degree of educational certainty as to the appropriate placement for as of March 29th of 2017?

A. Yes.

Q. And what is your opinion?

A. I felt at that time that Boys Town was the appropriate placement for

Q. And did you feel that Boys Town was the least restrictive environment in which could receive educational benefit at that point?

A. Yes.

Q. And do you stand by the IEP team's decision to change placement to the Boys Town Day School program?

A. I do.

296:11-25; 297:1.

The hearing officer followed up with questions of his own:

HEARING OFFICER: . . . So I'll just start out with -- with my first one, and that is: Taking into account that [redacted] will not be with children who are not disabled, is the placement at the Boys Town School the most appropriate placement for [redacted] in your opinion?

THE WITNESS: That [redacted] will not be with children that are not disabled? Oh, you mean, like, all the children [redacted] with will be children with disabilities?

HEARING OFFICER: Correct.

THE WITNESS: Correct. Yes. I still feel that it's a necessary placement for [redacted] at this time given that [redacted] doesn't have any access to [redacted] peers in Bennington with the hope that eventually [redacted] can transition back to Bennington.

HEARING OFFICER: Okay. My second question is: Given the nature and severity of [redacted] disability, can education in regular classes with the use of supplementary aids and services be achieved satisfactorily now?

THE WITNESS: No.

309:11-25; 310:1-14.

11. Sarah Ihrig, BPS Director of Student Services, believed, as of March 29, 2017, continued placement of [redacted] in the therapy room was not appropriate. 530:21-25; 531:1-4. Ms. Ihrig had observed the delivery of services to [redacted] in the therapy room every day except two. 478:16-18. She observed that work-to-reward ratios were not increasing, and that the behaviors which cannot occur in a general education classroom were escalating. 483:8-25; 484; 485:1-16; 490:15-25; 491:1; 530:1-5. In one twenty minute period on March 13, 2017, she observed ten

different inappropriate behaviors including kicking, disruption, elopement, and stabbing. 492:9-21. Ex. 143, p. 20. She told Ms. Newton that “ behaviors were too severe for the staff to be trained” on the CAS model, and that that was the case even if and when they saw the behaviors beginning to diminish. 217:18-19. Throughout the course of testimony by various BPS personnel, they voiced an understandable and unwavering refusal to expose themselves and others of the school’s staff and students to explosive and dangerous behaviors.

12. Ms. Ihrig did not feel was making sufficient progress on IEP behavior goals. 506:14-16. Her opinion was that continued placement in the therapy room was not appropriate because behaviors were increasing and was not getting any interaction with peers. 529:6-15. As of March 29, 2017, was outside of therapy room about one percent of day “if went down to the bathroom.” 512:12-15.

13. Ms. Ihrig testified that as of March 29, was not receiving the appropriate level of educational benefit in the therapy room and was a disruptive force in the BPS setting. 531:12-25. She testified that she and all of the members of IEP team concluded that the Boys Town Day School was the appropriate placement for and the least restrictive environment in which to provide an education. 532:1-14; 535:7-25.

A. would be in a small classroom with peers. It -- they have three levels of elementary classrooms, and would be in a classroom with kindergarten and first graders. There would be five students total in that classroom, and so have the opportunity to interact with peers. would have a special -- services from a special education teacher all day. would get specials which was not getting at Bennington Public Schools.

Q. And specials would include . . .

A. Art, P.E., music. Those -- those specials.

Q. Okay.

A. And [redacted] also would be able to go out for recess with other students. And one of the – one of -- and then they also have a very positive reward system. They – it's a -- in fact, it's a little bit similar to ABA -- ABA therapy in that they - - they get -- the first few days they just get tons and tons of points, they call it. And they just overload them with how wonderful they're doing, you know. If -- basically, if they breathe, they got a point, and so there would be continuous positive rewards.

And then there's behavior -- then there's a behavior therapist. If -- if something -- if they don't do something correctly, then the behavior therapist works with the student and reteaches the behavior and what they should have done instead, and then they have -- so they have an opportunity to practice that immediately on their own, and then they have an opportunity to practice it back in the classroom of five children as well.

532:15 to 534:3. Ms. Ihrig was not concerned that [redacted] peers at Boys Town would be students with disabilities due to management practices employed at Boys Town. 534:8-25.

14. Ms. Ihrig also explained that the reason [redacted] IEP had not been amended to correspond to the Boys Town placement was that the [redacted] had filed the due process complaint, thus invoking stay put. 538:10-25; 539:1-7. Childhood Autism Services canceled their contract with BPS in May 2017, thus their services could no longer be provided to [redacted] in the therapy room.

15. [redacted] Kindergarten teacher, Cindy Pichler, testified that as of March 29, 2017, continued placement of [redacted] in the therapy room was not appropriate 581:22-25; 582:19. Ms. Pichler was familiar with [redacted] behaviors while [redacted] was in the therapy room. She had reviewed the behavior graph and had witnessed [redacted] receive services in the therapy room. She and her class could hear [redacted] when [redacted] was in the hallway. [redacted] had destroyed other students' projects when [redacted] was in the hallway. 580:17-25; 581:1-14; Ex. 145.

16. Ms. Pichler's opinion was that Boys Town Day School was the appropriate placement for [redacted] because [redacted] could be with peers, and that the program was the least restrictive environment in which [redacted] could be educated. 585:23-25; 586:1-20.

17. Speech pathologist Heather Krejci testified that as of March 29, 2017, continued placement of [redacted] in the therapy room was not appropriate because [redacted] could not improve “social communication skills by being in a small room with adults” because “a child needs to be interacting with peers in . . . order to improve their communication skills, their social relations.” 657:5-24. She further testified that moving [redacted] back to the regular classroom at BPS was not a possibility “[b]ecause of the safety of the other children.” 660:10-19. She had considered other placements, such as Brook Valley and Madonna, but determined they were not appropriate for [redacted] academic and behavior needs. 661:1-25; 662:1-10. Her professional opinion was that the Boys Town Day School program was an appropriate placement for [redacted] and that it was the least restrictive environment in which to educate [redacted]. 659:15-21; 663:4-10.

18. Speech pathologist Megan Kruse served [redacted] during the time [redacted] was with CAS in the therapy room. She had witnessed [redacted] stomp [redacted] foot in the crease of a teacher’s neck and throw a jar. 674:4-25. On at least two occasions, [redacted] behavior was so out of control that she was unable to provide speech services, as [redacted] was “hitting the CAS worker, throwing objects, trying to escape the room” and “tossing chairs.” 676:5-21. On one occasion, [redacted] stomped on Ms. Kruse’s arm and threw a jar at the CAS worker’s face. She had also witnessed a teacher wiping blood off her cheek after [redacted] had stabbed her in the face with a pin. 677:10-19; Ex. 146, p.2. Other behaviors she witnessed included [redacted] “throwing things, hitting, pulling hair.” 677:19-20; Ex. 166. On March 28, 2017, [redacted] put a chair on a desk and tried to climb up to the chair. [redacted] threw “the chair, the desk and just was going all over. And then [redacted] pulled Kat’s hair,” at which point the CAS worker directed everyone to leave the room. 682:15-25; 683:106; Ex. 166, p, 4. She testified that [redacted] behaviors were not improving while in the therapy room and that was not close to being able to transition back to the regular classroom. 683:20-25; 684:1-2; 690:6-7. Ms.

Kruse testified that the therapy room was not the most appropriate placement for [REDACTED] because of lack of access to peers, as “we can’t practice social skills with adults.” 685:8-25. Placement in the regular education classroom was also not appropriate, as “[i]t was not safe for [REDACTED] or the other students to be in that situation.” 686:3-9. Her professional opinion was that the Boys Town Day School program was the appropriate placement for [REDACTED] as of March 29, 2017, and that it was the least restrictive environment in which [REDACTED] could be educated. 688:1-14.

19. Resource teacher Shelli Oborny testified that as of March 29, 2017, [REDACTED] placement in the therapy room was not appropriate for [REDACTED] especially since [REDACTED] had “no socialization. [REDACTED] was not getting very much academics, and [REDACTED] wasn’t practicing the specific skills that [REDACTED] needed to get back into the classrooms.” 736:10-25; 737:1-2. She testified that placement in the regular education classroom was also not appropriate, as [REDACTED] was not close to being able to return to the classroom. 737:8-12. Her professional opinion was that the Boys Town Day School program was the appropriate placement for [REDACTED] as of March 29, 2017, and the least restrictive environment in which [REDACTED] could receive meaningful benefit. 739:6-25; 740:1-6. She explained that that program “could provide a full day of school for [REDACTED] in -- working on social skills and [REDACTED] behaviors, and [REDACTED] would be in a classroom setting to help [REDACTED] prepare to come back to Bennington at some point.” 739:16-20.

20. Principal Chad Boyes testified that as of March 29, 2017, [REDACTED] placement in the therapy room was not appropriate for [REDACTED] as [REDACTED], behaviors were not improving, [REDACTED] was not receiving the appropriate level of educational benefit, it was not the least restrictive environment as [REDACTED] had no peer interaction, and [REDACTED] was a disruptive force in the school setting. 803:24-25; 815:13-25; 816; 817:1; Ex. 148 (accident reports). His professional opinion was that any benefit [REDACTED] may have been able to receive at BPS was outweighed by the benefits [REDACTED] would receive at

the Boys Town Day School, and that the Boys Town placement would provide [redacted] benefits that could not be provided at Bennington Public Schools. 817:2-12. His professional opinion was that the Boys Town Day School was the appropriate placement and was the least restrictive environment in which [redacted] could be educated. 818:25; 819:1-12. All of the members of [redacted] IEP team had expressed the same opinion at the March 29, 2017 meeting, except the [redacted]. 819:14-25; 820:1-7.

PROCEDURE

21. The procedure-related issues expressed were (1) the alleged lack of a behavioral intervention plan (BIP) or the existence of two BIPs; (2) whether multiple suspensions amounted to a change of placement; (3) the alleged lack of an adequate functional behavior assessment (FBA); (4) predetermination of the Boys Town Day School placement, and (5) a failure to give adequate prior written notice of the Boys Town Day School placement.

22. Regarding the procedural issues in general, Sarah Ihrig gave the following testimony:

Q. And even if there were one or more procedural violations, did you see any evidence that any of those violations could have impeded [redacted] right to receive educational benefit or a FAPE from Bennington Public Schools?

“A. No.

“Q. Did any of those alleged procedural violations cause a deprivation of educational benefit for [redacted] ?

“A. No.

“Q. Did any of those alleged procedural violations significantly impede the [redacted] ability to be part of the decision-making process?

“A. No.”

454:9 to 455:21. Specifically as it relates to the [redacted] involvement, Ms. Ihrig further testified:

“Q. And on that topic, were the _____ present at all of the IEP meetings and parent meetings that happened with regard to _____ during the second semester of the 2016-17 school year?

“A. Yes.

“Q. Were they always allowed to provide input into the discussion?

“A. Yes.

“Q. Did they provide input into the discussion?

“A. Yes.

Q. Were -- was there [sic] input listened to by all the members of the IEP team from the school district’s end that were present during those meetings?

“A. Yes.

“Q. Were they ever cut off or shut off?

“A. No.”

455:4-21.

Behavioral Intervention Plan

23. _____ initial IEP of September 21, 2016, included plans for _____ behaviors. Ex.

104. The IEP includes the following pertaining to addressing _____ behaviors:

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

“_____ needs sensory breaks worked into _____ daily schedule. The team is working on creating a picture schedule for _____ and a ring of picture cards to help communicate positive choices throughout _____ day. In the different areas of the school that _____ will be working, a defined space has been created for _____ to help _____ realize _____ boundaries. The speech pathologist is working with _____ on social stories with skills such as not hitting, no biting, listening to directions, etc.”

Ex. 104, p. 4. In the “present level” section of _____ IEP the team developed the following relating to addressing _____ behaviors:

“The team is creating a ring of picture cards to help [redacted] learn to make safe choices and to help [redacted] identify how [redacted] actions affect other people. Pictures include: no biting, no pinching, time out room, stay in line, listen to the teacher, etc. Sensory breaks need to be built into [redacted] day to help with [redacted] sensory needs. Parents shared that the private speech pathologist that [redacted] works with has been using the terms “expected and unexpected behaviors” with [redacted] to help [redacted] learn to watch the people and behaviors around [redacted]. School personnel will try to also use those terms at school to help [redacted] transition those words into different environments.

“Currently, in [redacted] speech group, [redacted] has been listening to social stories about appropriate school behavior and [redacted] ring of safe school choices has been reviewed repeatedly. The concepts “next to” and “away from” have been introduced. During [redacted] speech group, [redacted] struggles with listening to directions and not interrupting when someone else is speaking.”

Ex. 104, pp. 5-7.

24. Two of the annual goals in [redacted] IEP were directed to [redacted] behaviors, specifically:

“ [redacted] will follow a one to two step direction/instruction with 2 or less reminders to complete the task within a given amount of time.

“ [redacted] will be able to use self-calming techniques when [redacted] is frustrated or needs a break in 2 out of 4 attempts.”

Ex. 104, pp. 8-9. [redacted] IEP also addresses [redacted] behaviors on the services page:

“Statement of Special Education and Related Services:

“ [redacted] receives special education services within the general education classroom. The resource teacher will teach [redacted] how to listen to the teacher give directions and then complete the given task within a given amount of time. She will also work on using the social stories and picture cards to help [redacted] understand the expectations and rules of the classroom and how [redacted] choices affect others. She will also work on providing sensory breaks as needed. [redacted] receives individual/small group instruction to address [redacted] speech/language needs.”

Ex. 104, p. 13. Finally, [redacted] IEP includes behavioral accommodations, including [redacted] school environment, assignments, social interaction support and self-management. Ex. 104, pp. 16-17.

25. The foregoing components of [redacted] IEP are positive behavioral reinforcements and strategies. 280-17-25; 281-283; 284:1-9; 386:18-25; 387-396; 397:1-17. As resource teacher

Shelli Oborny explained, “ . IEP was basically written for behaviors... .” 721:8-18.

26. Pursuant to IEP, speech pathologist Heather Krejci had created numerous behavior intervention strategies with which were implemented by her and the teachers. 639:21-25; 640-648; 649-1-22; Ex. 134, 160-165. The strategies had worked with other students, but did not work with . 649:23-24; 651:8-12.] could not work in a small group with the strategies in place because ‘ was too distracting for the other children in the group. They couldn’t concentrate because of behaviors.” 650:4-25; 651:1.

27. Resource teacher Shelli Oborny also used behavior intervention techniques with pursuant to IEP, including social stories and Zones of Regulation, picture schedules, and met several times with the 701:2-25; 702-711; Ex. 133, 134, 135, 136, 137. Magnetic filters for the fluorescent lights were also used as a strategy. 729:2-14. The techniques did not work with 709:3-8; 729:15-16. Ms. Oborny attended a meeting on January 5, 2017, to discuss how to make more successful. At that time, she created daily behavior charts to track behaviors in increments of 15 minutes. 717:2-25; 718-9; Ex. 142.

28. At the end of the first semester, teacher, Ms. Pichler, expressed concern to the principal, Mr. Boyes, about causing harm to , and others. 767:12:-19. Mr. Boyes sent an email to the at the beginning of the second semester informing them of the intent to develop a behavior plan separate from IEP. Ex. 174. Mr. Boyes also telephoned to let her know of the plan. 767:22-25; 767:14-25; 768:1-13.

29. A behavior plan separate from IEP was then developed beginning on January 5, 2017. 717:2-25; 718-727; 727:1-16; Ex. 176, p. 5; 138, p. 3 (draft); 124 (final). The behavior plan was used with . but was not successful. 727:17-21.

30. The [redacted] have advocated for a behavior plan for [redacted] that is the same or similar to that which CAS prepared. Ex. 125. As Ms. Ihrig explained, once the school had a contract with CAS, then CAS's behavior plan was BPS's behavior plan. Ms. Mattson testified that there was no need to revamp CAS's behavior plan while [redacted] was in the therapy room, as "CAS's behavior plan was excellent." 280:5-10. Ms. Ihrig also recognized that the CAS plan was appropriate in a therapy room setting. 517:20-23. Her opposition to the CAS plan was only to its being implemented in a classroom setting, as it provided for [redacted] being removed if [redacted] presented a danger to other students, but not if he presented a danger to staff. 627:5-18; Ex. 125, p. 3.

31. Since the CAS behavior plan was used while CAS was working with [redacted] in the therapy room, the CAS plan was in fact implemented at BPS. 355:6-9. Further, as of March 7, 2017, CAS's behavior plan was formally made a part of [redacted] IEP. 383:3-5; Ex. 112.

Suspensions and Change of Placement

32. [redacted] was suspended for a total of ten school days during the 2016-2017 school year. 520:23-25; 521:1-17; 793:25; 794:5; Ex. 157. Thus, manifestation meetings were not required under Rule 51, which provides for manifestation determinations "[b]ecause the series of removals total more than 10 school days in a school year." Ex. 233, p. 111. In turn, since [redacted] was not removed for more than ten school days, the provisions of Rule 51 which require a school to conduct a functional behavioral assessment or to implement a behavioral intervention plan were never triggered. Ex. 233, p. 113.

33. [redacted] had also been suspended from the bus for misconduct. Ex. 155, 156. At the hearing, the [redacted], argued that the bus suspensions should count as putting [redacted] beyond ten school days of being removed; however, in Rule 51, the removals referenced are removals "from the child's current educational placement." Ex. 233, p. 11 (NDE Rule 51.016.01A). The bus

suspensions did not remove [redacted] from [redacted] current educational placement, as [redacted] never missed a day of school because of the bus suspensions. 625:14-24; 794:13-25; 795:1. Further, BPS had offered to pay mileage to the [redacted] during the time [redacted] was suspended from the bus. 522:9-12; Ex. 115 (last paragraph).

34. Petitioners' reliance on a discussion in 34 CFR 300.530, Fed. Reg. Vol. 71, No. 156, p. 46715 is misplaced. There, the US Department of Education was responding to commentary suggesting changes to regulations to "clarify" whether in-school and bus suspensions would constitute "a day of removal." The department pointed to the situation where bus transportation is part of the IEP and noted the department's long term "policy" that a bus suspension would be treated as a suspension under Sec. 300.530 "unless the public agency provides the bus service in some other way, because the transportation is necessary for the child to obtain access to the location where services will be delivered." The emphasis in the discussion is on access to participation in the general curriculum, receiving the services specified in the IEP, and participation with non-disabled children to the extent they would have in their current placement. In this case, BPS offered to pay mileage to the [redacted] during the time [redacted] was suspended from the bus and in fact [redacted] did not miss any school because of the suspensions. The department closed its discussion by declining to include its policy in its regulations "[b]ecause the determination as to whether [a]...bus suspension counts as a day of suspension under Sec.300.530 depends on the unique circumstances of each case... ." Under the facts in this case, bus suspensions did not count as "days of suspension."

Alleged Lack of an Adequate Functional Behavioral Assessment

35. A functional behavioral assessment (FBA) was completed by the school psychologist on February 6, 2017. Ex. 122. Rule 51, Sec. 003.29. says that a "[f]unctional

behavioral assessment means the process of gathering information that may be used to maximize the effectiveness and efficiency of behavior support (direct observation must be included). It involves a description of the problem behavior, the identification of antecedents which occasion the behavior and consequences which maintain it, the function the behavior serves (e.g., attention, communication, task avoidance), and the selection of alternative behaviors which will provide the same function.”

36. The school psychologist testified that she developed an appropriate FBA addressing the requirements in Rule 51. Ex. 264:7-25; 265; 266:1. She began collecting data on January 13, 2017. 256:3-11. She reviewed detailed behavioral data collected by the elementary resource teacher, Ex. 142, and interviewed the principal, kindergarten teacher, and elementary resource teacher. 261:23-25; 262; 263; 264:1-6. She gathered data, including from the petitioners on ADHD screening instruments (which at the petitioners’ subsequent request were never used for ADHD screening purposes). 250:16-253:25; Exs. 129, 130, 131, 132, 180. She conducted classroom observations from January 24 through January 27, 2017. 237:12-18, Although it should be noted that her observations were severely limited because of behavioral suspensions and an excused absence. She charted antecedents, the behaviors, and the consequence for the behavior. 259:24-25; 260; 261:1; Ex. 120. She was familiar with the parents’ concerns about behavior as she had attended previous meetings with them. She ended data collection when IEP team decided to place in the therapy room to receive services from CAS, and made the information available to CAS when they started working with . 238:11-17.

Alleged Predetermination of the Placement at Boys Town Day School

37. By March 29, 2017, behaviors in the therapy room had not sufficiently reduced to satisfy BPS personnel that was receiving a FAPE under the services being delivered by CAS. On that day, the IEP team met to consider an appropriate placement for including consideration of the Boys Town Day School program. Scott Butler, the Principal of the Boys Town Day School, attended the meeting to explain his program and answer questions. 32:4-6; 12-15. It was his understanding that the determination that would attend program “happened at that meeting.” 32:7-11.

38. Tara Mattson approached the March 29, 2017, IEP meeting with an open mind and listened to the input of other team members, including the 285:5-25; 286:1-8. She testified that the IEP team considered other possible placements other than Boys Town Day School, including continuing at BPS either in the regular classroom or the therapy room. 286:20-25; 287:1-2; Exs. 117, 118.

39. Sarah Ihrig attended the March 29, 2017, IEP meeting and listened to the input of other team members, including the 525:4-25; 526:1-20. Petitioners were concerned that transportation to Boys Town Day School had already been arranged by BPS prior to the March 29 meeting, and that this indicated that BPS had already decided on the Boys Town placement. Ms. Ihrig explained that the fact that transportation to Boys Town had been arranged before the meeting did not reflect a predetermination. She explained that the transportation was planned if needed because “[i]t’s very important if -- if the team would decide to send the student to Boys Town that we don’t waste any time in making sure that we are ready to send the student to the next level of placement.” 368:14-18; 369:1-4. She testified that she was open to additional placements other than Boys Town. 370:11 to 370:18. She further explained that transportation to

possible Level III placements other than Boys Town had not been made because the other possible placements had been rejected at the January 23, 2017, IEP meeting. 371:8-19.

40. kindergarten teacher, Cindy Pichler, attended the March 29, 2017, IEP meeting and listened to the input of other team members, including the . She had not previously made up her mind. 578:2-25; 579:1. This was also the testimony of speech pathologists Heather Krejci, 652:4-21, and Megan Kruse, 686:10-25; 687:1-5, resource teacher Shelli Oborny, 738:17-25; 739:1-5, and principal Chad Boyes. 810:11-22; 811:1-5. Mr. Boyes explained further that the fact that transportation to Boys Town had been arranged before the meeting did not reflect a predetermination, as they must plan for various outcomes. The school already had a bus taking students to Boys Town, intimating that it was easier to cancel a bus than to arrange for one. 812:15-25; 813-814; 815:1-7.

Prior Written Notice

41. A written notice was emailed to the on March 30, 2017. Ex. 118. The complain that they were not provided sufficient time between the giving of the notice and the date the Boys Town placement was to be implemented (March 31). Ex. 118. Yet, three months after the placement decision was made, testified that he would not have changed his mind regarding his opposition to the Boys Town Day School placement if given even more time. 128:10-14.

42. Further, acknowledged that she had been aware in advance of the March 29, 2017, IEP meeting that a Level III placement was up for consideration and she knew that Scott Butler, Principal of Boys Town Day School, was going to be attending the meeting. 96:22-25; 97:15-17. Further, she acknowledged that their due process petition was filed before change of placement was implemented, so stayed put at BPS until the end of the 2016-2017

school year. 111:10-25; 112:1-9. Meaning, the timing of the delivery of the prior written notice did not cause any harm to the [redacted] interests.

CONCLUSIONS OF LAW

43. 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] and [redacted] parents.” *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). *See also Lathrop R-II School District v. Gray*, 2017 U.S. App. LEXIS 13581 (8th Cir. July 2, 2017).

44. The over-arching issue is whether a free appropriate public education (FAPE) has been made available to [redacted]. [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.” [redacted] must be provided with “an educational program reasonably calculated to enable [redacted] to make progress appropriate in light of [redacted] circumstances.” *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000-1001 (2017).

PLACEMENT

45. All other issues in this case relate, ultimately, to the question of placement. On March 29, 2017, the decision was made to change [redacted] placement to Boys Town Day School. Exs. 177, 188. In determining placement from the continuum of alternative placements, the IEP team considers the concept of “mainstreaming” or “least restrictive environment.” 34 CFR § 300.114 provides that BPS must insure that:

- (i) “To the maximum extent appropriate, children with disabilities, ... 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.**”

(emphasis added). There were several placements considered for [redacted]. On January 18, 2017, the Boys Town Metro Intervention Center was suggested to the [redacted] as an option for [redacted] in order to provide [redacted] with more expertise in the area of social behaviors. 363:25; 364:1-2; 441:15-22. Other options that the IEP team explored were Brook Valley, Heartland School, and Alpha School. 442:13-16. Each of these options was decided to not be appropriate for [redacted] for the following reasons: Alpha School was allowed to be more physical than was thought to be appropriate for a kindergartner; Brook Valley does not have programs that can be specialized to each student as [redacted] needed; and Heartland was more for students whose behaviors initiate from emotional issues and that did not apply to [redacted]. 443:1-7; 444:13-18; 445:17-24. The current placement for [redacted] is in the therapy room with CAS. 274:22-25. The options of continuing [redacted] education at BPS, either in the classroom or in the therapy room, were all considered as well. 286:20-25; 287:1-2.

46. The primary objective of the BPS staff has been to get [redacted] back into the general education classroom as the least restrictive of the choices and the one in which [redacted] could best receive a FAPE. The therapy room was not making progress toward this goal and for weeks [redacted] remained in a room one-on-one with a teacher. BPS turned then to the Boys Town program which provided a learning environment where [redacted] would have peer interaction and where [redacted] behavior – the single obstacle to [redacted] returning to the classroom - could be addressed at the same time.

47. Mainstreaming is not, in and of itself, the primary goal of the law and is not appropriate where it would not benefit the child. Thus, 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,” and 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 *Pachl 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). behaviors - biting, kicking, spitting, and stabbing - are not behaviors that a teacher in a regular classroom can allow to continue in the manner that CAS services permitted them in the therapy room. 279:1-4. These kinds of behaviors are a disruption to the learning environment of and the other children in the classroom. 279:14-18. While was in the therapy room, ; behaviors were not improving and even increased during the last part of March. 289:23-25; 290:1-2; 292:5-9.

48. presented a knotty problem. behavior was not suited to mainstreaming, but behavior was not improving in the therapy room, thus making mainstreaming an elusive Catch-22 hope. BPS’s solution was to work in between the two extremes. Work on socializing behavior in an environment that was not mainstream, but not isolation either, with the goal of returning to the gen-ed classroom. It was, in short, the least restrictive alternative in which to provide a free and appropriate public education, at least until behaviors moderated.

49. To be adequate under the IDEA, an 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.” *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S.Ct. 988, 1000-1001 (2017). The student-teacher ratio at Boys Town is five kids to one teacher and all of the teachers are trained in the Boys Town social skill model. 39:10-18. The program also aligns the classroom instruction to the same state standards that public education settings align to. 40:7-9. Classes are multi-grade and the teachers individualize the instruction to each student’s academic needs and state standards for providing education. 40:10-14. [redacted] would be in a classroom with [redacted] peers and [redacted] would be able to participate in specials such as art, physical education, and music, which [redacted] was not able to participate in at Bennington Public Schools because of [redacted] behaviors. 532:15-25; 533:1-25; 534:1-3. If [redacted] were to be schooled at Boys Town Day School program, [redacted] would receive both the behavior and academic components needed for [redacted] to succeed. 40:15-18.

50. In *School Dist. of Monona Grove*, 27 IDELR 265 (1997), an eleven year old student had substantial behavioral problems, including yelling, hitting other students and teachers, kicking, throwing items, damaging property in the classroom, and taking items from other students. The school district decided to move the student to a self-contained classroom, but the student did not make any progress and his behavioral problems grew. The court concluded that “a day treatment program would have the kind of formal behavior plan for dealing with aggression which Harry’s M-team psychologist recommended. Therefore, the appropriate placement for Harry at this time is a day treatment program for severally emotionally disturbed children.” *Id.* at 22.

51. *Monona Grove* was cited by the hearing officer in *Adams County School District 0003 a/k/a Kenesaw Public Schools v. Bernstrauch*, State Department of Education, Case No. 00-03SE (May 2, 2000), in which it was held that an elementary student could not receive a FAPE at his public school and ordered that the student be placed in a Level III facility named the I Believe In Me Ranch.

52. Boys Town Day School is not a permanent placement, but one that will prepare to return to the regular classroom with peers. All of the Bennington Public Schools staff members testifying at the hearing said the therapy room was no longer the least restrictive environment for or otherwise an appropriate placement for many reasons, including because did not have access to any children own age and could not work on social skills with adults alone. 296:7-10; 585:23-25; 586:1-20; 657:5-24; 685:8-25; 736:10-25; 737:1-2.

53. 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.” *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 case the evidence is quite overwhelming that the services cannot be provided at BPS. Even after moving to an isolated learning environment, continued to exhibit behaviors that were harmful to and others. The evidence establishes that the IEP team correctly assessed disruptive and threatening behavior at BPS, and concluded that disruptive and dangerous behaviors made it quite nearly impossible to provide with a FAPE at Bennington.

54. I find that cannot be provided with a FAPE at Bennington Public Schools. I further find that an educational placement of at Boys Town Day School is the appropriate

placement for [redacted] to receive a FAPE and that it is the least restrictive environment in which [redacted] can be educated until such time as [redacted] behaviors are moderated.

PROCEDURE

55. 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 decisionmaking process regarding the provision of a free appropriate public education to the parents’ child; or (III) caused a deprivation of educational benefits.” 92 NAC 55-008.03; *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 circumstances just described.

Behavioral Intervention Plan.

56. [redacted] IEP team made good faith efforts to address [redacted] behaviors. [redacted] IEP itself was generated with a focus on [redacted] behaviors. The IEP goals were predominately behavioral. [redacted] IEP included strategies to address [redacted] behavioral needs. In the time prior to the March 29, 2017 IEP meeting, the focus of [redacted] educational program while in the therapy room working with CAS, was on [redacted] behavioral needs. BPS provided CAS therapists who worked one-on-one with [redacted], and with a special education endorsed teacher. Despite all of these efforts, [redacted] behaviors simply did not improve.

57. The [redacted] note the existence of multiple behavior plans. One behavior plan was created by the principal after he received input from the school team and had visited with the [redacted]. Another was created by CAS pursuant to a contract with BPS. And a draft was created, but never implemented, upon the [redacted] request that the behavior plans created by the Principal and CAS, at the request of the [redacted] be consolidated.

58. The focus must be on whether the issues with the behavior plan impeded right to a FAPE or caused a deprivation of educational benefits. The behavior plan created by the principal was in place for only a short time before the behavior plan created by CAS was implemented. No one, including the , fault the CAS behavior plan as used in the therapy room setting.

59. In *Alex R. v. Forrestville Valley Cmty. Unit Sch. Dist. # 221*, 375 F.3d 603 (7th Cir. 2004), a parent claimed that an IEP was inadequate because the behavior plan was not sufficient. The court rejected the claim on the basis that the law does not impose substantive criteria for determining the sufficiency of a behavior plan:

Although we may interpret a statute and its implementing regulations, we may not create out of whole cloth substantive provisions for the behavioral intervention plan contemplated by § 1415(k)(1) or § 1414(d)(3)(B)(i). In short, the District’s behavioral intervention plan could not have fallen short of substantive criteria that do not exist, and so we conclude as a matter of law that it was not substantively invalid under the IDEA.

Id. at 615. See also *T.W. v. Unified Sch. Dist. No. 259*, 136 Fed. Appx. 122, 129 (10th Cir. 2005) (“To the extent plaintiff argues that the BIP is substantively deficient, he faces an uphill battle. Neither the IDEA nor its implementing regulations prescribe any specific substantive requirements for a BIP.”) I find no violation of federal or state law as it relates to the issues involving the behavior plans.

Change of placement due to short term suspensions.

60. was not suspended for more than ten school days during the 2016-2017 school year. Thus, a change of placement did not occur related to the suspension. Manifestation meetings were conducted, but were not required under Rule 51. Ex. 233, p. 111 (NDE Rule 51.016.01A2a).

61. In any event, the removals that effect a change of placement must be removals “from the child’s current educational placement.” Ex. 233, p. 11 (NDE Rule 51.016.01A). No change of educational placement occurred related to the bus suspensions as [redacted] missed no school days as a result, and the [redacted] were offered mileage reimbursement.

62. The [redacted] also raise a claim that more than ten days of removal occurred because the school had called [redacted] to pick up [redacted] from school two times in the first semester. 831:4-12. There is insufficient evidence of the reasons for the school’s requests.

63. I find that the school suspensions and the bus suspensions did not impede [redacted] right to a FAPE or cause a deprivation of educational benefits. In particular, I find that the bus suspensions were necessary for the safety of the bus driver and the other passengers until such time as a harness had been obtained for [redacted] to keep [redacted] from getting out of [redacted] seat belt and engage is dangerous behavior.

Adequate functional behavior assessment.

64. The FBA completed by school psychologist Tara Mattson included each of the elements of a FBA under Rule 51. The [redacted] focus on the length of time the observations of [redacted] took place. But the formulation of the FBA was not limited to observations of [redacted]. The formulation of the FBA included reviews of significant behavioral data compiled prior to the school psychologists’ development of the FBA and her consideration of the [redacted] input related to [redacted] behaviors at previous meetings. The length or duration of her observations of [redacted] were truncated by [redacted] behaviors, a fact in and of itself supportive of the schools conclusions regarding the intractability of [redacted] behavior under the then-present circumstances.

65. In any event, any inadequacy of the FBA was harmless error. Any inadequacy did not impede [redacted] right to a FAPE or cause a deprivation of educational benefit. The FBA was

completed on the day that CAS commenced working with . Thereafter, the CAS behavior plan was implemented. No one, including the had any concern with the CAS behavior plan as implemented in the therapy room setting.

66. Furthermore, the FBA was not required as had not been removed for more than ten school days and IEP included positive behavior interventions. *See Coleman v. Pottstown Sch. Dist.*, 983 F. Supp. 2d 543, 565 (E.D. Pa. 2013) (“Creating an adequate IEP under the IDEA requires that a school district consider ‘positive behavioral interventions; under 20 U.S.C. § 1414 (d)(3)(B)(i) where a student’s behavior impedes his learning; however, other courts have interpreted that this requirement does not require an FBA, at least not where ‘the IEP sets forth other means to address the student's problematic behaviors.’” *M.H. v. New York City Dept. of Educ.*, 712 F. Supp. 2d 125, 158 (S.D.N.Y. 2010); *see also A.C. ex rel. M.C. v. Bd. of Educ. of the Chappaqua Central Sch. Dist.*, 553 F.3d 165, 172 (2d Cir. 2009) (finding an IEP lacking an FBA adequate where other behavior management strategies were included)).

Alleged predetermination of the placement at the Boys Town Day School.

67. 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.’ *Lathrop R-II School Dist. V. Gray*, 611 F.3d 419 (8th Cir. 2010). 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.” *Id.* *M.M. v. Lancaster Cty. Sch.*, 702 F.3d 479, 488 (8th Cir. 2012).

68. 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.*

69. The [redacted] were given notice of all of the IEP meetings, attended all of the IEP meetings and other meetings of the IEP team, and shared their views about [redacted] behavior plan and placement. The school members of the IEP team had not predetermined the decisions in question and listened to the input of the [redacted]. The [redacted] were not deprived of a meaningful opportunity to participate in the process of formulating the educational program for [redacted].

70. Some pre-IEP meeting planning is permissible. As the court in *N.L. v. Knox County Schs.*, 315 F.3d 688, 694 n.3 (6th Cir. 2003) recognized, the IDEA’s procedural safeguards “can hardly be construed as prohibiting school officials or school-appointed experts from forming opinions or compiling a report prior to the full meeting. Indeed, without some organization and evaluation prior to the IEP Team meeting, it is unclear how an IEP Team could make reasonable and informed decisions.” [redacted] IEP team did appropriately plan for the possibility that the team would decide to place [redacted] at the Boys Town Day School. But there is no other evidence from which it reasonably can be inferred that it inappropriately predetermined the outcome of the March 29, 2017, IEP meeting.

Prior written notice of the Boys Town Day School placement.

71. The [redacted] had been given notice in advance of the March 29, 2017, IEP meeting that the school district was proposing a Level III placement for [redacted], and specifically, via the noticed attendance of Scott Butler, that Boys Town was being proposed. The day after the decision was made to proceed with the proposal, the [redacted] were given prior written notice of [redacted].

the proposed placement. The [redacted] had sufficient time thereafter to file their Rule 55 petition before the change of placement being implemented.

72. “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 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 [redacted] with the education to which [redacted] is entitled, and where the parents has sufficient time in which 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.

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

“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.

C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 70 (3d Cir. 2010).

74. Any procedural violation related to the giving of prior written notice was harmless and not a basis for imposing any liability against BPS.

ORDER

Having considered the evidence as shown above, I conclude that petitioners have failed to prove by the greater weight of the relevant and credible evidence the material allegations of their petition. I further conclude that respondent has proved, by the same evidentiary standard, that the Boys Town Day School is the least restrictive environment in which to provide [redacted] with

the education to which [redacted] is entitled and an appropriate placement for [redacted] until such time as behavioral issues can be moderated sufficiently to return [redacted] to the classroom at Bennington.

IT IS, THEREFORE, ORDERED AS FOLLOWS:

A. Petitioners' special education petition is dismissed.

B. [redacted] placement at the Boys Town Day School is implemented forthwith and shall continue until [redacted] team determines that behavioral issues are moderated sufficiently to return him to the classroom at Bennington Public Schools, or determines that circumstances require some other placement in order to provide [redacted] with a free and appropriate public education in the least restrictive educational alternative available.

C. The parties shall pay their own attorneys fees.

D. Respondent shall pay petitioners' expenses incurred on account of the change of placement from Bennington Public Schools to Boys Town Day School, including transportation expenses.

E. The foregoing Findings of Fact and Conclusions of Law are in all respects made a part of this Order by reference to the same extent and with like effect as though such Findings of Fact and Conclusions of Law are fully set forth verbatim herein.

DATED: August 14, 2017.



Bill Morris, #15124, Hearing Officer
MORRIS & TITUS LAW FIRM, PC, LLO
4645 Normal Blvd., Suite 272
Lincoln, NE 68506
(402) 434-5200 – phone
(402) 434-5209 – fax
bmorris@morristituslaw.com

CERTIFICATE OF SERVICE

I certify that on August 14, 2017, I served the original or a true and correct copy of the Findings of Fact, Conclusions of Law and Order, by first-class United States certified mail, return receipt requested, postage prepaid, and via email, on the following parties:

Leigh Ellis
Legal Aid of Nebraska
209 South 19th Street, Suite 200
Omaha, NE 68102
lellis@legalaidofnebraska.org

Jeanette Stull
Gregory H. Perry
Perry Guthery Hasse & Gessford, PC, LLO
233 South 13th Street, Suite 1400
Lincoln, NE 68508
jstull@perrylawfirm.com
gperry@perrylawfirm.com

Sara Hulac, General Counsel
Brenda Wid, Legal Department
Nebraska Department of Education
301 Centennial Mall South
P.O. Box 94987
Lincoln, NE 68509-4987
sara.hulac@nebraska.gov
brenda.wid@nebraska.gov

Matthew L. Blomstedt, Commissioner
Nebraska Department of Education
301 Centennial Mall South
P.O. Box 94987
Lincoln, NE 68509-4987



Bill Morris, #15124
Hearing Officer