BEFORE THE SPECIAL EDUCATION REVIEW OFFICER

In the Matter of the Due Process,	)	
Review Hearing for	)	
	)	
M.S. and	)	
	)	
U.S.D. #___ _____ and	)	
U.S.D. #___ _____	)	
INTERLOCAL COOPERATIVE	)	
_____	)	Case No. 16DP___-01

REVIEW OFFICER'S REPORT

NOW, on this 24th day of August, 2017, the decision of the Reviewing Officer is rendered in the above-captioned appeal. Pursuant to K.S.A. 72-974, the Reviewing Officer has:

A. Examined the record of hearing;

B. Determined whether the procedures at the hearing were in accordance with the requirements of due process;

C. Afforded the parties an opportunity to present written argument by the filing of briefs;

D. Determined that no additional evidence should be necessary prior to rendering a final Decision;

E. Rendered an independent Decision and Report within the period which was extended by the mutual request of Petitioners and Respondents; and,

F. Has sent written notice of this independent Decision and Report to both parties and to the Kansas State Department of Education.

I. PROCEDURAL BACKGROUND:

The Hearing Officer, James G. Beasley, submitted his Decision on May 2, 2017. The Notice of Appeal was filed by the minor child by and through her parents (hereinafter "Parents") and received by the Kansas State Department of Education on May 30, 2017. The Notice of Appeal was timely filed. The Reviewing Officer was appointed on June 1,

2017. The Notice of Appeal was provided to the Reviewing Officer as part of the Kansas Department of Education's letter of appointment.

A Pre-Hearing Review Conference was scheduled by telephone with counsel for Parents and counsel for USD ___ and USD ___ (hereinafter "Districts"), on June 13, 2017. Following a full discussion of procedural issues and a pending Motion for Reconsideration filed after the Hearing Officer submitted his decision, the Review Officer issued the following Pre-Hearing Review Conference Order:

1. Parents' Reply to Districts' Response to Parents' Motion to Reconsider: Both parties jointly agree that Parents will be given an opportunity to Reply to the Districts' Response to Parents' Motion to Reconsider no later than 5:00 p.m. on Tuesday, June 20, 2017. The parties are in agreement that it shall be the responsibility of the Review Officer and not the Hearing Officer, to make a determination regarding Parents' issues set out in their Motion to Reconsider.
2. Pre-Hearing Telephone Conference: The parties agree that a second pre-hearing telephone conference will be scheduled at 4:00 p.m. on Thursday, June 22, 2017, to establish and define additional Review Officer actions in this matter.
3. Duration of Scheduling Order: This Pre-Hearing Review Conference Scheduling Order shall continue in effect unless and until amended by a subsequent Order by the Review Officer.

Following the Pre-Hearing Review Conference, the Review Officer received the Hearing Officer's decision and transcripts electronically and through mail delivery.

A second Pre-Hearing Review Conference was scheduled by telephone with counsel for Parents and counsel for the Districts on June 23, 2017. The Districts requested an opportunity to respond to Parents' Notice of Appeal. The Parents did not object to the Districts' request. Accordingly, the Review Officer established the following Scheduling Order:

1. Districts' Response to Notice of Appeal: The Districts shall provide a Response to the Notice of Appeal to be submitted by 5:00 p.m. on Friday, July 14, 2017.
2. Parents' Reply: The Parents shall provide their Reply to the Notice of Appeal to be submitted by 5:00 p.m. on Wednesday, July 26, 2017.
3. Pre-Hearing Telephone Conference: The parties agree that a third pre-hearing telephone conference will be scheduled at 4:00 p.m. on Monday,

July 31, 2017, to establish and define additional Review Officer action in this matter. Dialing instructions for the call are: Dial Toll Free: 1-877-802-4003, Enter Passcode 421067 and wait for Larry Rute to begin the meeting.

4. Duration of Scheduling Order: This Pre-Hearing Review Conference Scheduling Order shall continue in effect unless and until amended by a subsequent Order by the Review Officer.

A status conference was scheduled by telephone with counsel for Parents and counsel for the Districts on August 8, 2017. At that time, a discussion took place regarding the potential expungement of certain exhibits and/or whether the Review Officer should hold a hearing regarding the introduction of additional evidence. Accordingly, the Review Officer established the following status conference order:

1. Parties' Counsel Meet and Confer: The counsel for the parties have agreed to meet and confer the week of August 14, 2017, to determine whether a joint stipulation will be provided regarding Hearing Officer continuances.
2. Parties' Counsel Notification to Review Officer: The counsel for the parties shall notify the Review Officer whether there will be a Joint Stipulation of Facts no later than Thursday, August 17, 2017, at 5:00 p.m.

On August 17, 2017, the Review Officer reviewed Parents' Supplemental Brief to the Districts' Response to the Written Notice of Appeal, notifying that the Review Officer that the Parents had decided to withdraw their objection to the Districts' exhibits attached to the Response Brief. On August 18, 2017, the Districts notified the Review Officer that while there was a continuing objection to the "mischaracterization" of the Districts' request for Review Officer continuances, there was no objection to the Parents' Supplemental Brief.

II. NATURE OF DISPUTE

This is an appeal from a decision by James G. Beasley, Hearing Officer, rendered on May 2, 2017. The Hearing Officer's Decision summarized several issues, as follows:

Issue No. 1: Violation of the IEP by making substantial changes in placement.

Issue No. 2: Violation of the IEP by removing (student) from least restrictive environment.

Issue No. 3: Failure to consistently implement parts of IEP and denial of FAPE.

Issue No. 4: Retaliation for revocation/refusal to consent.

With respect to each issue, the Hearing Officer held for the Districts. The hearing process produced ten volumes of transcript. In his 58-page Decision submitted on May 2, 2017, the Hearing Officer issued a detailed analysis including procedural status, issues to be resolved, chronology and findings of fact, conclusions of law and conclusion. In his Conclusion, the Hearing Officer stated that it was his belief that a Behavior Intervention Plan (BIP) should be undertaken and that a Functional Behavioral Analysis (FBA) should be undertaken by an experienced professional taking into consideration M.S.'s Down Syndrome plus the ADHD and thyroid condition. The Hearing Officer further stated that he found no basis to award the Parents' attorneys' fees or other costs of the due process hearing.

III. DUE PROCESS PROCEDURES

The procedures at the due process hearing that a Hearing Officer must follow are identified in K.S.A. 72-973(b), and include:

(1) the right of the parties to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right of the parties to be present at the hearing;

(3) the right of the parties to confront and cross-examine witnesses who appear in person at the hearing, either voluntarily or as a result of the issuance of a subpoena;

(4) the right of the parties to present witnesses in person or their testimony by affidavit, including expert medical, psychological or educational testimony;

(5) the right of the parties to prohibit the presentation of any evidence at the hearing which has not been disclosed to the opposite party at least five days prior to the hearing, including any evaluations completed by that date and any recommendations based on such evaluations;

(6) the right to prohibit the other party from raising, at the due process hearing, any issue that was not raised in the due process complaint notice or in a prehearing conference held prior to the hearing;

(7) the right of the parties to have a written or, at the option of the parent, an electronic, verbatim record of the hearing; and,

(8) the right to a written or, at the option of the parent, an electronic decision, including findings of facts and conclusions.

Based upon a review of the record in this matter, it is the opinion of the Reviewing Officer that appropriate due process procedures have been followed and applied by the Hearing Officer. The Reviewing Officer finds that all of the due process procedural requirements set forth in K.S.A. 72-973 have been provided as follows:

A. The hearing was held at a time and place reasonably convenient to the parents of M.S.

B. The hearing was closed as provided in K.S.A. 72-973(b); and,

C. The following procedural due process rights were afforded:

1. The right of each party to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
2. The right of each party to be present at the hearing;
3. The right of each party to confront and cross-examine witnesses who appear in person at the hearing, either voluntarily or as a result of the issuance of a subpoena;
4. The right of each party to present witnesses in person or their testimony by affidavit, including expert medical, psychological or educational testimony;
5. The right of each party to prohibit the presentation of any evidence at the hearing which has not been disclosed to the opposite party at least five (5) days prior to the hearing, including any evaluations completed by that date and any recommendations based on such evaluations;
6. The right to prohibit either party from raising, at the due process hearing, any issue that was not raised in the due process complaint notice or in the pre-hearing conference held prior to the hearing;
7. The right of each party to have a written or, at the option of the parents, an electronic verbatim record of the hearing;
8. The right to a written or, at the option of the parents, an electronic decision, including findings of fact and conclusions;
9. The parties were afforded an orderly hearing; and,
10. The parties have been afforded a fair and impartial decision based upon substantial evidence.

D. Furthermore, the record contains insufficient evidence that would indicate or infer that the Hearing Officer was a person:

1. Responsible for recommending the proposed action upon which the hearing was based;
2. Who had a personal or professional interest which would conflict with objectivity in the hearing; or
3. Who is an employee of any agency involved in the education of the Petitioner.

IV. PARENTS' MOTION TO RECONSIDER AND CLARIFICATION OF THE DECISION.

A. Procedural Background:

On May 12, 2017, the Parents filed their Motion to Reconsider and Clarification of the Hearing Officer's May 2, 2017, Decision, and Clarification Regarding the Functional Behavioral Assessment and Issue 2—Violation of IEP by Removing (Student) from Least Restrictive Environment. The parties agreed at the Review Officer's Pre-Hearing Review Conference on June 13, 2017, that it would be the responsibility of the Review Officer to make a determination regarding Parents' issues found in their Motion to Reconsider the Hearing Officer's Decision.

B. Did the Parents request a Functional Behavior Analysis (FBA), and, if so, did the Districts fail to provide a Prior Written Notice (PWN) to the Parents regarding their request?

In general, the Parents maintain that they requested a Functional Behavior Analysis during the January 14, 2016, IEP meeting. They further argue that the Districts failed to produce a Prior Written Notice to the Parents as a result of their request.

1. Districts' Arguments and Authorities:

For their part, the Districts allege that the Hearing Officer's Findings of Fact in paragraph 118 on page 37 of his decision is inaccurate. The Districts suggest that the Hearing Officer took his finding in paragraph 118 on page 37 from the Parents' Proposed Findings set out in paragraph 67 on page 15 of the Parents' Proposed Findings of Fact and Law. The Districts argue that the Parents never requested an FBA to be performed on M.S. on January 14, 2016, but instead suggest that the February 1, 2016, IEP meeting notes demonstrate that any requests on the part of the Parents for an FBA were not clearly made.

The Districts suggest that a review of the Parents' Exhibit 5 indicates that the staffing notes from the February 1, 2016, IEP meeting state: "We need to request consent to

evaluate/complete FBA if any member of the team feels additional data is necessary to fully inform the continued development of the Behavior Intervention Plan." (Vol. 5 at 1174, ln. 17-1175 at ln. 2; Districts' Exhibit 39 at 4). Despite this statement, the next statement from Ms. Classen in the staffing notes is a concern about communication and wanting to know the level of behavior specialists involvement with M.S. (Dist. Ex. 39 at 4-5.) The Districts argues that at no point in the rest of the meeting did the Parents ever request an FBA, according to staffing notes. (Dist. Ex. 39.) Ms. S testified that the Parents never requested an FBA during the February 1, 2016, IEP meeting. Had the Parents done so, Ms. S would have given her a consent form (Vol. 10 at 2950, ln. 3-15.) Therefore, it is the Districts' opinion that the Parents asked questions regarding the previous FBA and whether another FBA was needed to be done. Ms. J answered those questions and Ms. S responded that they would need consent to evaluate if any member of the team felt an FBA was necessary. At that time, the Districts maintains that the Parents changed the topic of the discussion to concerns about communication about involvement of specialists. Thus, it was made clear in the hearing and the Districts' Proposed Findings of Fact and Conclusions of Law that no prior written notice was done denying the request for an FBA because the Parents never actually requested one.

In response to the Parents' argument that the Review Officer should consider whether the Districts were required to complete an FBA before moving M.S. to a more restrictive environment, the Districts argue that under K.A.R. 91-40-1 (sss), there is simply no requirement the Districts conduct an FBA or any type of evaluation prior to making a change of placement of less than 25% under Kansas law.

2. Parents' Arguments and Authorities.

In the Parents' Reply to the Districts' Response, the Parents argue that the Parents did clearly, and plainly, make a request that an FBA be performed on M.S. during the January 14, 2016, IEP meeting as demonstrated in both testimony and the IEP notes of January 14, 2016. (Hearing, Vol. 1, 138-139; Parents' Ex. 5, 276.) With respect to the February 1, 2016, IEP meeting, the Parents argue that the Districts had already told the Parents during the January 14, 2016, IEP meeting that they would not provide the FBA.

Parents argue that the January 14, 2016, IEP notes under the sole control of the Districts clearly indicate that the parents made a request for the Functional Behavioral

Analysis and that the Districts indicated that an FBA was not necessary. The IEP note stated:

> An FBA is not necessary in order to draft an IEP as sufficient behavioral data is available to develop a plan. (Exhibit 5, 276)

M.S.'s Rockin' Readers teacher, Ms. V, attended the January 14, 2016, IEP meeting. (Vol. 7, at 1677, ln. 6-13). Ms.V, after reviewing the IEP notes, stated it was consistent with her memory that it was determined by the Team that an FBA was not necessary. (Vol. 7, at 1678, ln. 17-25; 1679, ln. 1-3).

Ms.V's memory corroborates the Parents' testimony. When asked by her counsel whether Ms. K discussed the possibility of getting an FBA completed during the January IEP meeting, she responded:

> We did discuss it and we were told that it's not necessary to have an FBA in order to draft the IEP as they have sufficient behavioral data available to develop a plan, but that the FBA that was previously completed and by previously they meant 2013. (Vol. 1, at 138, l. 15-24)

3. Review Officer's Finding:

The Review Officer believes that the Hearing Officer was in the best position to judge the credibility of Ms.K's testimony regarding her request for an FBA. The Review Officer, having reviewed the arguments and authorities set out in the Districts' and Parents' post-hearing position papers, finds that the Hearing Officer's findings of fact in paragraph 118 on page 32 of his decision is not in error. The Review Officer further finds that the Districts did not provide a Prior Written Notice (PWR) for the denial of, or consent for, the requested FBA.

C. Was a Functional Behavior Assessment/Plan Required?

1. Teacher Responsiveness to M.S.'s Placement in the Classroom.

The testimony in this matter reveals that M.S.'s first-grade teachers were supportive of her and enjoyed her energy and happy personality. M.S.'s initial first grade teacher, LG, had M.S. in her classroom from the beginning of the school year until November 2014. (Vol. 7, pp. 17-18, ln. 8-10). Ms. G described M.S. as a fun, loving, very independent, joyful and active student. (Vol. 7, pp. 17-18, ln. 13-23).

Ms. LP was M.S.'s second first-grade teacher beginning November 2014. Ms. P testified "…I love [M.S.]. She's got such a wonderful personality. She loves to help in the classroom. She loves to be the teacher, she loves school, overall, she's just a happy little kiddo, full of energy. (Vol. 7, pp. 18-21, ln. 9-19).

Ms. K V served as M.S.'s Rockin' Readers Improvement Intensive Classroom teacher. (Vol. p. 1603, ln. 21-24). Ms. V testified that M.S. is "…a pleasant little girl, she laughs, she is very loving, she gives hugs, she wants to please, she— she has a good sense of humor and she works—she works well for me." (Vol. p. 1604, ln. 4- 8).

2. M.S.'s Behaviors in the Classroom.

A large volume of testimony was elicited throughout the hearing directly relating to M.S.'s behavior difficulties in the classroom. Ms. G described an event which occurred the first two weeks of the first grade:

> We were seeing hitting, throwing, lots of lying on the ground where she would not comply, where she would not get up, she had stood on a table in my back room. She had run through the room and knocked boxes—all the students have supply boxes with crayons and pencils and glue that we use and she had knocked those off the tables a number of times. She had tipped chairs, she had tipped a desk, she would not come in for recess sometimes when it was time to come in. (Vol. 7, p. 1723, ln. 12-21).

Ms. G went on to describe a Monday in class as follows:

> Example from Monday in class doing a lesson. Danni was with her and [M.S.] threw everything off desk. Took other kids items. [M.S.] scooted her chair to the bathroom door. Mrs. G corrected her [M.S.] circled room. Tip over things in back, laid on ground in back room. Para switched. Mrs. G removed the audience by closing door. She said [M.S.], not a good choice get up. She put herself in an unsafe position. Mrs. G got Shari for help. It was not a transition time, several adults were assisting in this process. The students were working on a coloring lesson on opposites. (Vol. 7, p. 1724, ln. 19-25; p. 1725, ln. 1-6).

Ms. G then responded to a question about the unsafe position. Ms. G replied:

> She was standing on a table in the back of the room which is kind of like a sunroom up against the window, the big glass window…I couldn't get her to come down and I didn't, you know, in a case of safety, I would have probably removed her, but I just got Shari and she came over and had to get her down. (Vol. 7, p. 1725, ln. 10-21).

Describing another behavioral incident, Ms. G stated:

> …we would be watching the math movie and then talking and discussion and students would raise hands and share examples or talk about the lesson. She did not do that. And then when we would be moving on to the paper pencil tasks or the manipulative tasks, she sometimes was not in the room because she was in time out or she would not have the behavioral maturity to use the manipulatives because she would put them in her mouth. They frequently called for cubes. She would be wanting to color instead of doing the math—the math job. One day she ate a hole in her math paper. (Vol. 7, p. 1730, ln. 12-24).

Later in her testimony, Ms. G summarized mal-behaviors as: "hitting, kicking, lying on the floor, scratching, tipping desks over, standing on tables." (Vol. 7, p. 1787, ln. 13-17).

Ms. P described M.S.'s behaviors as follows:

> Behaviorally, she came in with very minimal supports. She would often times throw her materials then she would get frustrated, we had a lot of loud verbal outbursts, defiance, occasionally, she would run out of the classroom. Often times she might hit a peer if she were trying to get from one place to the next. So there was quite a few behaviors that we were working on…often times when she would be speaking out or not wanting to cooperate with her para who was trying to give her teaching instruction per—her level would be above my level and I am a pretty loud person, but it would be difficult for her peers to hear. Obviously, when she was throwing her materials or running around the classroom, that would be disruptive. At times, some kids would get hurt when she was throwing things when she was frustrated. (Vol. 7, p. 1823, ln. 15-25 and p. 1824, ln. 1-10).

Ms. P also described M.S.'s interaction with the other children in her classroom:

> They—they loved [M.S.]. They were always very helpful to [M.S.], we had a very good classroom environment. Before [M.S.] became a part of the classroom, we worked really hard to create a culture of helpfulness and they were eager for her to join the classroom family. When she was—when she would have behavioral moments, the

> students would try and help her. If she knocked over her tool box out of frustration, they would try to help her. At times when she would be having outbursts, they could be—they could get frightened by her behavior. Sometimes when she was on the carpet if she was having a difficult day, they would get up and move knowing she would need a little more space and prompting to maintain ready hands. And so at those times, they would—they would tend to move away but for the most part they would try and help her as often as they could. (Vol. 7, p. 1832, ln. 8-25, p. 1833, ln. 1).

Ms. P testified that shortly after M.S. entered her class in November 2015, she received an email from a parent regarding an incident in which her child was injured by M.S. at school. (Vol. 7, p. 863, ln. 24-25 and p. 1864, ln. 1-8).

M.S.'s Rockin' Reader instructor, Ms. V, described M.S.'s behavior as follows:

> In my classroom. In my classroom, we had—usually something happened every day. Once in a while it didn't, but I mean it was throwing pencils if she was done. We had to make sure that everything was pulled away so she couldn't reach things because she would just take whatever she could get and throw it. Sometimes it was toward a student but most of the time she just flipped it to wherever it would go. Tissues was a problem. She constantly has tissues for her nose and she throws tissues wherever. She has a problem with someone sitting, like she and I would be there and a student would be to the left of her and [M.S.] has to have her space. And so if she thought a students or a child's stuff was too close to her, she's total—she's pushing them away, their work, their books, whatever. Sometimes she marks on kid's papers. Sometimes she will take their stuff from them and move it. She has thrown books, she throws shoes, and that you have to be careful of. She has got up and left class before. When we figured she was done and ready for a break, she's just gone up—she'll take—if she walks across the room we have to be careful with transitions because she walks across the room she would pick up—we had a puppet. She would pick up the puppet, sometimes she wanted to hold it and sometimes she wanted to throw it. There was only one time that she actually climbed on top of tables and had to be helped down because of it was very unsafe for her and we were trying to tell her she was unsafe. And that was the transition time from walking from my table to the other table across the room to do high-frequency words. She has hit students, she has hit the para, and not all of these things happen every day but you just don't know how many things are going to happen every day. (Vol. 7, p. 1613, ln. 19-25; p. 1614, ln. 1-25; p. 1615, ln. 1-5).

Describing aggressive behaviors, Ms. V stated:

> It can be aggressive behaviors as far as hitting or kicking. She's bitten before. Refuses to do things like come in from recess or when [M.S.] gets an idea in her head the way she wants to do it then that's the way to do it no matter what you say. She will get up and leave out of the classroom, she throws things. She takes things. She'll scribble on the table, she'll—I don't know—the list goes on. (Vol. 7, p. 1690, ln. 2-10).

Ms. V stated that: "there are times she exhibits these behaviors because she is frustrated, but not always." (Vol. 7, p. 1690, ln. 11-19). Ms. V agrees that a Functional Behavior Assessment could develop interventions to assist or control those behaviors. (Vol. 7, p. 1692, ln. 15-23).

3. M.S.'s Functional Behavior Analysis.

The position of the parties as it relates to the best use of Functional Behavior Analysis to address M.S.'s behavior is addressed by the parties' respective expert witnesses. The District's Principal, FBA specialist is DAS. The Parents' FBA expert witness is Shelby Evans, Ph.D.

(a) Testimony of DAS.

M.S.'s Functional Behavior Analysis Report was completed in November 2013, M.S.'s first of two years in kindergarten. (Exh. 1, Vol. 5, p. 1090, ln. 5-13). The Report was written by DAS, long-time school psychologist with the _____ Coop. (Vol. 5, p. 1087, ln. 1-10). Mr. S's licensure includes school psychology, early- childhood through twelve, educational supervisor and coordinator for special education administrative license, and also K-12 principal license. (Vol. 5, p. 1086, ln. 8-20). Mr. S had previously worked with M.S. when she was coming out of preschool for her exit evaluation. (Vol. 5, p. 1087, ln. 16-17).

The behavior that Mr. S and his team identified was her noncompliant behavior including grabbing materials, hiding materials, throwing items, laying on the floor, refusing to comply, running away from adults, hitting, kicking and spitting. (Vol. 5, p. 1090, ln. 16-22; Vol. 7, p. 1701, ln. 10-14). Dr. S testified that: "One of the biggest things that we saw was [M.S.] getting attention when she misbehaved, but also her tendency to seek attention from adults…another factor we saw was her desire to gain a preferred activity or to avoid nonpreferred activities." (Vol. 5, p. 1092, ln. 11-20). Mr. S further testified that:

> And then the activities seemed to affect it too, whether it was something she preferred more like reading that was a strength for her at the time, or math, which was a weakness. So we saw, in other words, more behaviors during a non-preferred activity than a preferred activity.
>
> The duration just was some data that we had several of the teachers taking, looking at how often or how long we saw her behaviors in the classroom. Again, we saw differences between the special ed versus the regular education classroom with the speech session being the least behaviors because it was basically one-on-one so we didn't see any behaviors during speech. (Vol. 5, pg. 1092, ln. 3-16).
>
> …when M.S. is presented with an academically related task wait time or transition to new activity, she tends to demonstrate behaviors including grabbing, hiding materials, throwing items and such. (Vol. 5, pg. 1093, ln. 8-12).
>
> …as far as the summarizing statement. That when M.S. is presented with academic related tasks, wait times or transitions to new activities, she demonstrates behaviors including grabbing, hiding materials, throwing items, lying on the floor, refusing to comply. This results in the use of one of the methods that we use for redirecting M.S. toward appropriate behaviors. The function of M.S.'s behaviors appears to be gaining a reaction or attention from adults, avoiding undesirable activity, or gaining a preferred activity… (Vol. 5, pg. 1094, ln. 1-13).

In conducting his observations for the FBA, Mr. S stated that he observed two 20-30 minute sessions per day over a period of one week. During a five-day period, observations would be somewhere between 40 and 60 minutes a day for a maximum of 6 hours. (Vol. 5, p. 1273, ln. 4-21).

In November 2015, Mr. S became aware of concerns that M.S.'s teachers had with her placement during the first grade. "I didn't attend any meetings til, I'm going to say, close to November. But I was aware of meetings that were going on with concerns regarding how M.S. was performing with that current IEP that we had developed the end of the previous year, whether it be behavioral or whether or not she had the appropriate supports in place." (Vol. 5, p. 1119, l. 12-25).

Mr. S testified, "…well, the November 12th meeting looks a lot of review on how she was performing, but no big changes are recommended…we needed to collect additional data or additional information prior to determining any placement or service

changes." (Vol. 5, p. 1120, ln. 16-23). Mr. S recalled that in November, M.S. had started in another classroom with LP. (Vol. 5, p. 1120, ln. 17-25, p. 1121, ln. 1-3).

Mr. S attended the January 14, 2016, IEP meeting. He recalls that:

> We went from reviewing how she was performing during Rockin' Readers, which actually at that time she was doing quite well in, the Rockin' Readers group. She was struggling more in the Math Masters group so there was concerns there. There was a lot of discussion about the behavior difficulties that were being seen in Math Masters. The behavior specialist also reported we were seeing increased behaviors during whole group instruction and I believe it was at this time that we started discussing the behavior plan [prepared by Sarah J.] (Vol. 5, p. 1124, ln. 6-20).
>
> I thought that the behavior plan that they developed was consistent with some of the behaviors that we'd seen with [M.S.] over the last just over two years. They were evident in the FBA that we completed, so the plan seemed to be consistent with the FBA that was developed and included a lot of strategies like if—then statements that seem to be effective with M.S. So I felt like it was an appropriate behavior intervention plan. (Vol. 5, p. 1125, ln. 13-22).

Mr. S acknowledges that he did not observe [M.S.] in the first grade nor did he see or observe the severity of the mal-behaviors in the first grade. (Vol. 5, p. 1200, ln. 4- 18). Mr. S acknowledges that a change of medication for ADHD could have an effect on M.S.'s behavior and that it was known to the school districts very early in February 2016 that M.S. had a thyroid condition. (Vol. 5, p. 1201, ln. 3-21). Mr. S further acknowledges that [M.S.] had a sudden uptake in mal-behaviors starting in January 2016. (Vol. 5, p. 2080, ln. 9-15). Mr. S testified that the behavior specialist, S J, reported that the Team was seeing increased behaviors during whole group instruction, and, at that time, the Team started discussing the behavior plan that was being prepared by Ms.J. (Vol. 5, p. 1124, ln. 6-20). Mr. S believed that the behavior plan that they developed was consistent with some of the behaviors they had seen with M.S. over the last two years. (Vol. 5, p. 1125, ln. 9-16). At that time, Mr. S did not believe that a new FBA was necessary to develop a behavioral intervention plan because data could be obtained through behavioral assessments. (Vol. 5, p. 1097, ln. 8-12; p. 1243, ln. 10-19).

Further, Mr. S does not agree with the proposition that it is necessary to do a Functional Behavior Assessment before changing the placement of M.S. to a more restrictive environment. (Vol. 5, p. 1249, ln. 7-11).

Mr. S was candid in his belief that a behavioral specialist with experience and qualifications including FBA's would have higher credentials than he to perform an FBA. (Vol. 5, p. 1248, ln. 6-13).

(b) Testimony of Shelby Evans, Ph.D.

Dr. Evans' credentials include a Ph.D. in Developmental and Child Psychology from the University of Kansas; Board Certification as Behavior Analyst at the Doctorate Level; an unrestricted license to practice psychology in the State of Kansas; and Board Certification to Behavior Analyst. (Vol. 5, p. 135, ln. 3-10).

Describing a Functional Behavior Assessment, Dr. Evans stated:

> So the Functional Behavior Assessment is designed to be used when an individual's having a lot of problem behavior. You want to determine what the purpose of that behavior is, find an alternative behavior to replace it that would be more appropriate so they can be successful in whatever setting they're in.
>
> So generally speaking, you get some background information because you need to know what the behavior problem is, for example, if they are aggressive and what does that look like. If they are not compliant, what does that look like and go through those kinds of things. Then you go in generally and you do direct observations, and you keep some sort of data. You can do frequency, like how often it happens. You can do duration, how long, for example, like a tantrum lasts. Is it five minutes, ten minutes, fifteen minutes. Looking at all of the things in the environment as well. How are people responding, what happens before the behavior, what happens after the behavior. And then you take all of that data together and use it to determine the purpose of the behavior and the appropriate interventions for the behavior. (Vol. 5, p. 1137, ln. 19-35; p. 1138, ln. 1-22).

Dr. Evans stated that she would expect a person with a diagnosis of Down Syndrome and ADHD like M.S. to have behavioral issues on a permanent basis. (Vol. 5, p. 1141, ln. 5-16). Dr. Evans further testified that, the goal with any—especially children, is if the behaviors are going to be around long-term, and often I have to tell families your child will have this behavior probably for life, you want to, as early as possible, get the appropriate replacement behaviors in. Your goal is to minimize. You may never take that rate of behavior to zero for the rest of their life, but you want to get in there early, get the appropriate intervention so that that is the lowest level. When families come in with teenagers who have been aggressive, you know, since kindergarten, it is a lot harder for us

to get anything done with a 14, 15, 16-year old than somebody who is kind of in the elementary school years. (Vol. 5, p. 1141, ln. 17-25; p. 1142, ln. 1-7).

Dr. Evans does not believe that the current FBA is an appropriate measure of M.S.'s behavior as it is at least two years out of date and that if a Behavior Intervention Plan is not successful, you go back to your FBA and try again, because you missed something, or overlooked something. (Vol. 5, p. 1142, ln. 20-25; p. 1143, ln. 1-22). Dr. Evans suggests that you may need new data. You need another person to look at it. Because behaviors change their purpose or their function. (Vol. 5, p. 1143, ln. 23-25; p. 1144, ln. 1-13). Dr. Evans further testified:

> And I think in this case it is important that a third party come in that is a little more, I don't want to say neutral, but is able to kind of say I am not part of all the difficulties that have gone on with the IEP. I am not part of some of this other stuff. (Vol. 5, p. 1150, ln. 17-23).

Dr. Evans believes that a FBA is important to assess current behaviors because with no FBA being done, "I think they are stabbing in the dark. You might hit something but you might not." (Vol. 5, p. 1153, ln. 23-25; p. 1154, ln. 1-5).

D. Review Officer's Analysis and Finding:

The Parents contend that Dr. Evans testified regarding M.S.'s need for the FBA and the importance that the FBA occur before changes were made creating a more restrictive environment. Dr. Evans is indeed a knowledgeable expert witness with nearly ten years of Board Certification. Her best practices description of the methodology of the FBA to identify problem behavior, the purpose of that behavior, and methods to develop an alternative behavior to replace the problem behavior provided by this expert is both instructive and beneficial to the trier of fact. Unfortunately, the use of a functional behavior assessment is not well defined or found to be a procedural violation under federal law.

Federal law appears only to require an FBA whenever a child with a disability has an educational placement change for disciplinary reasons in the following instances:

1. When a child is removed from school for more than 10 consecutive days for behavior that is a manifestation of the child's disability.
2. When a child is removed for more than 10 school days for conduct that is not a manifestation of the disability but the IEP team determines that an FBA is necessary.

3. When a child is placed in an interim alternative educational setting for not more than 45 school days for behavior involving a dangerous weapon, illegal drugs or infliction of serious bodily injury.

Thus, an FBA is required only if the Team determines the student's behavior is a manifestation of the disability and an FBA has not already been conducted on the target behavior. (34 C.F.R. §300.530).

Our own 10th Circuit Court of Appeals has found in an unpublished decision that a behavior intervention plan (BIP) faces an uphill battle because neither the law nor the regulations prescribe any specific substantive requirements for a BIP, and, by analogy, an FBA. See *T.W. v. Unified Sch. Dist. No. 259, Wichita, Kan.,* 136 F. App'x 122, 129 (10th Cir. 2005). In *T.W.,* the Court concluded that a first grader with Down Syndrome was appropriately placed in a self-contained classroom. The Districts demonstrated multiple attempts to accommodate the child in a regular classroom. Despite the mother's contention that her son acquired benefit(s) from being around children without disabilities and that those children benefited from being in class with him, the Court ruled that it was impossible and infeasible to implement the child's IEP in a way that was tied to the regular classroom curriculum.

Section 3 of the *T.W.* decision is entitled *"T.W.'s Behavior Intervention Plan."* In Section 3, the Court stated: "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. See *Alex R., ex rel., Beth R. v. Forrestville Comty., Unified Sch. Dist. #221*, 375 F.3d. 603, 615 (7th Cir., 2004), cert. denied, 125 S.Ct. 628 (2004). Courts should be leery of creating such substantive requirements 'out of whole cloth' where neither Congress nor the Department of Education, the Agency charge or the promulgating regulations for the IDEA has done so."

With respect to the argument by the Parents that the BIP should have been modified, the Court found that modifications would not have solved *T.W.'s* behavior problems, because their source was the fact that he was being instructed at an inappropriately high level in the regular classroom. *Id.*

Numerous courts have found that the failure to conduct an FBA is not a procedural violation of the IDEA. See *A.C., ex rel. M.C. v. Bd. of Educ. of The Chappaqua Cent. Sch. Dist.,* 553 F.3d 165, 172 (2d Cir. 2009); *K.L. ex rel. M.L. v. New York City Dep't of Educ.,* 530 F.

App'x 81 (2d Cir. 2013); *M.W., ex rel. S.W. v. New York City Dep't of Educ.,* 725 F.3d 131 (2d Cir. 2013); *L.O. v. New York City Dep't of Educ.,* 822 F.3d 95 (2d Cir. 2016); *A.M. v. New York City Dep't. of Educ.,* 845 F.3d 523 (2d Cir. 2017).

The Review Officer concludes, after review of the evidence, that the IEP adequately identified M.S.'s behavioral impediments and implemented strategies to address those behaviors. The failure of the Districts to conduct a second FBA or provide prior written notice to the Parents is a procedural violation, but it does not rise to the level of denial of a FAPE.

V. NOTICE OF APPEAL.

The Parents have appealed the Hearing Officer's Decision in this matter on the following issues:

1. The Parents allegedly were denied due process because the hearing was not timely concluded and the Hearing Officer did not issue a timely decision.
2. The Parents allegedly were denied due process because the Hearing Officer's decision was incomplete due to his failure to address the Parents' issues;
3. The Parents allege that they were denied due process because the Hearing Officer did not address whether M.S.'s behavior should have been addressed by an FBA prior to being moved to a more restrictive placement; and,
4. The Parents were denied due process because the Hearing Officer's decision was statutorily deficient for failure to include appeal rights in the decision.

A. <u>The Failure of the Hearing Officer to Timely Conclude Hearing and Issue D</u>ecision.

The Parents contend that they were denied due process because this matter was not concluded within 45 days after the Districts received the Due Process Complaint. For discussion and analysis purposes, it is appropriate to outline timing issues in three categories: pre-hearing timelines; hearing timelines; and post-hearing timelines following the Hearing Officer's illness.

1. <u>Pre-Hearing Timelines.</u>

Following Resolution Sessions held on April 19, 2016, and April 28, 2016, a telephone scheduling conference was conducted by the Hearing Officer on May 9, 2016. (Districts' Response, Exh. A). The Hearing Officer ordered that discovery was to be completed by June 14, 2016, with the hearing to begin June 21, 2016, for one week. (Districts' Response, p. 2).

On May 16, 2016, Parents submitted discovery requests via email. The Districts describe within the email that the discovery request is "very broad." (Districts' Response, p. 2). The Parents admit that there was an "extreme amount" of discovery requested. (Parents' Reply, p. 2).

As early as June 7, 2016, counsel for the Districts informed counsel for the Parents that it would be unlikely that she could review all of the documents to be produced in time to produce them by the June 14, 2016, deadline. (Districts' Response, p. 2; Exh. B).

A status conference was conducted on June 9, 2016. At the status conference, counsel for the Districts indicated that the sheer number of documents (consisting of four copy-paper sized boxes) would not permit her to review the documentation in time to produce them to Parents' counsel. (Districts' Response, pp. 2-3).

At that time, the Parents made it known that time was of the essence and that the Parents desired the matter to be completed prior to the start of the school year. (Parents' Supp. Brief, p. 2; Districts' Exh. K). The Hearing Officer granted a continuance with a discovery deadline of July 1, 2016, and the hearing to begin July 18, 2016. (Districts' Response, p. 3; Exh. C).

Following the status conference, the Districts received additional discovery requests from the Parents on June 22, 2016. (Districts' Response, p. 3). In order to avoid multiple deadlines, on July 1, 2016, the parties agreed to timeline revisions and the Hearing Officer reviewed the revisions via email on June 24, 2016. (Districts' Response, p. 3; Exb. D and E). The Districts provided responses to the Parents' discovery on June 29 and June 30, 2016. (Districts' Response, p. 3).

On July 11, 2016, the Districts submitted their witness/exhibits and informed counsel for Parents that she had been ill over the weekend and that she had scheduled a doctor's appointment. (Districts' Response, p. 4; Exh. F). On July 14, 2016, counsel for the Districts informed the Hearing Officer and counsel for Parents that she had been ill all week

and requested a continuance of the hearing. Parents' counsel did not object to the proposed continuance (Districts' Response, p. 4; Exh. G and H), and understood that the hearing would take place on July 19, 2016. (Parents' Supp. Brief, p. 3; Exh. 2). On July 14, 2016, counsel for the Districts requested a continuance as "I have been out sick all week and do not seem to be getting any better." (Districts' Response, Exh. H).

In an email exchange on July 20, 2016, counsel for the Districts stated that she had not returned to work until that very day and continued to feel unwell. (Districts' Response, p. 4; Exh. I). On July 29, 2016, counsel for the Districts notified Parents' counsel and the Hearing Officer that her husband had been scheduled for surgery on August 22, 2016, and requested that the hearing be scheduled for the week of August 29, 2016. (Districts' Response, Exh. J). As a result, the Hearing Officer scheduled the hearing to begin on August 30, 2016, and continuing to September 1, 2016. (Districts' Response, p. 5, Tr. Vol. 1-3; Parents' Supplemental Brief, Exh. 4).

Analysis and Finding:

After reviewing the supporting exhibits, the Review Officer concludes that the continuances of the hearing until August 30, 2016, were granted for good cause shown and within the sound discretion of the trier of fact.

2. Hearing Timelines.

The due process hearing was conducted starting August 30, 2017, and continued to September 1, 2016. All three of those days were utilized by the Parents for their case-in-chief. (Tr. Vol. 1-3).

The matter was continued for hearing on September 12-14, October 3-5 and concluded on October 10, 2016. (Tr. Vol. 4, 5, 6, 7, 8 and 9). Following the conclusion of the October 10, 2016, hearing, the Hearing Officer requested proposed findings of fact and conclusions of law be submitted by the parties by October 31, 2016. (Districts' Response, p. 5).

On October 25, 2016, counsel for the Districts requested an extension of time for the Findings of Fact and Conclusions of Law. Her email to the Hearing Officer and counsel for the Parents stated:

> With over 2,600 pages of transcript and dealing with all of the fires that were on hold during this hearing, there is simply no way this will be done by October 31. I would propose an additional 4 weeks. That would be more in line with how long it typically takes for Findings of

> Fact and Conclusions of Law to be written for a hearing of this length. (Districts. Response, Exh. K).

In response, counsel for the Parents responded as follows:

> My client has requested that I strongly express their objection to any continuance. As this matter was supposed to go to hearing months ago before the school year began, and they are wanting a decision as soon as possible. I can totally appreciate Sarah's concerns about the length of the transcript and the urgencies that have resulted from the extended hearing (trust me I do), but this due process—and the child is now almost halfway through the next school year. Obviously, we will abide by whatever the Court decides, but ultimately, this case needs to come to conclusion as soon as possible. *Id.*

The Hearing Officer granted an extension until December 1, 2016. In his order, the Hearing Officer stated:

> This matter was heard over a ten days extending from August 30, 2016, to October 10, 2016. Extensions and continuances were necessitated for the appearance of witnesses composed of staff and experts. The transcript of the hearings exceeds 2,400 pages. At the conclusion of the evidence, the Hearing Officer requested counsel to provide proposed findings of fact and law. Due to the extensive testimony and evidence presented, the request for additional time to prepare the requested findings has been made. After review of the requests and over objection of the Parents, the Hearing Officer finds that the matter shall be extended for filing the proposed findings of facts and conclusions of law to December 1, 2016. (Districts' Response, p. 6; Exh. L).

On November 28, 2016, counsel for the Districts requested a second post-hearing extension until January 9, 2017. In doing so, counsel for the Districts pointed out that she had been given two months to prepare proposed findings of facts and conclusions of law in another hearing that was half the length and only 1,100 rather than 2,800 pages in transcript in another case. In the body of her email, counsel for the Districts stated:

> …while I realize the Parents will object to this request, I am unable to work any quicker on this as I am the only attorney handling special education matters at KASB and there have been a lot more special education issues across the state this year. Even those that don't end up in due process take a significant amount of my time to avoid going there.
>
> I am hopeful that I may be able to complete this with an extension to January 9 since school will be out of session, a good chunk of that time

> and I should not be receiving many calls and emails that require my immediate attention. I have gone back and looked at my last lengthy hearing (5 days) and I was given two months to write findings of fact and conclusions of law in a case that had just over 1,100 pages of transcript, so I do not believe my request for extension to be unreasonable. (Districts' Response, Exh. M).

In response, the Parents strongly objected to the requested extension, stating in part:

> The Parents do vehemently object to the requested extension. This would be the fourth extension granted for the school districts. I can totally appreciate Sarah's workload issues but I am a solo practitioner myself, I have well over 100 clients that I represent and I represent alone—I do not have any other attorneys to assist me. I appear in multiple court hearings a week and I run the entire office myself. This matter needs to go to decision. This matter was supposed to have been decided in the summer, before M.S. started her second-grade year. When requesting the last continuance, the Districts contended that at the end of this semester it would be a good break for any transitions that need to be made. Now they are requesting to go into not only another semester, but an entire new calendar year. To delay any further would be a denial of the Parents' due process, especially considering the ongoing issues that M.S. and the Parents are dealing with while waiting on this decision. (Districts' Response, p. 6; Exh. M).

In addition, in an email dated November 30, 2016, counsel for the Parents pointed out that the Districts had already received a months' extension and suggests that if any extension is granted that it should be no longer than seven (7) days "as these issues are still ongoing and tumultuous for the child." (Districts' Response, Exh. M).

The Hearing Officer quickly responded "just had surgery and still a bit queasy. I will grant some additional time past December 1 to submit your proposals but will set a definite time Friday after I get it together." *Id.*

In his Order of Continuance dated December 5, 2016, the Hearing Officer granted the second post-hearing extension until January 5, 2017, stating:

> After review of the request and based on the extensive volume of testimony and evidence offered at the due process hearing, the Hearing Officer finds, for good cause, that the time for filing proposed Findings of Fact and Conclusions of Law shall be extended to January 5, 2017, and that a decision on the issues shall be entered no later than January 16, 2017. (Districts' Response, p. 6; Exh. M-2). Is this in the right spot now?

In their brief to the Review Officer, the Parents argue that these multiple extensions moved the case into a timeframe where the Hearing Officer had become ill and required surgery. Parents contend that if the extensions would not have been granted, especially the briefing deadline continuances, it was likely the parties would have had the decision issued before the Hearing Officer's unfortunate health circumstances had occurred. (Parents' Supp. Brief, p. 7). Further, Parents argue that Kansas Special Education Regulation 91-40-28 clearly states what is required for an extension of the statutory requirement of completing the matter within 45 days and the press of either parties' attorneys' business is not one of them nor was there a written agreement as defined in 91-40-28(g)(3).

Analysis and Finding

The Review Officer finds that K.A.R. 91-40-28 is narrowly written. Sec. (g)(1)(2)(3) does not attempt to provide any guidance to the Hearing Officer with respect to the conduct of the due process hearing or post due process proceedings. The 45-day timeline for completion of the due process hearing is utilized merely to demonstrate when the 45 days begins to run following a resolution meeting or mediation. There is nothing in the regulation which prescribes the inherent power of the due process hearing officer to conduct any aspect of the hearing, including continuances, timelines for completion of transcripts or the date the hearing is considered to be closed. Nonetheless, the Review Officer finds that the Hearing Officer abused his discretion in granting the second post-hearing extension until January 5, 2017. It appears that the extension was granted over the objection of Parents' counsel and as a business-related convenience to the Districts' counsel. Thus, the Review Officer finds that the January 5, 2017, extension was not for good cause shown. The Review Officer retains jurisdiction to grant attorneys' fees and costs, if any, demonstrated to have occurred as a result of the excessive continuance. Nonetheless, there is no evidence before the Review Officer that the excessive continuance rose to the level of a denial of a FAPE.

3. Post-Hearing Timelines Following the Hearing Officer's Illness.

The Hearing Officer initially indicated that he had undergone surgery in a brief email to the parties dated November 30, 2016 (referenced above). Unbeknownst to the parties, the surgery involved the removal of a tumor. Both parties later learned that the

Hearing Officer had to undergo both chemotherapy and radiation treatments during the first months of 2017. (Districts' Response. p. 6).

On January 13, 2017, counsel for the Districts requested an extension of time for the Hearing Officer to issue a decision due to the lengthy Findings of Fact and Conclusions of Law, as well as the pending Motion to Strike Arguments. That same day, counsel for the Parents responded: "In the light of the developing events, the Parents would not object to the extension to February 3, 2017." (Districts' Response, pp. 6-7; Exh. N and O). The Parents acknowledge that these events "put the Parents at the mercy of the situation, as there was really no other recourse for them but to wait for a decision to be issued." (Parents' Supp. Brief, pp. 7-8).

On March 15, 2017, both parties received email correspondence from Mark Ward at Kansas State Department of Education, indicating that the Hearing Officer had suffered a setback in his recovery and inquired about alternative ways to assist him in completing a decision. Both parties responded with suggestions to Mark Ward on March 6, 2017. (Districts' Response, p. 7; Exh. P). Additional correspondence between the parties and Mark Ward on May 1 and May 2, 2017, indicated that the decision was nearly completed and would be submitted shortly. (Districts' Response, p. 7; Exh. Q). The Hearing Officer's decision was emailed to the parties on May 2, 2017.

Analysis and Findings

In view of the Hearing Officer's serious illness, the Review Officer finds that the continuation extending deadlines to February 3, 2017, and beyond was necessary and proper.

B. Did the Hearing Officer Fail to Address all Issues Presented?

The Parents argue that they were denied due process because the Hearing Officer failed to address all of their issues in his decision. On August 26, 2016, the Hearing Officer issued an Order Regarding Issues of Due Process Hearing. In pertinent part, the Order stated the following:

> After review of the presentations and arguments regarding the issues to be determined at the due process hearing, the Hearing Officer finds that the issues as presented in the Request for Hearing and Due Process Complaint are as follows:

> Issue 1. Violation of IEP by making substantial changes in placement.
>
> Issue 2. Violation of IEP by removing (student) from least restrictive environment.
>
> Issue 3. Failure to consistently implement parts of IEP and denial of FAPE.
>
> Issue 4. Retaliation for revocation/refusal to consent.
>
> **Such matter and issues as proposed by Parents proposed issues not set forth above shall be considered at the time of the hearing.** (Districts' Response, p. 8; Exh. R). (Emphasis added).

The Districts argue that the above Order clearly did not adopt the Parents' issues as issues to be determined at the hearing. Likewise, the Parents' counsel never requested the issues be amended to include the Parents' previously proposed issues. The Districts further argue that had the parents only presented evidence related to the issues as set forth in the August 26, 2016, Order, it might have been unnecessary to have 10 days of hearing on this matter. (Districts' Response, p. 8).

The Districts state that following the hearing, the Parents submitted proposed Findings of Facts and Conclusions of Law. The Districts responded by filing a Motion to Strike Parents' proposed Conclusions of Law. The Districts argue that, by virtue of the fact that the Hearing Officer never issued a separate order in response to the Districts' Motion, the Hearing officer essentially ruled that the parties should have submitted conclusions of law based on the four issues found in the August 26, 2016, Order. (Districts' Response, p. 8).

In response, the Parents point to that portion of the August 26, 2016, Order allowing Parents' proposed issues to be considered at the time of the hearing. The Parents further point out that one of the main remedies sought by the Parents, a revised FBA, was clearly indicated in their proposed Conclusions of Law. (Parents' Reply, pp. 6-7).

Analysis and Finding

The Review Officer notes that the Hearing Officer did not fail to address Parents' FBA issue in his decision. Seven full pages of the Hearing Officer's decision were devoted to issues relating to the Functional Behavior Analysis. In addition, the Hearing Officer's Conclusion in his May 2, 2017, Decision, specifically sets out the following:

> I do believe a Behavior Intervention Plan (BIP) should be undertaken and that a Fundamental Behavior Analysis (FBA) be undertaken under the same complexity as M.S.'s disabilities. The FBA should be done by an experienced professional, taking into consideration M.S.'s Down Syndrome plus the ADHD and thyroid condition. I would suggest Dr. Shelby Evans or a professional with similar qualifications be engaged for that purpose. (Hearing Officer's Decision, May 2, 2017).

K.S.A. 72-953(b)(5) and (6) provides the following due process requirements:

> (5) The right of the parties to prohibit the presentation of any evidence at the hearing which has not been disclosed to the opposite party at least five days in advance of the hearing…."
>
> (6) The right to prohibit the other party from raising, at the due process hearing, any issue that was not raised in the due process complaint notice or in a prehearing conference held prior to the hearing.

The Review Officer has carefully reviewed the Hearing Officer's Order Regarding Issues of Due Process Hearing issued on August 26, 2016, as well as the due process requirements found in K.S.A. 72-953(b)(5)(6). It appears to the Review Officer that the Parents made a strategic decision to seek the Hearing Officer's approval of additional proposed issues during the due process hearing. This strategic choice is, of course, limited by the inability of a party from raising at the due process hearing, any issue that was not raised in the due process complaint notice or in the pre-hearing conference. This strategic choice is further limited by the exhibits that must be disclosed to the opposing party at least five days prior to the hearing.

The avenue properly chosen by the Parents to ensure that their issues received adequate attention is found in the Parents' Motion for Reconsideration and Clarification of the Decision following the Hearing Officer's Decision on May 2, 2017. In the Motion for Reconsideration, the Parents requested reconsideration of the Hearing Officers' Decision in favor of the Districts on Issue 2 due to the findings of fact that had been proposed by the Parents and adopted by the Hearing Officer regarding the FBA. This issue was fully reviewed and findings made by the Review Officer pursuant to the agreement of the parties and found in IV. of this decision. No other issues were submitted to the Review Officer under the Motion for Reconsideration. As the issues regarding the FBA have been fully

addressed, there have been no additional issues to present. The decision of the Hearing Officer submitted on May 2, 2017, is accepted subject to any modifications found in the Review Officer's Report.

C. Failure to Require Assessment of M.S.'s Behavior Before Allowing a More Restrictive Environment.

As indicated above, issues relating to the utilization of an FBA prior to placing M.S. in a more restrictive environment, has been fully reviewed and findings made by the Review Officer and are found in IV., pp. 17-19 of this Report.

The Parents further argue, however, that special education pullout services for reading and math in the spring of 2016 constituted a substantial change in placement of M.S. to aid more restrictive environment. It is further contended that M.S.'s removal from 75 minutes of reading and 60 minutes of math comprises thirty-one percent (31%) of M.S.'s educational day in violation of K.A.R. 91-40-1. It is suggested that these pullouts were made during the same school year. (Parents' Reply, p. 8).

The Districts argue in response that, pursuant to K.A.R. 91-40-1 (sss), a change in placement of less than 25% does not require parental consent. (Districts' Response, p. 9).

The record reveals that it was initially proposed that M.S. receive special education pullout services for math during the February 1, 2016, IEP. (Tr. Vol. 5, p. 1173, ln. 24-25; p. 1174, ln. 1-10; Vol. 10, p. 2491, ln. 22-25). The Coop Assistant Director for Education, C S provided through her testimony a review on how the Districts calculate the percentage of time to determine a substantial change in placement. Ms. S calculates that a pullout of 108 minutes in a 435-minute school day represents 25%. A pullout for M.S.'s reading, for example, would be approximately 16% or math, 17%. (Tr. Vol. 10, p. 2490, ln. 13-23; p. 2491, ln. 3-17; p. 2588, ln. 14-25; p. 2589, ln. 1-5).

The Parents contend, without citation, that although ultimately the physical removal of M.S. in both math and reading from the general education classroom was implemented several weeks apart, the result is more than a 30% change.

Analysis and Findings

The Review Officer can find no legal support for the proposition that pullouts made over the same school year can be "stacked" in a method to serve as a violation of K.A.R. 91-40-1(sss). As a result, the change of placement was less than 25% and did not require

parental consent. The Review Officer finds that math and reading pullouts did not represent a violation of the regulation nor does it rise to the level of a denial of FAPE.

D. Failure to Provide Appeals Rights.

The Parents contend that the Hearing Officer's May 2, 2017, Decision did not include any instruction setting out the appeal rights of either party. Further, they argue that the mere fact that appeal rights were left off could have realistically damaged or delayed the Parents' right to appeal. (Parents' Reply, p. 10).

In response, the Districts state that the Parents are correct that the Hearing Officer failed to include information regarding appeal rights in the Decision, but that the Parents have also failed to identify which statute was allegedly violated. The Districts state that K.S.A. 72-973(h) provides as follows:

> Whenever a hearing officer conducts any hearing, such hearing officer shall render a decision on the matter, including findings of fact and conclusions, not later than 10 days after the close of the hearing. The decision shall be written or, at the option of the parent, shall be an electronic decision. Any action of the hearing officer in accordance with this subsection shall be final, subject to appeal and review in accordance with this act. (Districts' Response, pp. 9-10).

Analysis and Finding

After a diligent search, the Review Officer cannot find that Kansas statutes or Kansas Department of Education regulations require that the Hearing Officer make any instruction regarding the appeal rights of any party. In any event, the Notice of Appeal was filed by the minor child through her parents and received by the Kansas Department of Education in a timely matter on May 30, 2017. The Parents were clearly not prejudiced by any perceived lack of appeal notice, nor does the lack of notice serve as a denial of due process rights.

VI. *CONCLUSION AND DECISION.*

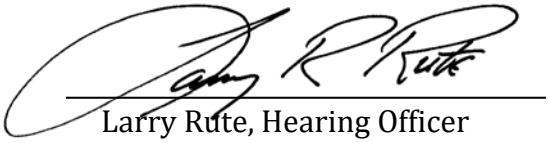
The Review Officer has determined through the weight of the testimony and exhibits that the Districts did not: (1) impede M.S.'s right to a free appropriate publication education; (2) impede the Parents' opportunity to participate in the decision-making process regarding the provision for a free appropriate education to M.S., or (3) that the Hearing Officers' Findings of Fact and Conclusions of Law in his May 2, 2017, decision is deficient. The Review Officer has further found that the January 5, 2017, extension was not

for good cause shown. The Review Officer has retained jurisdiction to grant Parents attorneys' fees and costs, if any, determined to have occurred as a result of the excessive continuance.

While the Review Officer has rendered a decision in favor of the Districts, the Review Officer acknowledges the persistence and commitment of the Parents in seeking to provide M.S. a quality educational experience.

IT IS SO ORDERED.

August 24, 2017
Date



Larry Rute, Hearing Officer

CERTIFICATE OF SERVICE

I, Larry R. Rute, do hereby certify that I have provided a true and correct copy of the above and foregoing Review Officer's Report upon the following parties:

Ms. Joni J. Franklin
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by mailing the same by U.S. mail, postage prepaid and by e-mailing a copy to the parties, this 24th day of August, 2017.

Larry R. Rute, Hearing Officer