NOTICE OF HEARING OFFICER'S DECISION
KANSAS DEPARTMENT OF EDUCATION FILE #16 DP ____-001

CHILD'S NAME:	M.S.
PARENT(S) NAMES:	_____ and _____ (Referred to as JC and PS for confidentiality)
PARENT'S COUNSEL:	JONI J. FRANKLIN Franklin Law Office, PA 727 North Waco, Suite 150 Wichita, KS 67203
SCHOOL DISTRICT:	USD _____, ____, KANSAS and ____COUNTY AREA EDUCATIONAL SERVICES INTERLOCAL COOPERATIVE #____
DISTRICT'S COUNSEL:	SARAH J. LOQUIST Kansas Association of School Boards 1420 SW Arrowhead Road Topeka, KS 66604
HEARING OFFICER:	JAMES G. BEASLEY 601 Birkdale Dr. Wichita, KS 67230
DATE:	May 2, 2017

PROCEDURAL STATUS

On March 24, 2016, the parents, JC and PS, filed a Notice of Parent's Request for Due Process Hearing, which was received by the District on April 5, 2016. On April 14, 2016, the present Hearing Officer was requested by the District and parents to serve as Hearing Officer for the Due Process Hearing. Subsequently, the following procedural events occurred:

1. On April 25, 2016, the Hearing Officer sent a letter to the attorneys for the parents and the District acknowledging appointment as Hearing Officer.
2. A Scheduling Conference was conducted by phone with the Hearing Officer and counsel on May 9, 2016, and a Scheduling Conference Order was entered on May 19, 2016, setting dates for completion of discovery, filing motions, setting a Status Conference and setting the Due Process Hearing for June 21, 2016. A subsequent Amended Scheduling Conference Order was filed on June 9, 2016 re-setting the Due Process Hearing for July 18, 2016. Due to extensive issues regarding discovery and for good cause shown, the Due Process Hearing was re-scheduled to begin on August 30, 2016, to be held at the ____ County Area Educational Services Interlocal Cooperative offices in Goddard, Kansas.
3. The Due Process Hearing was commenced on August 30. 2016, and was heard on August 31, September 1, 12, 13, 14, October 3, 4, 5 and 10, 2016. The parents were present at all hearings and with counsel, Ms. Joni Franklin, Attorney at Law. The District was represented by Ms. Sarah Loquist, Attorney at Law with the Kansas Association of School boards and representatives of the School District.
4. It was determined that the parents would bear the burden of proof and proceed first with their evidence.

5. At the conclusion of the evidence the Hearing Officer requested counsel offer Proposed Findings of Facts and Conclusions of Law. The Hearing was very lengthy, 2,400 pages of transcript and __ witnesses. Due to the length of the hearing, and illness of the Hearing Officer, and the matter being delayed and continued until this Decision is entered.

ISSUES TO BE RESOLVED

Issue 1 Violation of the 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

CHRONOLOGY AND FINDING OF FACTS

1. M.S.'s mother, Ms. C, described M.S. as follows:

> M.S. was diagnosed at birth with Down Syndrome, which is an extra chromosome. She's loving, she's energetic, she loves her family, she loves school, she loves to play with friends at school. She has a couple of friends that come over on a pretty consistent basis from school that were classmates. She had open heart surgery in 2014. She was in the hospital for a week and we went back in August and there was fluid around her heart about the amount of a pop can so they had to take that out and she stayed for another week. But she progressed very well. And then she was most recently diagnosed in the end of January, first of February with a thyroid issue. Ms. C further testified that M.S. has also been diagnosed with ADHD, for which she takes medication, and that she continues to take medication for her thyroid issue. (Tr., Vol. 1, at 27, In. 3-15.)
>
> At home she's funny, she's, she follows the expectations. We give really short concise statements and directions to her. Her follow through is consistent. She doesn't get a lot of chances and opportunities because that's what we have found was best for her. (Tr., Vol. 1, at 26, ln. 5-25.)

2. M.S. began her tenure at ___ Elementary School in 2010 at age 3, when she entered the Early Childhood Program, after attending Rainbows when she was smaller. (Hearing, Vol.1, 27). She attended this program to prepare and transition her to Kindergarten. (Id.). M.S. was re-evaluated during her preschool year on April 26, 2013. (Dist. Ex., 1). This evaluation was done to specifically "identify her present levels of educational performance, and determine any additions or modification that may be necessary for M.S. to meet her IEP goals or progress appropriately in the general curriculum." (Id.). Based upon said assessment, an IEP for M.S. was instituted, dated May 10, 2013, with a later Prior Written Notice dated September 13, 2013, sent to the parents for consent, as well as an IEP Amendment Form for Minor Changes Not requiring parental consent dated November 15, 2013. (Parents Ex. 11, 442). Four days after the IEP Amendment Form for Minor Changes was sent out, the parents filed a complaint with the State Board of Education. (Parents Ex. 11, 442). In that complaint, the parents contended that the District had added a Behavioral Intervention Plan (BIP) to M.S.'s IEP, as a minor change, and without consulting with them, or obtaining their parental consent for the same. (Parent Ex. 11, 443).

3. Diana Durkin, the Complaint Investigator, held that "the addition of a new BIP to the student's IEP **does** represent a material change in service. A Behavior Intervention Plan is a "service." Adding a BIP to an IEP when no plan had previously been in place is a 100% change in both the frequency and the duration of the service. Such an action would require the parent to be notified **and** give written consent for that change before the plan could be implemented." (Parent Ex. 11, 443). She further held that because the District implemented the BIP without written consent of the parent, that a violation of

special education laws and regulations was substantiated against the District for said actions. (Id).

4. With respect to the state complaint Ms. C filed in 2013, a total of four issues had been raised. The first issue was that a behavior intervention plan had been added to the IEP without parental consent. (Tr., Vol. 2, at 312, ln. 15-18; Parent Ex. 11.) In that instance, the Districts did notice the parents regarding the behavior intervention plan, they just had not considered it a consent item. (Tr., Vol. 2, at 312, ln. 19 – 313, ln. 15.) The second issue was that the Districts had moved M.S. to a more restrictive environment for reading instruction without parent consent. The investigator found that the change constituted less than 25 percent and found in favor of the Districts on this issue. (Tr., Vol. 2, at 313, ln. 16 – 314, ln. 6.) The third issue alleged that M.S. had not been given her hourly breaks as set forth in the IEP at that time. While the Districts had been counting lunch and recess as part of her hourly breaks, the investigator on that complaint had disagreed. (Tr., Vol. 2, at 314, ln. 12 – 315, ln. 5.) The fourth issue was an allegation that the Districts had failed to provide the visual schedule, visual aids and manipulatives that were specified in the IEP, and the investigator found in favor of the Districts on that issue. (Tr., Vol. 2, at 315, ln. 6-13.)

5. Ms.C., the special education teacher for M.S. at the time of this complaint, testified that the District did not even know that they had to obtain parental consent for the behavioral intervention plan. (Hearing, Vol. 6, 1405). Ms. C. went on to testify that the District did not even know that a behavior intervention plan was even considered a special education service associated with an IEP. (Id. at 1358-1359 & 1405). Ms. C. also stated at that time that she believed they were able to incorporate modifications within the IEP,

without a BIP being necessary, to address M.S.'s behaviors at that time, and the parents agreed to the same. (Id. at 1405).

M.S.'s First Kindergarten Year

6. Ms. LaM was M.S.'s kindergarten teacher for both her first and her second year of kindergarten. (Tr., Vol. 3, at 518, ln. 2-11.) The first year of kindergarten "started off rocky." (*Id.* at 518, ln. 12-16.) M.S. received her core academic classes in special education until sometime in the middle of the year when she came into Ms. LaM's room for whole group language arts. Otherwise, M.S. was only in her classroom at certain times, such as centers, recess, and specials such as PE and music. (*Id.* at 518, ln. 22 – 519, ln. 10.) Ms. LaM testified that some of M.S.'s behaviors that first year of kindergarten included fidgetiness and impulsiveness to grab other students' supplies or papers. (*Id.* at 519, ln. 15-22.) She couldn't recall whether M.S. had any physical aggression that year or not. (*Id.* at 519, ln. 23 – 520, ln. 2.) However, she did recall a discussion about M.S. being retained for a second year in kindergarten with Ms. LaM but with a different setup. (*Id.* at 520, ln. 3-10.) For M.S.'s second year of kindergarten, she would be in Ms. LaM's class for full inclusion with the exception of some pull-out time for writing. (*Id.* at 520, ln. 11-19.)

7. Ms. C testified that M.S.'s first year of kindergarten was frustrating because M.S. was removed from the classroom 18 days into school without parent consent and a behavior intervention plan was also implemented without parent consent. (Tr., Vol. 1, at 28, ln. 3-11.) As a result, she filed a complaint with the state, and she also requested that M.S. be retained for a second year of kindergarten because she wanted "to find out just how she could do in a mainstreamed classroom because that's our belief, that's our vision and they weren't willing to do that at the beginning." (Id., at 28, ln. 12-24; Parent Ex. 11.)

8. A functional behavior assessment (FBA) was conducted on M.S. on November 7, 2013. (District Ex., 2). Although this document does not list an author, the District's school psychologist, Mr. S. testified that he completed the FBA. (Hearing, Vol. 5, 1193-1194).

Mr. S. acknowledged that the 11/7/2013 FBA was the only FBA completed by the District on M.S., and that he did not collect a majority of the data used in completing the FBA. (Hearing, Vol. 5, 1193). This included a "variety of people," collecting data for the FBA, and his direct observation was very limited, 20-30 minutes per observation over a week period of time. (Id. at 1194-1195).

Mr. S. stated that he did not have any expert training in completing FBAs, and he admitted that a pediatric behavior specialist, like the parent's expert, would have higher credentials and better qualifications to complete an FBA. (Id. at 1194 & 1248).

9. Ms. C. acknowledged that M.S.'s progress reports and grade cards from her first year in kindergarten all indicated that she was making adequate progress towards her IEP goals, and that said reports are an "important part of M.S.'s academic records." (Hearing, Vol. 5, at 1402, & 1417-1418; see also District Exs. 15 & 16).

10. After the 2013-2014 school year, all Downs Syndrome students from ___ Central Elementary were transferred to the Functionally Applied Academic (FAA) program that was moved to another school, except M.S. (Hearing, Vol. 4, 888). At the time of the Due Process Hearing Request by the parents, M.S. was the only child with Downs Syndrome that remained at the school.

11. It has been two and half years since Ms. C. has taught or observed M.S., but she stated that she believed that M.S. needed to be in a FAA classroom after her first year in kindergarten. (Hearing, Vol. 6, 1408, 1410, & 1424-1425). However, Ms. C. admits in

testimony that there is nothing in M.S.'s educational records, including her 2012-2014 school year IEPs, that indicate such a need for a FAA setting. (Id. at 1411 & 1422; see also District Ex. 3 & 9). Ms. C. even testified that while working for the Co-Operative we were never to use or document what type of classroom setting that she would recommend. (Hearing, Vol. 5, 1410-1411).

Ms. C. also testified that even with the opinion indicated above, as an IEP team member at the end of M.S.'s first year of kindergarten, she agreed with M.S. being mainstreamed for core academic subjects like math and reading. (Id. at 1412; see also Parent Ex. 2, 0174). She further indicated that these placements would provide M.S. with a FAPE. (Id.).

12. M.S.'s IEP going into her second year of kindergarten, makes no mention of an FAA setting, the need for FAA for M.S., or a removal of M.S. from core academic areas, only for written expression. (Parents Ex. 2, 0174).

M.S.'s Second Kindergarten Year

13. During M.S.'s second year of kindergarten, Ms. C felt the communication with her classroom teacher, Ms. LaM, was much better than it had been during the first year of kindergarten. She would communicate with Ms. LaM at least once a week by phone and through e-mail and sometimes daily. (Tr., Vol. 1, at 33, ln. 9-25.)

14. Ms. C testified about an example of a math modification Ms. LaM did for M.S. as follows:

> I can remember, for instances, when they were working on odd and even, and I was trying to help M.S. at home, she had said what they would do at school is put the paper and put even and odd and up at the top they would put 0, 2, 4, 6, 8; and then on odd they will put 1, 3, 5, 7, 9, and that would be a reference to take big numbers and decide.
> (Tr., Vol. 1, at 36, ln. 3-10.)

15. Ms. C believed that M.S.'s behaviors were better controlled during her second year of kindergarten than in first grade because she believed Ms. LaM was more consistent. (Tr., Vol. 1, at 39, ln. 8-17.)

16. During her second year of kindergarten, M.S. had a full-time para with her in Ms. LaM's classroom – a morning para and an afternoon para. (Tr., Vol. 3, at 523, ln. 21 – 524, ln. 2.)

17. Ms. LaM communicated with M.S.'s parents, particularly her mother, several times a week. (Tr., Vol. 3, at 525, ln. 2-12.) Ms. LaM did not find the parents' communication to be threatening or harassing. She did not always agree with Ms. C and told her when she did not agree, but Ms. C did not become aggressive or harassing. (*Id*. at 525, ln. 21 – 526, ln. 10.)

18. Ms. LaM testified that the para used some of the following behavioral interventions with M.S.: proximity, taking her for a walk down the hall or to get a drink of water before M.S.'s behavior escalated, talking to M.S. about her actions and giving her a choice to return or not, and giving M.S. her space (either her own chair or letting her sit at the table while everyone else was at the carpet). (Tr., Vol. 3, at 526, ln. 22 – 527, ln. 25.)

19. With regard to M.S.'s sensory breaks, Ms. LaM testified that they were supposed to do a minimum of 5 per day. While they had worked out a schedule for those breaks, if M.S. was in the middle of working on an assignment and wanted to finish it, they allowed her to finish it and took the break later. (Tr., Vol. 3, at 528, ln. 1-18.) Ms. LaM testified that they also utilized the swings as a calming sensory for the last five minutes of recess in order to get M.S. to leave the monkey bars. (*Id*. at 528, ln. 22 – 529, ln. 24.)

20. At one point during the second year of kindergarten, Ms. LaM talked with all of the other students while M.S. was out for a sensory break because they had been laughing when M.S. misbehaved and that caused M.S. to continue to do it. Ms. LaM explained to the other students that they could not laugh at M.S.'s behavior. (Tr., Vol. 3, at 533, ln. 3 – 534, ln. 4.)

21. Ms. LaM testified that she had other students in her class who had behavior issues as well and that none of the interventions that were done for M.S. were above and beyond what would have been done for those students. (Tr., Vol. 3, at 534, ln. 10-18.) Ms. LaM further testified that none of the other students were afraid of M.S. (*Id.* at 534, ln. 23 – 535, ln. 23.)

22. Ms. LaM testified that they had some issues with M.S. using bad language and had used thumb sucking medicine to try to prevent it. It worked for a while because M.S. did not like it, but then she started using it as a way to get Ms. LaMs attention. (Tr., Vol. 3, at 536, ln. 4 – 537, ln. 13.)

M.S.'s First Grade Year

23. Ms. C testified that she was concerned with M.S.'s transition from kindergarten to first grade, and discussed her fears with Ms. LaM about preconceptions of M.S.'s placement and abilities, as well as a continued and systematic removal of M.S. from inclusion classes in core academic subjects. (Hearing, Vol. 1, 273; Vol. 3, 570-571; see also Parents Ex. 19, 0777-0778).

Based upon the IEP finalized at the end of M.S.'s second year of kindergarten, and entering into M.S.'s first grade year, the parents, as well as other IEP team members [i.e. SPED teacher, Ms. T, and kindergarten teacher, Ms. LaM] believed that M.S. would be in the inclusion setting for math, and would only be pulled for 40-45 minutes of reading, for

phonemic awareness and reading comprehension. (Id. at Vol. 1, 42, 97-98, 272; Vol. 3., 569-570; Vol. 5,1323-1324).

The possibility of pulling M.S. for the entire ELA block was never discussed or indicated in the Spring 2014 IEP meetings. (Id.; see also Vol. 1, 272).

Specifically, the April 24, 2015 IEP indicates that inclusion would be done for M.S. in math and reading, with only special educational services in a special education classroom only for phenomic awareness, reading comprehension, and written expression [this is the only pull out had existed in prior year], this mirrors the parents' understanding of the pull out time expected. (District Ex., 19; Parents Ex., pg. 11 of exhibit).

A review of the IEP meeting notes from 4/30/15 also directly refers to 45 minutes' time frame for pull out time, as the parents indicate that was the plan and what their consent was for. The District specifically notes that the parents questioned, "if we need to put the 45-minute time frame," in the actual IEP wording itself. (Parents Ex. 5, 302). There is no dispute, contention, or correction of the 45 minute pull out time indicated or documented by the District at this meeting. (Id. at 301-302).

24. Ms. C testified that her biggest fear going into first grade was that M.S. would be pulled out of the first-grade curriculum without parent consent and only allowed to socialize due to what had happened during the first year of kindergarten. (Tr., Vol. 1, at 40, ln. 12 – 41, ln. 1.) Based upon her discussions with Ms. LaM, she believed M.S. would only be pulled out for 45 minutes in first grade for reading. Instead, it ended up being 75 minutes because the language in the IEP was worded as being for the same amount of time as general education peers. (*Id.* at 41, ln. 2 – 42, ln. 21; Parent Ex. 19 at 777-779.) Ms. C's discussion with Ms. LaM regarding appropriate services for M.S. did not occur

during an IEP meeting with all of the team members, but rather by way of e-mail solely between herself and Ms. LaM. (Tr., Vol. 2, at 339, ln. 15 – 341, ln. 2.)

25. Ms. C testified that the Districts informed her that M.S. should be pulled out for math in January 2016. (Tr., Vol. 1, at 43, ln. 12-19.) The reason given for this was that M.S. could not "benefit in the classroom because they think that she is not at instructional level, but in reality, it was probably the behaviors and lack of implementing the IEP [sic] they should have." (*Id.* at 49, ln. 7-12.) Ms. C believes the timing is important because M.S. developed a thyroid condition in January 2016, which she believes could have contributed to M.S.'s behavior issues. (*Id.* at 49, ln. 13-16.) *D 11*

26. M.S. was initially assigned to Ms. G. as her first-grade teacher. Ms. C sent an e-mail to David J., principal, in August questioning whether Ms. G. was a "good fit" for M.S. and then had a meeting with Mr. J. in October requesting a different teacher. (Tr., Vol. 1, at 55, ln. 6-21.)

27. Ms. C testified that "As we have always told them, our vision for M.S. is to remain in the general education classroom and be educated with her peers." (Tr., Vol. 1, at 58, ln. 2-5.)

28. Ms. C testified that she was told her consent was not required in order to pull M.S. out of the general education classroom for math because it was a change of less than 25 percent. (*Id.* at 58, ln. 13 – 59, ln. 12.)

29. M.S. was absent almost all of February while they were dealing with the thyroid issue. (*Id.* at 61, ln. 6-9.) On February 3, 2016, Dr. P. diagnosed M.S. with hypothyroidism. (*Id.* at 71, ln. 19 – 72, ln. 9.) On March 8, 2016, Dr. P. referred them to Dr. E, a pediatric psychologist. (*Id.* at 76, ln. 7-14.) Ms. C testified that the purpose of the referral was "[t]o help support us as parents in regards to what we see of M.S. versus the

difference between the school and just to offer us some guidance maybe in how to support the school, what could we do different maybe at home that would benefit M.S." (*Id.* at 76, ln. 15-22.)

30. In November of M.S.'s first grade year, Ms. C was negotiating with the Districts to discuss allowing M.S. to be removed from the reading and math intervention classes (both of which were general education classes) and placing her in special education for intensive instruction during those times, but only if M.S. was placed back in the general education classroom for all other reading times. Neither change took place at that time. (Tr., Vol. 2, at 286, ln. 16 – 291, ln. 22; Parent Ex. 19 at 740-741.)

31. Ms. C testified that the Districts offered to hold an IEP meeting specifically to discuss M.S.'s thyroid issue, and the meeting was held on March 7, 2016. (Tr., Vol. 2, at 298, ln. 9-21.)

M.S.'s First Grade Year with Ms. G.

32. M.S. was in Ms. Gs classroom from the beginning of school until the first of November 2015. (*Id.* at 1718, ln. 7-10.) Ms. G described M.S. as a fun loving, very independent, joyful, and caring little girl. (*Id.* at 1718, ln. 11-23.) Ms. believes she had a great connection with M.S. Even after M.S. was moved from her room, she would return to visit and do puzzles. M.S. continues to greet Ms. G. in the hallway and gives her hugs. (*Id.* at 1719, ln. 4-22.)

33. Ms. G. found out that M.S. would be assigned to her classroom sometime in May at the end of M.S.'s second year of kindergarten. (*Id.* at 1720, ln. 2 – 1721, ln. 1.) At that time, Ms. G. did not know why M.S. had been assigned to her but later learned it was because she has a very structured classroom, she was good with parents and students, and she is very honest. (*Id.* at 1721, ln. 4-11.) On the teacher workday when they were cleaning

out their classrooms, Ms. G. stopped and asked Mrs. LaM to tell her about M.S., whether she was reading and anything else she should know. (*Id.* at 1721, ln. 12-22.)

34. Ms. G. received an IEP snapshot for M.S. prior to the start of the school year, which is a brief summary of the IEP. (Id. At 1722, In. 6-18.)

35. Ms. G. attended a meeting with the parents on August 26, 2015, to discuss concerns about M.S.'s behaviors in the classroom. (*Id.* at 1722, ln. 19 – 1723, ln. 10; Dist. Ex. 86-AA.) At that time, they were seeing behaviors such as hitting, throwing, lying on the ground for non-compliance, standing on a table, knocking student supply boxes off tables, tipping chairs and desks, and refusing to come in from recess. (Tr., Vol. 7, at 1723, ln. 11-21.) These behaviors were occurring even though M.S. had a para with her at all times who was following the strategies set forth in the IEP. (*Id.* at 1724, ln. 2-8.)

36. During the August 26th meeting, Ms. G. stated that they were not meeting M.S.'s needs. Ms. G. clarified that she meant M.S. was present for whole group instruction for math but she was not engaged and did not participate. Instead, she often had behavior issues, which required a timeout. (*Id.* at 1726, ln. 6-23.)

37. Ms. G. had also stated in the August 26th meeting that M.S. was a year or two behind the other students. She testified that they reviewed kindergarten concepts for the first three weeks of school and it was obvious from observing M.S. that she was not able to do much of that work independently. Ms. G. had also done the DIBELS assessment with M.S. and, while M.S. scored 21 on the letter names, she scored zeroes in the other areas. (*Id.* at 1727, ln. 7 – 1728, ln. 4.)

38. Less than two weeks into M.S.'s first grade year, Ms. G, as M.S.'s regular education teacher, opined that M.S.'s IEP goals were not being met, and "her behavior is in the way." (Id.; see also Hearing, Vol. 7, 1777). Ms. G stated that she believed that M.S.'s placement

for inclusion was improper prior to the 8/26/15 meeting, and that within the first week of school she had determined that M.S. should not be in inclusion "because her behavior was so severe." (Hearing, Vol. 7, 1778). She confirmed that she did not agree with M.S.'s placement in writing on 9/20/15 as well, less than a month into the school year. (Parents Ex. 19, 0757).

39. Ms. G testified it was her belief that M.S. could not be in an inclusion or "whole group" instruction due to her behavior, which she stated was because, "she [M.S.] did not have the behavior maturity to be in the classroom for what we were asking her to do as a result of her Downs Syndrome." (Id. at 1778-1779). She confirmed this by indicating that she assumed M.S.'s behavior was due to her Downs Syndrome, and that based upon M.S.'s behavior she should not be in her classroom for math. (Id. at 1780 & 1788).

40. Ms. G further acknowledged that certain aspects of M.S.'s IEP were not being followed in her regular education class, including a failure to provide M.S. with touch screen access on a computer while in her classroom. (Hearing, Vol. 7, 1781).

41. Ms. G testified that she shared via email with Mr. J, the principal, and Ms. P., the Assistant Principal, that she had frustrations and concerns about the para support for M.S. in her classroom on September 20, 2015. (Id. at 1782; see also Parents Ex. 19, 0757). Ms. G acknowledged that she did not share those frustrations or concerns regarding M.S.'s para support with the parents, and that she requested from Mr. J and Ms. P. not to share this email with anyone else. (Hearing, Vol. 7, 1782 & 1788; see also Parent Ex. 19, 0758).

42. Ms. G testified that she did not communicate with the parents regarding M.S.'s behavioral issues in the communication log. Instead she would have the paras document the communications that went home to the parents. (Hearing, Vol. 7, 1794). This was

true even though she was the teacher who had M.S. for a majority of the day (until M.S. was removed from her classroom by administration), and after expressing concerns regarding the para's performance. She specifically testified that it wasn't her "responsibility" to communicate such things regarding M.S.'s behavior and daily activities in her classroom. (Hearing, Vol. 7, 1795).

43. Ms. G did not directly engage with M.S. during whole group instruction. (Parents Ex. 5, 0287). Both Mr. S. and Ms. LaM testified that failure to directly engage M.S. while teaching her would not be an affective or an appropriate teaching method for M.S. considering her disabilities, and could actually add to the frustration level and behavioral issues of M.S. (Hearing, Vol. 5, 1221-1222 (Mr. S.); see also Hearing, Vol. 3, 578 (LaM).

44. Ms. G further testified that she rarely referred to M.S.'s IEP, and that no one ever went through M.S.'s IEP with her, and that all she had access to was a "snapshot" of the IEP. (Hearing, Vol. 7, 1802-1803; see also Parents Ex. 19, 0703). *P 60*

45. Ms. G testified that the special education teacher, Cara T., had made a visual notebook for M.S. at the beginning of the year, but Ms. C told them during the August 26th meeting not to use it because it was a distraction. (*Id.* at 1731, ln. 22 – 1732, ln. 10.)

46. During the parent teacher conference at the end of September, Ms. G felt that Ms. C was upset with her right away. (*Id.* at 1767, ln. 2-13.) Ms. C became upset that M.S. was working primarily with the para during math and became more upset when Ms. G. indicated that she could not work directly with M.S. during whole group instruction. When Ms. G. asked Ms. C what she thought it should look like, Ms. C responded that Ms. G. should be working directly with M.S. and the para should be working with the rest of the class. (*Id.* at 1758, ln. 11 – 1759, ln. 12.) This would not have been possible because paras are not permitted to provide initial instruction – only re-teaching, practice, or

remediation. (*Id.* at 1759, ln. 13-25.) By the end of the conference, Ms. G felt that Ms. C was raising her voice and that Ms. C was attacking her. (*Id.* at 1768, ln. 12-16.) Ms. G has never had another parent treat her like that at a conference before. (*Id.* at 1768, ln. 20-22.)

47. Ms. G testified that she went in an extra hour earlier each day to prepare for M.S.'s lessons so that her plan time would be free for planning with M.S.'s special education teacher and related service providers. (*Id.* at 1768, ln. 23 – 1769, ln. 25.)

48. Ms. G believed that Mrs. LaM was sharing information with Ms. C because she had gone to Mrs. LaM for help several times early in the year and it had come out that Mrs. LaM knew information that Ms. G had e-mailed to Ms. C. As a result, Ms. G was put in an awkward position in which she felt Mrs. LaM and Ms. C were working against her, not trying to help her or M.S. (*Id.* at 1747, ln. 22 – 1749, ln. 3.)

49. Toward the end of October, Ms. G had a discussion with Mrs. LaM in which she said that she hated to see the staff members not getting along and that she wished she had a better relationship with the parent. Shortly thereafter, Ms. G formed that M.S. would be removed from her classroom due to parent request. (*Id.* at 1770, ln. 1 – 1771, ln. 23.)

50. Ms. G believed that Ms. C's treatment of her created an intimidating work environment, contrary to district policy. (*Id.* at 1755, ln. 6-16.) She believed Ms. C was creating an intimidating work environment because Ms. C tore apart the e-mails Ms. G. sent her, Ms. C observed in her classroom and walked back and forth to Mrs. LaM's room while she was there, Ms. C asked for meetings without stating her purpose or requesting that Ms. G. not be present, and Ms. C asked on more than one occasion for a new teacher. (*Id.* at 1755, ln. 17 – 1756, ln. 13.)

51. Ms. G testified that she has never been treated by a parent the way she was treated by Ms. C. (*Id.* at 1757, ln. 3-4.) Ms. G. testified that she did not believe there was anything the staff could do to make Ms. C happy. (*Id.* at 1760, ln. 24 – 1761, ln. 2.) Ms. G went so far as to review the district harassment policy and make a list of inappropriate behaviors. (*Id.* at 1762, ln. 3 – 1763, ln. 1.)

52. Ms. C observed in Ms. G's classroom twice. The first time she stayed the entire morning and the second time she stayed for 45 minutes to an hour. (*Id.* at 1765, ln. 14-21.) Ms. C's observations were disruptive because she would talk to M.S., she wanted to help M.S., she was taking notes, she went in and out of the classroom, and she tried modeling behavior for M.S. by taking over from the para. (*Id.* at 1766, ln. 1 – 1767, ln. 1.)

53. Ms. G believed M.S. was not in the least restrictive environment when she was in her classroom because M.S. did not have the behavioral maturity to handle the work and she impeded her own education, as well as the education of others. (Id. at 1773, ln. 8-15.) M.S. was not able to access the general education curriculum. (*Id.* at 1773, ln. 16-18.) M.S. was not able to function at grade level, making it difficult for her to access and participate in the whole group instruction. (*Id.* at 1815, ln. 6 – 1816, ln. 1.) Her behavior also disrupted the rest of the class because, if they could not ignore the behavior (such as scratching someone on the carpet or tipping chairs), the lesson for everyone else had to stop while it was addressed. (*Id.* at 1816, ln. 2-23.) Some of the other students were scared of M.S.'s behavior. (*Id.* at 1816, ln. 24 – 1817, ln. 8.)

54. Ms. G. had 24 students in her first-grade classroom, while Ms. V typically has a group of about six students. (*Id.* at 1811, ln. 24 – 1812, ln. 8.) *D 298*

55. Although she did not have M.S.'s full IEP, she conferred with M.S.'s special education teacher on a daily basis, at which time they discussed the IEP and modifications for M.S. (*Id*. at 1813, ln. 11-21.)

56. After the summer break, it ended up that M.S. was pulled out for the entire ELA block for reading or 75 minutes. (Hearing, Vol. 1, 42). Nothing that had been discussed or noticed to the parents since the 4/30/15 IEP and IEP meeting regarding this change. There are no notices for meetings between 4/30/15 and 11/12/15. (District Ex., 21 & 26).

57. Ms. C immediately raised her concerns with these pull out times with the district, and this started a series of meetings regarding both reading and math pull out time of various amounts that lasted up until the time of this due process hearing request was filed by the parents. (Hearing, Vol. 1, 42-43, 52-54, 97-99, 124, 130, 144-145, and 272).

58. A non-IEP meeting, with no written notice given by the District to the Parents, was held on 8/26/15 (again, there are no written notices from the District to the Parents between 4/30/15 and 11/12/15). (District Ex., 21 & 26; see also Parents Ex., 5, 0285-288).

59. School Psychologist, Mr. S. confirmed this meeting took place less than two weeks into the school year. (Hearing, Vol. 5, 122; see also Parents Ex. 5, 0285).

60. M.S. was removed from Ms. G.'s class by Mr. J and Ms. P. at the end of October 2015. (Hearing, Vol. 7, 1770-1771).

61. Ms. G. testified that she was very upset when M.S. was removed from her classroom and that she loved M.S. even though her behaviors were inappropriate. (*Id*. at 1814, ln. 2-12.)

M.S.'s First Grade with Ms. P.

62. M.S. was transferred from Ms. G's classroom to Ms. P.'s classroom. M.S. was in her first-grade classroom since the first of November 2015 until the end of the school year.

(*Id.* at 1821, ln. 9-12.) Ms. P. described M.S. as being happy and full of energy. (*Id.* at 1821, ln. 13-20.) She testified that she had a great relationship with M.S. and that M.S. would come in with a smile and give her hugs. (*Id.* at 1821, ln. 21-25.)

63. When M.S. came into her classroom, Ms. P. had academic concerns about whether M.S. would be able to keep up with the same level of rigor as the other students. (*Id.* at 1823, ln. 5-12.) Ms. P. also had behavioral concerns because she would often throw her materials when she became frustrated, would have loud outbursts, would hit her peers, would demonstrate defiance, or would run out of the classroom. (*Id.* at 1823, ln. 13-22.) These behaviors were a disruption because M.S. was louder than Ms. P. when not wanting to cooperate with her para, making it difficult for other students to hear. Likewise, it was disruptive when she was running around the room or throwing her materials or when she hurt other students. (*Id.* at 1823, ln. 23 – 1824, ln. 10.)

64. Ms. P., in conjunction with other team members, created a communication notebook which had M.S.'s daily schedule on the front. (Dist. Ex. 88; Tr., Vol. 7, at 1824, ln. 11 – 1825, ln. 4.) She got the idea for this after talking to Ms. C. to give M.S. better control of her schedule and more predictability. The notebook also provided visual cues for M.S.'s reward system. (*Id.* at 1825, ln. 5 – 1826, ln. 11.) None of her other students required a communication notebook like this. Likewise, none of her students required the same kind of deep pressure therapy they used with M.S. (*Id.* at 1826, ln. 12-20.)

65. Ms. P. spent an additional two hours per day planning for M.S. Ms. P. also spent "quite a lot" of additional time communicating with M.S.'s parents through phone calls, e-mails, and text messages. In fact, she even had a telephone call which lasted one or two hours with M.S.'s mother while she was out on medical leave for a concussion and had

other telephone calls with M.S.'s mother while she was at church on Wednesday nights. (*Id.* at 1827, ln. 4 – 1828, ln. 14.)

66. Ms. P.testified that the other students in her classroom were very helpful and wanted to help M.S. if she did something like kicking over her toolbox in frustration, but when she was having an outburst they realized that they needed to move away and give her more space. (*Id.* at 1832, ln. 6 – 1833, ln. 1.) Sometimes the students would say something like asking if they could move to their desks so they could be safe. (*Id.* at 1833, ln. 6-22.) Another student drew a picture for Ms. P.showing M.S. swinging her doll away from the group and the rest of the students being sad because they were trying to help her follow the rules. (Parent Ex. 22 at 975; Tr., Vol. 7, at 1834, ln. 4 – 1835, ln.7.)

67. After M.S. came into her classroom, they had to alter their classroom rules so that the students would not immediately rush to help M.S. but instead would let M.S. and her para sort things out in case M.S. was still angry and might hurt one of her peers. (*Id.* at 1838, ln. 16 – 1839, ln. 13.)

68. Ms. P.does not believe M.S. received any social benefit from inclusion during academic time because she was not working on the same things as her peers and was typically working more one-on-one with either the para or Ms.P.. (*Id.* at 1839, ln. 15 – 1840, ln. 18.) However, Ms. >does believe that M.S. received social benefit from inclusion during nonacademic time because her peers wanted to play with her and it gave her an opportunity to practice her social skills. (*Id.* at 1840, ln. 19 – 1841, ln. 9.)

Ms. P participated in the development of the February 1, 2016 IEP, the purpose of which was to provide M.S. with more appropriate math instruction in special education. M.S. was not able to access the math curriculum in the general education setting. (*Id.* at 1841, ln. 10 – 1843, ln. 4.)

69. Ms. P. testified that there was initially some confusion regarding a new reward system she had discussed with Ms. C for M.S. and whether it could be implemented due to the parents' revocation. However, it was cleared up relatively quickly and the reward chart was implemented. (Dist. Ex. 36; Tr., Vol. 5, at 1843, ln. 24 – 1846, ln. 12.) The development of the new reward system had started after the revocation was received, but while M.S. was still out sick. (*Id.* at 1877, ln. 4 – 1880, ln. 18; *id.* at 1925, ln. 9 – 1927, ln. 23.)

70. Ms. P. completed M.S.'s grade card differently than the other students. Instead of showing progress on the state standard, it showed progress toward her individual goal. (*Id.* at 1854, ln. 18 – 1858, ln. 1.)

71. Ms. P. testified that her understanding of inclusion was can a child be included in the classroom working on the same academic standards doing the same academic activity with modification successfully and also be able to part of the academic process with peers. (*Id.* at 1858, ln. 14 – 1859, ln. 2.) Ms. P. stated that what the student was doing needed to be the same skill or the same modification of a question, and the student needed to be able to use the same academic vocabulary. (*Id.* at 1859, ln. 3-22.) M.S. typically was not working on the same skills as the rest of her peers. (*Id.* at 1859, ln. 23-25.)

72. Ms. P. testified that M.S. had some rewards and sensory breaks which required the use of specialized or large equipment that needed more room than they had in the back of the classroom, so M.S. would do those activities in the hallway. If it was an activity that would be distracting to the other students, that would need to be done in the hallway. In addition, M.S. would choose whether she wanted to do her rewards in the classroom or in the hallway, and sometimes chose to go to the hallway. (*Id.* at 1865, ln. 9 – 1866, ln. 15.)

73. Ms. P. did not believe M.S. was in the least restrictive environment and did not believe she was receiving a FAPE when she came to her classroom because she was not able to access the curriculum and was having a lot of behaviors based upon frustration. (*Id.* at 1868, ln. 6-25.) The team tried to address that through the multiple IEP meetings that were held during M.S.'s first grade year, tried to provide her with additional behavioral supports, and provided additional visual supports. (*Id.* at 1869, ln. 1-12.) However, the parents disagreed with what the school staff felt was best for M.S., making it difficult to implement changes. (*Id.* at 1869, ln. 13-21.)

74. Ms. P. believed the May 17, 2016 IEP was designed to provide M.S. with a FAPE in the LRE because M.S. requires additional wait time, additional re-teaching, and additional social teaching to the point that she was not able to access the curriculum in the regular education classroom. (*Id.* at 1871, ln. 12 – 1872, ln. 2.)

75. Ms. P. disagreed that M.S.'s behavior increased in January 2016. Rather, she believes it was more appropriately documented. (*Id.* at 1903, ln. 20 – 1904, ln. 2.) Ms. P. testified that she had been documenting M.S.'s behavior, but she was being lenient and trying to get M.S. adjusted into her classroom. (*Id.* at 1905, ln. 12 – 1906, ln. 12.)

76. Ms. P. did not agree that a FBA alone would assist M.S. in receiving a FAPE. (*Id.* at 1908, ln. 19-23.) Ms. P. testified that:

> I think it would assist her in getting an appropriate behavior plan. I feel like the behavior plan is a tool that would aid in her ability to access her school environment appropriately, whether she's waiting for her functional behavior assessment, whether she has it afterwards. A behavior plan is very fluid and can be changed depending upon the student's behavioral needs.

(Tr., Vol. 7, at 1908, ln. 10-18.)

77. Ms. P.

testified that they accommodated M.S.'s thyroid issue by giving her more frequent snack breaks, more rewards, having her work less often, giving her more frequent praise, paying closer attention to her fatigue, giving her more frequent breaks, staying in closer communication with the parents, and logging everything she had for lunch on the parent communication sheet. (*Id.* at 1918, ln. 9-22.)

Behavioral Facts of M.S.

78. The following members of the IEP team testified that M.S.'s behavior made her instructionally unready, and unable to be sustained in the general education classroom in math and reading:

a. L. G. (Hearing, Vol. 7, 1776, 1778, 1787,1800-1801, see also Parents Ex. 5, 0286-0287, and Parents exh. 19, 0749 & 0754).

b. K. V. (Hearing, Vol. 7, 1668-1669, 1670-1671, 1690-1691)

c. K. P. (Hearing, Vol., 1570-1571, 1573, & 1575).

d. L. P. (Hearing, Vol. 7, 1874-1875, 1908-1910).

e. Mr. S. (Hearing, Vol. 5, 1215, 1223-1224).

f. C. S. (Hearing, Vol. 10, 2532-2535).

79. M.S. has a documented increase in behavioral disruptions in frequency and severity beginning January 2016. This is documented in the disciplinary records, behavioral reports, and emergency safety interventions of M.S. (Parents Ex. 8, Parents Ex. 9, and Parents Ex. 10).

80. Prior to January of 2016, M.S.'s disciplinary records reflect only one recorded discipline on 2/4/15, involving non-compliance and foul language on the bus. (Parents

Ex. 8, 0382). During and/or after January 2016, the same time frame in which M.S.'s hypothyroidism developed, eight documented disciplinary reports were recorded regarding M.S.'s behavior. (Id. at 0376-0377).

81. Likewise, Behavioral Reports indicate that there were 11 recorded mal-behaviors between January 21, 2016 and April 28, 2016 (Parents Ex. 9, 0383-0397), whereas there were only a total of 7 reported behavior reports for the entire time that M.S. attended ___ Central from August 2013 through December 2015. (Id. at 0398-0422).

82. Similarly, in all of the records provided for M.S.'s two years prior to the complaint, there were no reports of the use of Emergency Safety Interventions until January 2016 or after. (Parents Ex. 10, 0424-0441). The only documented use of emergency safety interventions documented or provided are between January 19, 2016-April 28, 2016, all during the time in which M.S.'s thyroid condition was diagnosed, and medication was being administered and adjusted in dosage. (Id.; See also Hearing, Vol. 2, 433-434).

83. School psychologist, Mr. S. admitted that M.S. had a significant uptick in mal behaviors after January 2016, and that said increase in behaviors should be a significant consideration in completing an updated FBA. (Hearing, Vol. 5, 1232-1233). However, Mr. S. testified that he did not request, recommend, or perform an updated FBA on M.S. (Id. at 1233), and instead the IEP relied on the 2013 FBA in evaluating M.S.'s behaviors and the proposals on how to address said behaviors. (Id. at 1225).

84. Ms. T. was M.S.'s special education teacher during her first grade year. Ms. T. holds a bachelor's degree in human services psychology, as well as having obtained her teaching license and her certification in adaptive special education. (Tr., Vol. 8, at 1939, ln. 24 – 1940, ln. 4.) She is licensed to teach grades K-6 in adaptive special education. (*Id.* at 1940, ln. 7-10.) She is currently employed as an instructional supports special education teacher

for the ____ County Coop, a position which she has held for four years. (*Id.* at 1940, ln. 11-17.) She taught an FAA classroom for a short time after starting with the Coop and taught another Down Syndrome student then. (*Id.* at 1940, ln. 21-25.)

85. Ms. T. described M.S. as a sweet, fun-loving little girl who could be stubborn and independent. M.S. was one of her special education students during the 2015-2016 school year. (*Id.* at 1942, ln. 7-17.)

86. M.S. was with Ms. T. for an hour to an hour and 15 minutes per day. M.S. required much more preparation time than any of her other students, and Ms. T. would often be called from her classroom to handle behavioral issues with M.S. (*Id.* at 1943, ln. 1-20.) M.S.'s behaviors included the following: throwing, kicking, hitting, standing up on tables, lying on the floor, refusing to get up, running in the hallways, and running from adults. (*Id.* at 1944, ln. 1-4.)

87. M.S. had less behaviors when she was in Ms. Turbury's classroom, especially fewer incidents of physical aggression. (Dist. Ex. 89; Tr., Vol. 8 at 2003, ln. 19 – 2004, ln. 1.) Ms. T. believes this was because it was a smaller group and the instruction was at her level. (*Id.* at 2004, ln. 2-7.)

88. Ms. T. testified that if you take away M.S.'s behaviors, she still struggles academically with grade level instruction and still requires small group instruction. (Dist. Ex. 89; Tr., Vol. 8 at 2060, ln. 10-16.)

89. Ms. T. testified that sometimes the parents would request meetings to discuss data without being specific about what data they wanted and then would be upset when she did not have they wanted with her, but she did provide the data later. (*Id.* at 1990, ln. 8 – 1993, ln. 11.) Ms. T. is not required to keep her raw data once she has used it for a progress report, nor is she required to share it with the parents. (*Id.* at 1995, ln. 19 – 1996, ln. 8.)

Parent requests for data were often immediate demands, and Ms. T. needed to go through her data to pull out the other students and put it in a format that would be understandable for the parents, which caused some delays. (*Id.* at 1998, ln. 8 – 1999, ln. 14.)

Relationship between the District and Parents

90. There was considerable testimony from District witnesses regarding tension between the Staff and Ms. C, including Ms. G. (Parents Ex. 19, 754, see also Hearing, Vol. 7, 1755), Ms. P. (Parents Ex. 19, 754; see also, Hearing, Vol. 1578-1579), Ms. V. (Hearing, Vol. 7, 1682), and Ms. LaM (Parents Ex. 97).

91. However, all witnesses agreed that Ms. C never cursed, threatened, or became physically aggressive with them at any time. (G. – Hearing, Vol. 7, 1785-1786) (V.– Hearing, Vol. 7, 1682) (P. – Hearing, Vol. 6, 1578-1580; see also, District Ex., 86-PP). Ms. LaM even testified that after Ms. C disagreed with her, she could re-establish an open line of communication with her, even when her opinion remained contrary to Ms. C's. (Hearing, Vol. 3, 726).

92. Mr. J. is the principal at ___ Central Elementary School. Mr. J. holds a bachelor's degree in elementary education, a master's degree in educational administration, and a district level administration degree. (Tr., Vol. 8, at 2096, ln. 1-8.) He is licensed to teach elementary education grades K-9, building level administration for grades K-9, and K-12 for district level administration. (*Id.* at 2096, ln. 9-13.) Mr. J. has held that position of principal for 12 years. He has been in education for a total of 26 years. (*Id.* at 2096, ln. 14 – 2097, ln. 6.) ___ Central Elementary has 700 students, covering grades K-5. (*Id.* at 2108, ln. 22 – 2109, ln. 1.)

93. Ms. P. is the Assistant Principal at ___ Central Elementary. After receiving e-mails about Mrs. LaM's ongoing involvement in the situation with M.S. and her mother as late

as October, Mr. J. and Ms. P. had a discussion with Mrs. LaM and telling her that she needed to back off and remove herself from the situation since she was no longer M.S.'s teacher. (*Id.* at 2121, ln. 4 – 2123, ln. 6.) Mr. J. had this discussion with Mrs. LaM because it was making things tense in the building. Mrs. LaM agreed that she should remove herself from the situation. (*Id.* at 2123, ln. 7-18.)

94. Mr. J. met with the parents twice during M.S.'s first grade year to discuss keeping observations to a reasonable amount of time, such as one or two hours, due to the disruption and anxiety it was causing staff. Staff members felt they were being critiqued. (*Id.* at 2128, ln. 12 – 2130, ln. 1.) ___ does have a visitor policy, which is made available to all parents on its website. (*Id.* at 2130, ln. 2-21.) Mr. J. has never had any other parents observe a student as long as M.S.'s parents did in his entire 21 years as an administrator. (*Id.* at 2130, ln. 22 – 2131, ln. 3.) Mr. J. had another conversation with Mr. S. during the present school year and discussed that parents would observe for no more than an hour to an hour and a half at a time. Mr. J. thought this had resolved the issue. (*Id.* at 2131, ln. 22 – 2133, ln. 6.)

95. On January 27, 2016, Mr. J. made the decision to out of school suspend M.S. for the safety of other students and adults. The behavioral strategies in her IEP had been tried and had not been effective. (Tr., Vol. 9, at 2149, ln. 18 – 2150, ln. 23.) M.S. was out of school suspended again on March 4 and March 7 for the same reason. In both instances, M.S. continued to escalate and harmed both peers and adults. (*Id.* at 2151, ln. 5 – 2152, ln. 12.) The purpose of the out of school suspension was to keep others, primarily her peers, safe. (*Id.* at 2154, ln. 1-4.)

96. Dr. N. is the Executive Director of the ___ County Coop. Dr. N. holds a bachelor's degree in music education, a master's degree in music education, a master's degree in

psychology in special education, a master's degree in educational administration, and a doctorate of education degree in educational leadership. She also has completed a district level administration certification program. In addition, she completed various special education course work. (Tr., Vol. 10, at 2365, ln. 14 – 2366, ln. 5.) She is licensed K-12 in all of the following: vocal and instrumental music, education for the mentally retarded, learning disabilities, gifted, special education supervisor coordinator, building administrator, district administrator and director of special education. (*Id.* at 2366, ln. 6-12.) She is currently the Executive Director of the ___ County Area Educational Local Co-operative #___, and has held that position for two years. (*Id.* at 2366, ln. 13-18.) Prior to that, she was an assistant special education director for the Coop for 18 years. (*Id.* at 2366, ln. 19-21.) She has also been a special education teacher in both public and private settings (the Institute of Logopedics, now known as Heartsprings), an assistant principal at a high school, and she has taught a graduate level course on special education legal issues for Southwestern College. (*Id.* at 2366, ln. 21 – 2367, ln. 5.) Dr. N has been in education approximately 30 years total. (*Id.* at 2367, ln. 6-9.)

97. Dr. N is familiar with M.S. through this due process proceeding, a previous formal state complaint, and assistant directors sharing information in leadership meetings. (*Id.* at 2367, ln. 10-17.) Dr. N became aware of issues from the 2015-2016 school year around February 2016 from Assistant Director Ms. S.. (*Id.* at 2367, ln. 18-23.) She attended a meeting with Ms. S. and the parents on March 3, 2016, and two IEP meetings in May. (*Id.* at 2367, ln. 24 – 2369, ln. 5.)

98. Dr. N spoke to Ms. C again on April 14. The school staff was available the afternoon of April 18 but not at the requested time, which would not work for Ms. C. Ms. C then requested a time on the weekend. Dr. N informed her that she did not think it would be

possible but that she would check and let her know. Ms. C also requested that the resolution session be held the next day, but, as she did not make this request until after hours, Dr. N told her it would not be possible to arrange for substitutes and that at least two people would not be available. They also discussed the requirement of the district to hold the resolution session and the regulation regarding what happens if the agency fails to hold the resolution session. (*Id.* at 2375, ln. 13 – 2379, ln. 22.)

99. Dr. N then informed her that the stayput IEP would be the February 1, 2016 IEP minus the consent items and that M.S. was being served in the special education classroom for reading and math. (*Id.* at 2379, ln. 23 – 2380, ln. 4.) Ms. C disagreed with that assessment, and Dr. N reminded her that there were items that were non-consent and once properly noticed could be implemented and that was where the discrepancies were. (*Id.* at 2380, ln. 5-17.) Dr. N reminded Ms. C of the IEP meeting scheduled for April 22 and Ms. C stated that she did not agree to that date and the school could not hold the IEP meeting without her. Dr. N reminded Ms. C that the school could meet without the parents if they have been properly noticed. (*Id.* at 2380, ln. 20 – 2381, ln. 6.)

Retaliation Against Parents

100. The district had always accommodated the parents work schedules for M.S.'s IEP meetings until after consent was revoked on 2/16/16, and 3/7/16. (Hearing, Vol. 1, 241). The only time that the district started an IEP without the parents being present was after they revoked consent, and with the full knowledge that they could not be present at the time it was scheduled to begin. (Id. at 239-242; See also, Parents Ex. 19, 573-574).

101. As indicated above, parents' concerns and comments were drastically reduced in the educational records, created and maintained by the District, after consent was revoked in March 2016. (District Ex., 40 & 63).

102. The parents testified that M.S. had never received out of school suspension for any behavioral issues until after the parents revoked consent on February 16, 2016. (Parents Ex.8, 0377). Within a few weeks after revoking consent, she was suspended out of school two times, on March 4, 2016 and March 7, 2016, with March 7, 2016 being the date that the second revocations for M.S.'s math and reading placements were received by the district. (Id.; and Parents Ex. 3, 0183-0184; See also; District Ex. 38 & 39).

100. In addition, after the 2/16/16 revocation, M.S.'s general education teacher, Ms.P. , communicated to Ms. C that the district would be unable to implement any new reward system, to her [to]day because I think you denied services to change it." (Parents Ex. 19, 0652).

102. When the parents responded that the rewards chart was covered in the prior stay put IEP on 2/26/16, indicating how the new chart would aid in M.S.'s success (Id. at 0647). Later, Ms. P. sent an email indicating that she had gotten together "with everyone who works with M.S. last night, and we decided that we could implement a reward chart without violating any stay put regulation," although neither the identities of the persons attending that meeting or the content of what occurred during that meeting was shared with the parents. (Id. at 0645).

103. M.S. was given out of school suspension on three occasions, even though IEP team members, including school psychologist, Mr. S. indicated that such punishment was not appropriate for M.S. considering her disabilities, and that the behaviors should not be addressed through traditional discipline methods that are offered through the office. (Hearing, Vol. 5, 1228-1230; See also Parents Ex. 19, 0747).

104. Ms. G, M.S.'s regular education teacher at the beginning of her first grade year, put in writing that M.S. should be suspended, even though M.S. "wouldn't understand but

mom would." (Parents Ex. 19, 0754). Ms. P. indicated that paras did "not get paid enough to deal with this,' describing M.S. (Id.). Ms. G clearly indicates that she is unwilling to "find time each day to work with just M.S. for 2 or 3 weeks," and that "One of them [Mr. J. or Ms. P.] would have the nerve to tell her [Ms. C] that was happening. They think nothing will make her happy. It just really stinks." (Id.). These sentiments were reduced to writing a little over a month into the school year on September 30, 2015. (Id.).

105. M.S. was the only Downs Syndrome child left at Central ___ Elementary, with all other Downs children being removed to the FAA program. (Hearing, Vol. 3, 587). Ms. G. testified about her pre-conception regarding M.S. and her Downs Syndrome diagnosis, testifying that her Downs diagnosis caused her mal behavior that inhibited her from being in the mainstream classroom. (Hearing, Vol. 7, 1779). According to the parents, Ms. G retaliated against the parents for wanting M.S. to be in an inclusion setting from the very start of her first grade year. (Id. at 1780, 1781; See also Parents Ex. 19, 0757).

Functional Behavior Analysis

106. Ms. S., the Assistant Director of Special Education for the Cooperative. She holds a bachelor's degree, a master's degree in special education, a master's degree in educational administration, and has completed her district level licensure program. She is currently a third year doctoral student at Wichita State University, preparing to defend her proposal for her dissertation. (Tr., Vol. 10, at 2443, ln. 10 – 2444, ln. 2.) She is licensed to teach elementary K-9, learning disabilities K-9, building level leadership pre-K – 12, and district level administration pre-K – 12. (*Id*. at 2445, ln. 19-24.) Ms. S. currently holds the position of Assistant Director of Special Education for the ___ County Coop, and has held that position since 2010. She has worked in various other education positions in other districts and had previously worked as a program consultant for the State

Department of Education, ensuring compliance with state and federal special education laws. (*Id.* at 2444, ln. 11 – 2445, ln. 18.)

107. Ms. S. testified that M.S. was not in her least restrictive environment at the beginning of her first grade year. She was accessing instruction in general education classroom at the frustration level. In addition, her behavior sometimes made her unable to receive instruction even when presented with material at her level. The team realized early on that they needed to take action to ensure that she continued to receive FAPE. (*Id.* at 2527, ln. 17 – 2528, ln. 22.) They addressed these issues by gathering data and beginning to hold multiple IEP meetings with the parents to discuss M.S.'s needs. (*Id.* at 2528, ln. 23 – 2529, ln. 3.)

108. Based upon her experience, Ms. S. believed that the February 1, 2016 IEP would confer FAPE in the least restrictive environment for M.S. because it would allow her to access the instruction in such a way that she could begin to make progress on her IEP goals and in the general education curriculum. (*Id.* at 2529, ln. 4-23.)

109. Ms. S. believes the May 17, 2016 IEP would confer FAPE in the least restrictive environment for M.S. because "it afforded her the necessary placement which would allow her to access the appropriate level of instruction and support necessary for her to make progress in relationship to herself, her IEP goals and in her relationship to her general peer group." (*Id.* at 2529, ln. 24 – 2530, ln. 11.)

110. Mr. S. also prepared the functional behavior assessment ("FBA") report, dated November 2013. (Dist. Ex. 2; Tr., Vol. 5, at 1090, ln. 3-13.) In that FBA, they were targeting noncompliant behaviors, which included: grabbing materials, hiding materials, throwing things, laying on the floor, and kicking and some hitting of adults and peers. (*Id.* at 1090, ln. 16-22.) While looking at the functions of M.S.'s behaviors, they

determined that she sought attention from adults, and she desired to gain a preferred activity or to avoid a non-preferred activity. (*Id.* at 1091, ln. 8-20.) However, there were more behaviors in the general education classroom versus the special education classroom. (*Id.* at 1091, ln. 21 – 1092, ln. 2.) Likewise, there were more behaviors when attempting a non-preferred activity versus a preferred activity. (*Id.* at 1092, ln. 3-8.) With respect to the duration data, they continued to see the same trend with more frequent behavior in the general education classroom than the special education classroom with no behaviors at all in the speech sessions, which are one-on-one. (*Id.* at 1092, ln. 9-16.)

111. Mr. S.also noted in the FBA (Dist. Ex. 2) that M.S.'s skill deficits were related to her ability to sustain her attention. Mr. S. explained that M.S.'s proficiency with a task affects her behavior so that, if M.S. was working on a non-preferred task, then they were more likely to see behaviors. On the other hand, if she was working on a preferred task, they were less likely to see behaviors. (Tr., Vol. 5, at 1096, ln. 1-17.)

112. Mr. S. has continued to be a member of M.S.'s IEP team and the behaviors noted in the 2013 FBA are consistent with the reports of M.S.'s behavior that he received during M.S.'s first grade year. (Tr., Vol. 5, at 1094, ln. 20 – 1095, ln. 17.)

113. Mr. S. was part of the IEP team when a draft behavior plan was presented to the parents in the spring of 2016. (*Id.* at 1096, ln. 18 – 1097, ln. 2.) He testified that the draft behavior plan was consistent with the results of the 2013 FBA and that, based upon the reports be received, he believed M.S.'s behavior continued to be consistent with the results of the 2013 FBA. (*Id.* at 1097, ln. 3-12.)

114. Mr. S. also attended the IEP meeting held on February 1, 2016, for M.S.. At that meeting, the Districts proposed pullout services for math and continued discussion of the draft behavior plan, but the parents were not in agreement. (Tr., Vol. 5, at 1174, ln. 2-15.)

The staffing notes from that meeting indicate that Ms. S. stated "We need to request consent to evaluate/complete an FBA if any member of the team feels additional data is necessary to fully inform the continued development of the behavior intervention plan." (*Id.* at 1174, ln. 17 – 1175, ln. 2; Dist. Ex. 39 at 4.) Despite this statement, the next statement from Ms. C in the staffing notes is a concern about communication and wanting to know the level of the behavior specialist's involvement with M.S. (Dist. Ex. 39 at 4-5.) At no point in the rest of that meeting did the parents ever request an FBA, according to the staffing notes. (Dist. Ex. 39.)

115. Dr. Shelby E. testified as an expert for the parents. Dr. E. holds a Ph.D. in developmental and child psychology from the University of Kansas. She also holds Board Certification to behavior analyst at the doctorate level. She has an unrestricted license to practice psychology in the State of Kansas, and has had a board certification to behavior analyst for ten years. (Tr., Vol. 5, at 1135, ln. 3-10.) Dr. E. has worked with the evaluation and treatment of children with special needs since she received her Master's degree in 2001. (*Id.* at 1135, ln. 11-19.)

116. Dr. E. recommended that M.S. have another FBA conducted to make sure everyone was on the same page and targeting the same behaviors. (*Id.* at 1155, ln. 5-6.)

117. The IEP team reconvened on February 1, 2016 again to complete M.S.'s revised IEP. (Parents Ex. 5, 0247-0274). At this meeting, M.S.'s behavioral issues were discussed at length, and the behavioral coach, Ms. J., again discusses the implementation of a BIP for M.S. (Parents Ex. 5, 0260). Again, the parents address the issue of completing another FBA regarding M.S.'s behavioral issues. (Id.).

118. The parents requested a functional behavioral assessment for M.S. at the 1/14/16 meeting, when the behavior coach addressed her belief for the need for a BIP (behavioral

intervention plan). (Parents exh. 5,_0276). Ms. J., the behavior coach, informed the parents that, "an FBA is not necessary in order to draft an IEP as sufficient behavioral data is available to develop a plan, but one was previously completed." (Id.).

119. Mr. S. stated that he did not have any expert training in completing FBAs, and he admitted that an expert pediatric behavior specialist would have higher credentials and better qualifications in completing an FBA. (Hearing, Vol. 5, 1194 & 1248).

120. Dr. E., the psychologist, testified that it was an important part of the FBA process to have a significant amount of personal observation time as a provider completing the FBA. (Hearing, Vol. 5. at 1138-1139). Dr. E indicated that 12 hours would be appropriate amount of personal observation time, over the span of different days and different times of day. (Id., 1139). She specifically testified that without direct personal observation time, there was no way to assess the quality of the data collected for the functional behavioral assessment. (Id.).

121. Dr. E. provided further testimony that it is important for the FBA to be completed by a source outside the district, especially considering the history of difficulties with the district and M.S. (Hearing, Vol. 5, 1149-1150). She also emphasized the importance to have the evaluations in place, and done correctly for children at a younger age, like M.S., before reaching teenage years. (Id. at 1150). "The earlier, the easier they are, the more amenable they are to a change and the better it's going to work for everyone. (Id. at 1165).

122. Dr. E. opined that if behavior is going to be considered as part of the student's placement, that an FBA is a necessary part of that assessment. (Hearing, Vol. 5 at 1153). She explained that without an FBA, opinions regarding why behaviors are being exhibited are just assumptions. The FBA will help you determine what about that setting might be triggering or causing the behavior. (Id.). "So you can make any number of assumptions

you want to about why that behavior is higher, for example, in math than it is during oral reading, but if you don't have an FBA you don't have a good idea as to why that is the case. It may not be the material is too hard or she doesn't like the teacher or other kinds of things that often we guess when we're just looking at it." (Id.).

123. Dr. E. testified that the district's proposal of a BIP by Ms. J. without an FBA was not only not appropriate, but was like, "you're stabbing in the dark. You might hit something, but you might not." (Hearing, Vol. 5, 1154).

124. The parents again requested an FBA to be completed by an outside provider on June 13, 2016. (Parents Ex. 25). Mr. S. testified that the IEP team was never informed of this request by the parents in their June 13, 2016 email. (Hearing, Vol. 5, 1277). Instead Mr. S. testified that the "administration" informed them that the parents did not "accept the resolution agreement." (Id. at 1276). He further indicated that the parents were "never presented with a consent" for the FBA. (Id.). That the district "never filled out what I [Mr. S.] would consider a proposal or a prior notice and consent to complete an FBA," and that the district "never went to mom and dad to [have such a proposal] be signed or denied." (Id.).

125. Mr. S. also agreed that the completion of an FBA on M.S. would be a reasonable assessment of her behavior in the LRE before changing her placement to an MRE, and that the same would assist M.S. in receiving a FAPE. (Hearing, Vol. 5 at 1249).

126. Dr. N testified that an FBA is not required to be done prior to implementing a behavior intervention plan if the team has enough information to create the plan without it. (Tr., Vol. 10, at 2400, ln. 1-11.) Dr. N has assisted in completing FBAs during her 30 years of experience in education, and is aware of the type of information necessary for

completion of an FBA. (*Id.* at 2400, ln. 21 – 2401, ln. 5.) Dr. N has also drafted behavior intervention plans. (*Id.* at 2401, ln. 7-9.)

127. When an FBA is performed, it is considered an evaluation and the school must have parent consent. This means the school then has 60 school days to complete the evaluation. (Tr., Vol. 10, at 2403, ln. 8-17.) The team is not required to wait until an FBA is completed before addressing the behavior and could be doing a disservice to the student if they did wait that long. (*Id.* at 2403, ln. 24 – 2404, ln. 6.)

128. Ms. S. has been in education for 22 years, she has assisted with the completion of functional behavior assessments, has drafted behavior intervention plans, and has had training regarding special education law on functional behavior assessments. (Dist. Ex. 53; Tr., Vol. 10 at 2510, ln. 7-19.) She testified that a FBA is not required prior to creating a behavior intervention plan because federal and state regulations do not require it, except when it is being done in response to a manifestation determination. (*Id.* at 2510, ln. 20 – 2511, ln. 21.)

129. Ms. S. testified that it would be inappropriate for an outside evaluator to perform an FBA without team input and then draft a behavior intervention plan without team input because it would be a disservice to the student and would not consider all of the areas of the student's need. (Dist. Ex. 53; Tr., Vol. 10at 2513, ln. 13 – 2514, ln. 8.)

130. Ms. S. testified that a FBA was offered to the parents during the resolution session, and the Cooperative was willing to consider the use of an outside evaluator to work alongside the team. The parents chose not to accept that offer. (Dist. Ex. 53; Tr., Vol. 10 at 2521, ln. 3-16.)

131. Ms. S. testified that the Districts never received consent from the parents to share information with M.S.'s doctor. (Dist. Ex. 53; Tr., Vol. 10 at 2521, ln. 14-16.)

132. Ms. S. testified that Ms. C never asked for a FBA during the February 1, 2016 IEP meeting. If she had, Ms. S. would have given her a consent form. (Dist. Ex. 53; Tr., Vol. 10 at 2590, ln. 3-15.)

CONCLUSIONS OF LAW

1. Special Education law requires that prior written notice to be given to parents regarding any meaningful changes in placement or services, even if consent is not required by the parents for the change. If the proposed change in the educational program substantially or materially affects the composition of the educational program provided to the child, then a change in placement occurs, which triggers the notice requirement. *Weil v. Board of Elem. & Secondary Educ.*, 17 IDELR 902 (5th Cir. 1991), *cert. denied*, 112 LRP 26051 , 502 U.S. 910 (1991).

2. The law is very specific, in that it requires that notice from the district must be clear and understandable to the parents, and not require them to "read between the lines," regarding the IEP, educational placements or services for their child, and/or their ability to participate as an informed educational decision maker for the child. *Fern Ridge Sch. Dist. 28J*, 16 IDELR 676 (SEA OR 1990).

3. Under 34 CFR 300.503(a), a district must provide parents with Prior Written Notice (PWN) whenever it proposes or refuses to change of services or placement of a child. The notice must contain a description of the action proposed or refused by the district, and given at a reasonable time before the decision is implemented. The notice must also be given within a reasonable amount of time after the refusal or denial. *Letter to Atkins-Lieberman*, 56 IDELR 141 (OSEP 2010). Refusals of a proposed evaluation trigger the requirement of a PWN by the District. *Mesa County Valley Sch. Dist. 51*, 116 LRP 16255 (SEA CO 02/09/16).

"It is recognized that an FBA typically requires the same prior written notice as any other evaluation conducted pursuant to the IDEA. The key is whether the assessment is intended to evaluate the educational and behavioral needs of a single, specific child, rather than as a process for understanding and improving problem behaviors throughout the school. Therefore, when conducting or refusing to conduct an FBA to determine eligibility or services for an individual student, districts must provide parents with prior written notice in accordance with 34 CFR 300.503(a)." *Letter to Anonymous*, 59 IDELR 14 (OSEP 2012). Not only must the district give notice of the refusal to conduct the FBA, but that notice must include an explanation of why the agency refuses to conduct the FBA, and a description of the data, including other assessments, that the district is using as a basis for the denial of the proposed evaluation. 34 CFR 300.503(b). (Id.).

4. It is accurate that a district may remove a student with a disability from a regular education placement when the placement no longer confers a meaningful benefit on the child. *Pachl v. Seagren*, 46 IDELR 1 (8th Cir. 2006). However, if the child is deriving a meaningful benefit from the LRE, then the student should not be moved to a MRE. In *Fresno Unified Sch. Dist.*, 52 IDELR 150 (SEA CA 2009), the court noted that because a student with an intellectual disability was able to derive an educational benefit from a magnet school, the district couldn't place her in a more restrictive placement.

5. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, should be educated with children who are nondisabled. 34 CFR 300.114 (a)(2)(i). The least restrictive environment provisions of the IDEA express a strong preference for educating children with disabilities alongside their typically developing peers. *See P. v. Newington Bd. of Educ.*, 51 IDELR 2

(2d Cir. 2008), holding that including students in the regular classroom as much as is practicable is undoubtedly a central goal of the IDEA. (Id.).

6. School districts must obtain parental consent before taking any of the following actions: "(1) [c]onducting an initial evaluation or any reevaluation of an exceptional child; (2) initially providing special education and related services to an exceptional child; or (3) making a material change in services to, or a substantial change in the placement of, an exceptional child. . ." K.A.R. 91-40-27. A "substantial change in placement" means "the movement of an exceptional child, for more than 25 percent of the child's school day, from a less restrictive environment to a more restrictive environment or from a more restrictive environment to a less restrictive environment." K.A.R. 91-40-1(sss).

7. Under the IDEA, school districts are required to provide students with the least restrictive environment. This means that

> [t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
>
> 20 .S.C. § 1412(a)(5)(A).

8. The burden of proof and the burden of persuasion lie with the party challenging the IEP. *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005); *Johnson v. Indep. Sch. Dist. No. 4 of Bixby, Tulsa County, Okla.*, 921 F.2d 1022, 1026 (10th Cir.1990). In this matter, the parents are the party challenging the IEP.

9. The Tenth Circuit follows the *Daniel R.R.* test for determining whether a district has violated the least restrictive environment mandate. *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 977 (10th Cir. 2004). The *Daniel R.R.* test has two parts, in which the

court: (1) determines whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; and (2) if not, determines if the school district has mainstreamed the child to the maximum extent appropriate. *Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

10. The first prong of the *Daniel R.R.* test relies upon the following four factors: (1) steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services; (2) comparison of the academic benefits the child will receive in the regular classroom with those she will receive in the special education classroom; (3) the child's overall educational experience in regular education, including non-academic benefits; and (4) the effect on the regular classroom of the disabled child's presence in that classroom. *Nebo,* at 976 (citing *Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036, 1048-50 (5th Cir. 1989)).

11. "Free appropriate public education" (or "FAPE") means

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

20 U.S.C. §1401(9).

12. The U.S. Supreme Court expanded this definition in the Rowley case, holding that a district

> satisfied this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the

> public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 (1982).

13. The U.S. Supreme Court went on to set forth a two-part test to determine whether the district has complied with federal special education law:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Id. at 206-07. In reviewing such cases to determine whether the above requirements have been met, the U.S. Supreme Court cautioned that

> courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.
>
> *Id*. at 207.

14. IDEA requires that parents are members of the IEP team and that school districts must make efforts to ensure their participation. 20 U.S.C. §1414(d)(1)(B)(i) (requiring parents be members of IEP team); 20 U.S.C. §1414(e) (requiring that parents are part of any group that makes decisions regarding the educational placement of the child). Nonetheless, a placement decision may be made without the involvement of the parents if the school district is unable to obtain the parent's participation and can demonstrate a record of its attempt to ensure their involvement. 34 C.F.R. §300.501(c)(4). Likewise, a similar provision exists to allow the conduct of any IEP meeting without the parent. 34 C.F.R. §300.322(d). Parents simply must be "afforded the opportunity to participate." 34 C.F.R. §300.322(a). Parents do not control the outcome of IEP meetings. (*See Bd. of*

Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 207 (1982)("The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.")

DECISION

After a review of the facts and law herein, the Hearing Officer enters the following ruling on the issues:

Issue 1: USD ____ and ____ Central Elementary School have violated M.S.'s IEP by making a substantial change in her placement, regarding reading and math, without parental consent.

The parents of M.S. argue that the District and cooperative violated M.S.'s IEP by making substantial changes in her placement, regarding reading and math, without parental consent. Specifically, the parents argue that M.S.'s last IEP with valid parental consent is from May 14, 2014, the amended IEP dated June 5, 2015 has been revoked by Ms. C.

The District and Cooperative concede that school districts must obtain parental consent before taking any of the following actions: "(1) [c]onducting an initial evaluation or any reevaluation of an exceptional child; (2) initially providing special education and related services to an exceptional child; or (3) making a material change in services to, or a substantial change in the placement of, an exceptional child. . ." K.A.R. 91-40-27.

The District argues that the pull out for reading and math did not amount to a "substantial change in placement," as defined by K.A.R. 91-40-27, which provides that a "substantial change in placement" means "the movement of an exceptional child, for more than 25 percent of the child's school day, from a less restrictive environment to a more restrictive environment or from a more restrictive environment to a less restrictive environment." K.A.R. 91-40-1(sss).

Christy S., Assistant Direct of Special Education for the Cooperative testified that by her calculations, 25% changed had to be more than 108 minutes. The time in services for the reading placement in April 2015 IEP was 75 minutes, a 17% change. The change in time in service for math in the February 1, 2016 IEP was 70 minutes, a change of 16% to 17%.

Based on the calculation of time and the application of the "substantial change in placement," as defined above, the Hearing Officer finds that neither of the changes in reading or math constituted a substantial change in placement and did not require parental consent.

After a review of the testimony and evidence presented, the Hearing Officer finds for the District and Cooperative on Issue 1.

Issue 2: USD ___ and ___ Central Elementary School have violated M.S.'s IEP by removing her from the least restrictive environment in which she can receive FAPE.

As noted above, Under the IDEA, school districts are required to provide students with the least restrictive environment.

Pursuant to the *Daniel R.R.* test cited above followed by the Tenth Circuit, relies on the four factors set forth in the decision. Those four factors are: (1) steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services; (2) comparison of the academic benefits the child will receive in the regular classroom with those she will receive in the special education classroom; (3) the child's overall educational experience in regular education, including non-academic benefits; and (4) the effect on the regular classroom of the disabled child's presence in that classroom. *Nebo,* at 976 (citing *Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036, 1048-50 (5th Cir. 1989)).

Testimony from District and Cooperative staff members indicates they had tried modifications to the curriculum, additional training for staff, additional accommodations such as more visual cues, and that they had implemented behavior strategies as well as they could without a behavior intervention plan.

The second factor of the first prong of the *Daniel R.R.* test involves comparison of the academic benefits the student will receive in the special education classroom versus the general education classroom. There was substantial testimony from all of the District and Cooperative staff members that M.S. would benefit greatly from the smaller class size in the special education classroom, the ability to have more on-on-one attention from staff, and the ability to have instruction that was specifically geared to her skill level and paced slowly enough for her to access the instruction. Many of the staff members testified that M.S.'s skill level simply did not permit her to access first grade level instruction in a fast-paced general education classroom. There was ample testimony that many of M.S.'s skills were still at the kindergarten level, and it is important to note that M.S. is already a year older than her peers because she was retained in kindergarten for a second year at

the parents' request. I find the testimony from the District and Cooperative staff members who worked with M.S. during her first grade year to be credible. Given that M.S. has been identified as intellectually delayed, it is not surprising that she is functioning below grade level, nor would it be fair to M.S. to expect her to continue to try to grasp concepts that are above her skill level.

The third factor of the first prong of the *Daniel R.R.* test is consideration of the child's overall educational experience in regular education, including non-academic benefits. There was ample testimony from the District and Cooperative staff members demonstrating that M.S. had significant behaviors in the regular education classroom, that she was frequently not even present in the regular education classroom (even the MTSS classrooms which had smaller class sizes and lower functioning general education students), and that she was unable to access the general education curriculum even with modifications, accommodations, and her supplementary aids and services. While Ms. P. and others testified, that M.S. received some social benefit from being in the regular education classroom during non-academic times, she would still have that opportunity under both the February 1, 2016 IEP and the May 17, 2016 IEP because she was remaining in general education with special education supports for her non-academic courses and the MTSS Rockin' Readers.

The fourth and final factor of the first prong of the *Daniel R.R.* test is the effect on the regular classroom of the disabled child's presence in that classroom. Again, with the exception of Mrs. LaM, nearly every District and Cooperative staff member testified that M.S. had significant behaviors and was disruptive in the classroom. Given the behaviors that were described and the large number of times M.S. had to leave the classroom for

frustration breaks, sensory breaks, or reward breaks, it is difficult to imagine how this would not disrupt a regular education classroom.

The second prong of the *Daniel R.R.* test is whether or not the school district has mainstreamed the child to the maximum extent appropriate. As discussed above, there was ample evidence regarding M.S.'s frustration, her behaviors, her inability to access the general education curriculum, and the fact that her many of her skills remained at the kindergarten level despite having been retained for a second year. The evidence is clear that M.S. now needs to be pulled out for special education services in the special education classroom for her core academic content, as reflected in the May 17, 2016 IEP. That IEP will provide her with the least restrictive environment.

After a review testimony of the witnesses and evidence presented, the Hearing Officer finds that the District and Cooperative have met the criteria set forth in the *Daniel R.R.* case and thereby finds for the District and Cooperative on Issue 2.

Issue 3: USD ____ and ____ Central Elementary School have violated M.S.'s IEP by failing to consistently implement parts of the IEP aimed to assist M.S. in her overall behavior in the mainstream classroom, and thus denying her FAPE in the least restrictive environment.

The parents argue that the District has failed to meet the IEP requirement set forth as "across all settings, visuals will be offered to M.S> to help her understand expectations throughout her day, as long as needed to follow direction or complete activity." Additionally, the IEP states "the staff will model language to help teach social skills in the moment when the opportunity occurs throughout the day, across all settings."

The parents believe that these positions of the IEP are not being consistently implemented.

"Free appropriate public education" (or "FAPE")has been defined above.

The United States Supreme Court expanded the definition of FAPE in the Rowley case, holding that a district

> satisfied this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 (1982).

The United States Supreme Court went on to set forth a two-part test to determine whether the district has complied with federal special education law:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Id. at 206-07.

In reviewing such cases to determine whether the above requirements have been met, the United States Supreme Court cautioned that

> courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.

Id. at 207.

In reviewing the parents' due process complaint for this issue, the parents have asserted that District and Cooperative staff members are not using visuals, were not following M.S.'s supplementary aids and services (citing the "last consented to IEP" which a presumed reference to the second year of kindergarten IEP), that they were not appropriately trained, did not take M.S.'s thyroid condition into consideration, and retaliated. The parents do not appear to have alleged a procedural complaint with the possible exception of the scheduling complaint that will be addressed in the next issue.

As an initial matter, it is clear that the parents are mistaken in their opinion as to the stayput IEP for M.S. The stayput IEP is the February 1, 2016 IEP minus the consent items. Dr. Erica N explained that the stayput IEP would be the last IEP for which the school had consent to implement and/or had properly noticed the parent for non-consent items. (Tr., Vol. 10, at 2386, ln. 16-24.) For the February 1, 2016 IEP the behavior intervention plan was a consent item, but the change in placement to special education for math was a non-consent item because it was not a substantial change in placement. (*Id*. at 2388, ln. 2-20.) Even though a parent signs do not give consent, it does not affect the implementation of non-consent items. (*Id*. at 2389, ln. 17 – 2390, ln. 4.)

Dr. N then reviewed District Exhibit 33, the prior written notice from May 27, 2015 signed "do not give consent" on February 16, 2016, which serves as the basis for Ms. C's claim that the stayput IEP would be the kindergarten IEP. Dr. N testified that she did not see how it could possibly make the kindergarten IEP the stayput IEP, due to the non-consent items that would still need to have been implemented. (*Id*. at 2390, ln. 11 – 2391, ln. 10.) Dr. N further testified that, on a partial revocation of consent (District Exhibits 38 and 39), the student continues to receive services when the team makes a finding that the

student needs the services. Such a finding was made by the team in this matter. (*See* Dist. Ex. 38 & 39.) The parent then can exercise their other rights, including mediation and due process. (Tr., Vol. 10, at 2391, ln. 11 – 2393, ln. 5.)

Regarding the visuals, there was testimony from multiple witnesses that staff members had, and used with M.S. visuals that they wore on lanyards around their necks. Regarding the other supplementary aids and services, Ms. T. kept data on that which is contained within District Exhibit 82-E and multiple other District members testified regarding using "if-then" language with M.S. as well as modeling appropriate behavior. With respect to training, the Cooperative provided additional training from Ms. G. and Ms. J. to Ms. T. and her paras that was aimed specifically at meeting M.S.'s needs. Finally, regarding M.S.'s thyroid condition, all of the District team members had seen at least one of the letters from Dr., M.S.'s physician, there were multiple meetings with the parents at which the thyroid issues were discussed, and Ms. P. gave multiple examples of specific accommodations they made related to M.S.'s thyroid issue. (Tr., Vol. 7, at 1918, ln. 9-22.)

Although several District and Cooperative staff members testified that they did not feel M.S. was in the least restrictive environment or may not have been receiving FAPE at the beginning of her first grade year, they took action to start collecting data to determine M.S.'s needs and started holding IEP meetings with the parents as early as November 2015 to try to help M.S. be successful. All of the District and Cooperative staff members on the IEP team testified that they felt the February 1, 2016 IEP and the May 17, 2016 IEP were designed to provide M.S. with a FAPE in the least restrictive environment. In fact, M.S. did progress to second grade.

After a review of the evidence, the Hearing Officer finds for the District and Cooperative on Issue 3.

Issue 4: USD ____ and ____ Central Elementary School have violated M.S.'s IEP by treating the parents in a punitive manner after their revocation and/or refusal to consent to the IEP changes, and thus denying M.S. FAPE in the least restrictive environment.

The parents allege that the District violated M.S.'s IEP by "treating the parents in a punitive manner after their revocations and/or refusal to consent to the IED changes and thus denying M.S. FAPE in the least restrict environment."

The parents argue that M.S. had never received out of school suspension for any behavioral issues until after the parents revoked consent on February 16, 2016. (Parents Ex.8, 0377). Within a few weeks after refusing consent, she was suspended out of school two times, on March 4, 2016 and March 7, 2016, with March 7, 2016 being the date that the revocations for M.S.'s math and reading placements were received by the district. (Id.; and Parents Ex. 3, 0183-0184; see also; District Ex. 38 & 39). During the time that M.S. was suspended, she did not receive her special education services, and said denial of services came only after the revocation of the parent's consent regarding her math and reading placements.

In addition, after the 2/16/16 revocation, M.S.'s general education teacher, Ms. P, communicated to Ms. C that the district would be unable to implement any new reward system, to her [to]day because I think you denied services to change it." (Parents Ex. 19, 0652).

When the parents responded that the rewards chart was covered in the prior stay put IEP on 2/26/16, and indicated how that would aid in M.S.'s success (Id. at 0647), a day later, 2/26/16 at 5:08 p.m., Ms. P. responded that M.S. was doing well in math. (Id. at 0646). Then seven minutes later, Ms. P. sent a second email indicating that she had gotten together "with everyone who works with M.S. last night, and we decided that we could implement a reward chart without violating any stay put regulation," although neither the identities of the persons attending that meeting or the content of what occurred during that meeting was shared with the parents. (Id. at 0645). It is clear that the district refused services previously provided to M.S. in the stay put IEP based upon the parent's revocation of consent, even if for a brief amount of time, the retaliation and denial of services still occurred.

The due process complaint indicates that this issue was based upon an educator's e-mail referencing Ms. C's revocation, Ms. S's refusal to implement supplementary aids and services that would have been in the stayput IEP (presumably second year of kindergarten IEP), and allegations that the District "intimates" services would be withdrawn for M.S. which were included in the stayput IEP. At hearing, the parents also seemed to allege that the District started the May 16, 2016 IEP meeting without them, knowing they would be late, in retaliation.

With respect to the e-mails about the new reward system, Ms. P. testified that most of the discussion regarding the reward system occurred while M.S. was absent for an extended period of time; however, the reward system was implemented within a day of M.S. being back at school. (Tr., Vol. 7, at 1877, ln. 4 – 1880, ln. 18; *id.* at 1925, ln. 9 – 1927, ln. 23.)

With respect to the May 16, IEP meeting, Mr. S. testified that he had difficulty finding available dates at that time of year due to other meetings for other students. (Tr., Vol. 5, at 1183, ln. 24 – 1186, ln. 4.) Likewise, Dr. N and Ms. S. also testified regarding the difficulty finding dates that would work with the parents' schedule and the school schedule at that time of year.

As noted in the Conclusions of Law, IDEA requires that parents are members of the IEP team and that school districts must make efforts to ensure their participation. 20 U.S.C. §1414(d)(1)(B)(i) (requiring parents be members of IEP team); 20 U.S.C. §1414(e) (requiring that parents are part of any group that makes decisions regarding the educational placement of the child). Nonetheless, a placement decision may be made without the involvement of the parents if the school district is unable to obtain the parent's participation and can demonstrate a record of its attempt to ensure their involvement. 34 C.F.R. §300.501(c)(4). Likewise, a similar provision exists to allow the conduct of any IEP meeting without the parent. 34 C.F.R. §300.322(d). Parents simply must be "afforded the opportunity to participate." 34 C.F.R. §300.322(a). Parents do not control the outcome of IEP meetings. (*See Bd. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982) ("The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.”))

In this case, the May 16, 2016 meeting is the only one which was started without the parents. Although the parents complained about the scheduling of some of the other dates, such as the April 19. 2016 resolution date and the April 22, 2016 IEP meeting, the Districts have demonstrated that they made efforts to try to find mutually agreeable dates.

When they could not, they properly noticed the parents for the meetings. Under the law, they were permitted to go forward without the parents in attendance.

Additionally, ___ J., Principal of ___ Elementary School, testified regarding M.S.'s out of school suspension. (Tr., Vol. 8 at 2128, In. 12-2130, Ln 1.) and parent in-class visits.

Mr. J. met with the parents twice during M.S.'s first grade year to discuss keeping observations to a reasonable amount of time, such as one or two hours, due to the disruption and anxiety it was causing staff. Staff members felt they were being critiqued. (*Id.* at 2128, ln. 12 – 2130, ln. 1.) ___ does have a visitor policy, which is made available to all parents on its website. (*Id.* at 2130, ln. 2-21.) Mr. J. has never had any other parents observe a student as long as M.S.'s parents did in his entire 21 years as an administrator. (*Id.* at 2130, ln. 22 – 2131, ln. 3.) Mr. J. had another conversation with Mr. this present school year and discussed that they would observe for no more than an hour to an hour and one half at a time. Mr. J. thought this had resolved the issue. (*Id.* at 2131, ln. 22 – 2133, ln. 6.)

On January 27, 2015, Mr. J. made the decision to out of school suspend M.S. for the safety of other students and adults. The behavioral strategies in her IEP had been tried and had not been effective. (Tr., Vol. 9, at 2149, ln. 18 – 2150, ln. 23.) M.S. was out of school suspended again on March 4 and March 7 for the same reason. In both instances, M.S. continued to escalate and harmed both peers and adults. (*Id.* at 2151, ln. 5 – 2152, ln. 12.) The purpose of the out of school suspension was to keep others, primarily her peers, safe. (*Id.* at 2154, ln. 1-4.)

After a review of the evidence presented, the Hearing Officer finds for the District and Cooperative.

Conclusion

The Hearing Officer is persuaded by the extensive testimony of the educational professionals that they found M.S. to be a sweet, loving child that each stated they enjoyed having in their classroom. The parents and staff recognized the negative behaviors and sometime difficulties the staff had in M.S.'s educational process. The overwhelming evidence presented by the educational staff supports their position that M.S. needs to be in pullout sessions for her core subjects, reading and math.

It should be noted that Ms. C, M.S.'s mother, is an educator with many years of experience. The Hearing Officer observed that each parent are desirous of maximizing M.S.'s education progress and are very adamant in pursuing that goal. While Ms. C, as an educator, could objectively see and pursue a professional goal to achieve the desired ends of M.S.'s education. But, as a parent, she is not as objective and not unlike any parent in her position, loses some of that objectivity and makes her decisions on a subjective basis that "this is my child and by golly I'm going to see to it that she has the best education possible." I certainly don't blame the parents of M.S. for being strong advocates for their daughter. I would do the same.

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 Downs Syndrome plus the ADHD and Thyroid condition. I would suggest Dr. Shelby E, or a professional with similar qualification be engaged for that purpose.

The Hearing Officer can find no basis to award the Parent's attorney fees or other cost of the Due Process Hearing.

IT IS SO ORDERED this 2nd day of May, 2017.

Original signed/James G. Beasley
James G. Beasley
Special Education Hearing Officer

The foregoing Due Process Decision was electronically sent this 2nd day of May, 2017 to:

Ms. Joni Franklin, Attorney for M.S. and her parents,

Sarah J. Loquist, Attorney for USD____, and the ____ County Area Cooperative

Mr. Mark Ward, Kansas State Department of Education.