STATE OF NORTH CAROLINA

COUNTY OF CABARRUS

IN THE GENERAL COURT OF JUSTICE
ADMINISTRATIVE COURT
07 EDC 2339

Student a minor, by and through his Legal guardians, Father and *Mother*, and Father and *Mother*, individually,	)	
Petitioners,	)	**RECOMMENDED DECISION**
v.	)	
Cabarrus County Board of Education,	)	
Respondent.	)	

THE ABOVE-ENTITLED MATTER was scheduled to be heard by the Chief Administrative Law Judge Julian Mann II on March 17, 2008. Petitioners filed a Motion for Emergency Relief and for Continuance that was heard on that date. The hearing was continued in order to allow Respondent to conduct a functional behavior assessment and to conduct an investigation of the incident resulting in the Motion for Emergency Relief.

This matter came before the undersigned Administrative Law Judge Selina M. Brooks and was heard on April 21-25, 29-30, 2008 and May 19-20, 2008. At the close of Petitioners' case in chief, Respondent made an oral Motion for Directed Verdict. Petitioner made an oral response. The Undersigned granted the motion in favor of Respondent on nine claims and denied the motion on the claim concerning whether Respondent had provided a safe environment and appropriate behavioral interventions for the minor Petitioner. The remainder of the hearing and, therefore, Respondent's case in chief, addressed only the tenth claim. Upon consent, the parties submitted written closing arguments to the Undersigned at a later date.

APPEARANCES

For the Petitioners:
Lisa C. Flowers, Esquire
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Matthews, North Carolina 28106

For the Respondent:
Mark P. Henriques, Esquire
Sarah A. Motley, Esquire
Womble, Carlyle, Sandridge & Rice, PLLC
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ISSUES

The parties stated the issues in the Order On Final Pre Hearing Conference, entered on April 9, 2008, as follows:

By Petitioners:

1. Did Respondent fail to comply with the procedural requirements of IDEA and the North Carolina regulations?

2. Did Respondent fail to develop appropriate behavior plans with appropriate behavioral interventions for the minor Petitioner?

3. Has the minor Petitioner's individualized education program ("IEP") been reasonably calculated to enable him to receive educational benefit?

4. Has Respondent educated the minor Petitioner in the least restrictive environment?

By Respondent:

1. Did Respondent fail to comply with the procedural requirements of IDEA and the North Carolina regulations when drafting the minor Petitioner's 2007/2008 IEP such that his IEP does not provide any educational benefit to him?

2. Is the minor Petitioner's 2007/2008 IEP reasonably calculated to enable him to receive educational benefits?

3. Is the minor Petitioner in the least restrictive environment?

WITNESSES

In the order in which they testified:

S.D., a licensed occupational therapist, who was qualified as an expert in occupational therapy.

E.H., a licensed physical therapist, who was qualified as an expert in physical therapy.

Ms. B.H., a licensed speech/language pathologist, who was qualified as an expert in speech pathology.

S.M., Ph.D., is a licensed psychologist who was qualified as an expert in psychology.

B.V. has a temporary license in speech/language pathology and is employed by Cabarrus County Schools.

S.M.P., Ph.D., is an Associate Professor at Appalachian State University, and was qualified as an expert in special education.

Ms. A.K. is licensed as an elementary exceptional children's teacher and is employed by Cabarrus County Schools.

Ms. K.C. is licensed as a regular education teacher and is employed by Cabarrus County Schools.

Mr. G is licensed to teach grades K-12 in learning disabilities, educably mentally disabled, and physical and health education, and is employed by Cabarrus County Schools.

Mr. T. is employed as a Behavior Specialist by Cabarrus County Schools and was qualified as an expert in classroom behavioral procedures.

*M.M.*is the Program Support Specialist for the intellectual disabilities program at Cabarrus County Schools and was qualified as an expert in special education.

Ms. M.K. is the Assistant Exceptional Children's Director for Cabarrus County Schools and was qualified as an expert in special education.

V.S. is employed as Director of the Exceptional Children's Department for Cabarrus County Schools, and was qualified as an expert in special education.

Ms. C.M. is employed as a Guidance Counselor by Cabarrus County Schools.

Ms. M. is employed as an Elementary School Principal by Cabarrus County Schools.

Ms. D.H. is employed as a Speech Language Coordinator by Cabarrus County Schools.

Ms. M..J.S. is employed as Lead Therapist for the Assistive Technology, Occupational Therapy and Physical Therapy Department at Cabarrus County Schools.

Ms. S.O. is employed as a Psychologist by Cabarrus County Schools.

Mother is a Petitioner and mother of the Minor Petitioner, *Student*.

Ms. M. is a non-attorney special education advocate.

Ms. M..P. is employed as a psychologist by Cabarrus County Schools and was qualified as an expert in behavioral intervention.

APPLICABLE LAW

North Carolina Administrative Procedures Act ("APA"), N.C. Gen. Stat. Chapter 150B

N.C. Gen. Stat. Chapter 115C, Article 9 "Education of Children with Disabilities"

Individuals with Disabilities Improvement Act (IDEA 2004), 20 U.S.C. § 1400 *et. seq*.

STIPULATED FACTS

The parties stipulated to the following facts in the Order On Final Pre Hearing Conference, entered on April 9, 2008:

1. The Parties stipulated to the following facts:

(a) *Student* is an 11-year-old boy who resides in Cabarrus County. *Student* qualifies under federal and state law as an exceptional child. His current area of eligibility is trainably mentally disabled ("TMD"). *Student* has attended Cabarrus County Schools as follows:

(i) 2001/2002: Preschool

(ii) 2002/2003: Kindergarten ELEMENTARY SCHOOL A

(iii) 2003/2004: Kindergarten (ELEMENTARY SCHOOL A)

(iv) 2004/2005: 1st Grade (ELEMENTARY SCHOOL A)

(v) 2005/2006: 1st Grade (ELEMENTARY SCHOOL A)

(vi) 2006/2007: 3rd Grade (ELEMENTARY SCHOOL A)

(vii) 2007/2008: 4th Grade Elementary School B

(b) *Student* currently is in the fourth grade and is in a self-contained classroom for students with intellectual disabilities. His current IEP provides that he is to be in the self-contained environment for 4 hours and 30 minutes per school day and to receive 90 minutes of time with the resource teacher per day (45 minutes in the resource classroom; 45 minutes in total school environment with resource teacher). His current IEP also provides that he is to receive 30 minutes of speech three times per week in the total school environment and that he is to participate in the regular education program for library, music/art, assemblies, physical education, and guidance.

(c) *Student*'s previous IEP expired on November **, 2007. To draft *Student*'s current IEP, four IEP meetings were held: October **, November **, November **, and December **, 2007. A state Department of Public Instruction facilitator was present at the first three meetings. *Student*'s mother attended the October **, November **, and December **, 2007 meetings, but only attended the first 30 minutes of the November ** meeting via telephone due to her work responsibilities.

(d) During the summer of 2007, *Student* received Extended School Year ("ESY") services.

(e) It is stipulated and agreed that each of the exhibits identified by the Parties are genuine and, if relevant and material, may be received in evidence without further identification or proof.

MOTION FOR DIRECTED VERDICT

Applicable Law for Motion for Directed Verdict

At the close of Petitioners' case in chief, on May 19, 2008, Respondent made an oral Motion for Directed Verdict. Petitioner made an oral response. The Undersigned rendered her decision from the bench on May 20, 2008 and was memorialized in an Order, entered on June 13, 2008.

1. The North Carolina Court of Appeals has given this guidance to trail courts concerning a motion for directed verdict:

> In a bench trial, Rule 41(b) of the Rules of Civil Procedure is the proper motion to dismiss on the ground that "upon the facts and the law the plaintiff has shown no right to relief." In contrast, in a jury trial, the proper motion to dismiss is one for directed verdict pursuant to Rule 50(a). … When a motion to dismiss under Rule 41(b) is incorrectly designated as one for a directed verdict, it may be treated as a motion for involuntary dismissal. … The test of whether dismissal is proper under Rule 41(b) differs from the test of whether dismissal is proper for directed verdict under Rule 50(a). On a motion to dismiss pursuant to Rule 41(b), the trial court is not to take the evidence in the light most favorable to plaintiff. Instead, "the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him." The trial court must pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn from them. A dismissal under Rule 41(b) should be granted if the plaintiff has shown no right to relief or if the plaintiff has made out a colorable claim but the court nevertheless determines as the trier of fact that the defendant is entitled to judgment on the merits. Hill v. Lassiter, 135 N.C. App. 515 (Ct. App. 1999) (citations omitted)

2. The statute of limitations for a Petition filed under the IDEA is set forth in N.C. Gen. Stat. § 115C-109.6 which states in pertinent part:

> (b) …the party shall file a petition … not more than one year before the party knew or reasonably should have known about the alleged action that forms the basis of the petition… .
>
> (c) The one-year restriction in subsection (b) of this section shall not apply to a parent if the parent was prevented from requesting the hearing due to (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the petition, or (ii) the local educational agency's withholding of information from the parent that was required under State or federal law to be provided to the parent.

Findings of Fact for Motion for Directed Verdict

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interest, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. Wherefore, the Undersigned makes the following Findings of Fact, Conclusions of Law and Decision, based upon the preponderance of the evidence.

Statute of Limitations

1. The Respondent school district has properly notified *Mother* of any changes being made to *Student*'s IEP. This notification was made on the Prior Written Notice (DEC 5) form which contains the following language:

> You, as the parent, are entitled to the due process rights that are described in your Handbook on Parents' Rights if you disagree with this final agency action. If you do not have a copy of the Handbook on Parents' Rights or would like another one, please contact your school principal or call the Director of Exceptional Children Programs. The deadline for filing a contested case petition for a due process hearing is sixty (60) days from receipt of this notice. The principal or Director can also help you understand your rights if you have any questions, or you can call the Exceptional Children Assistance Center, 1-800-962-6817 or the Governor's Advocacy Council for Persons with Disabilities, 1-800-821-6922. Please save this notice for your records.
>
> See Pet. Exh. 5, 11, 20, 23, 36, 69, 76, 101, 181.

2. The Petitioner, *Mother*, has had a copy of the Handbook on Parents' Rights, published by the North Carolina Department of Public Instruction ("Parents Handbook"), since the first IEP meeting she attended for *Student* in 2002.

3. *Mother* requests a copy of the Parents Handbook at every IEP meeting she attends.

4. *Mother* obtained the assistance of an advocate prior to the beginning of the 2006-07 school year ("SY 06/07") who explained due process procedures to her.

5. *Mother* has attended and participated in every IEP for *Student* and has been in active communication with the school district concerning *Student*.

6. The school district made no misrepresentations to *Mother*.

7. The school district did not withhold information from *Mother*.

8. The school district did not prevent *Mother* from pursuing her legal rights or from filing a due process petition.

9. The statutory exceptions to the one-year statute of limitations do not apply to this contested case.

10. *Mother* filed a due process petition on December 31, 2007.

11. The statute of limitations applies as of December 31, 2006.

12. Any allegations in the Petition that the 06/07 IEP, written on November **, 2006, is not proper or legally sufficient are time-barred.

13. The Petition makes no allegations that the 06/07 IEP was not implemented and such claims, if made at the hearing, are time-barred.

14. The Petition makes no allegations that Extended School Year ("ESY") was not considered by the IEP team prior to the 07/08 IEP and such claims, if made at the hearing, are time-barred.

15. The Petition makes no allegations that the school district failed to provide *Student* with the standard course of study ("SCOS") or failed to have an IEP aligned with the SCOS, and such claims, if made at the hearing, are time-barred.

16. The Petition makes no allegations that the 07/08 IEP is deficient because it should have included a specific curriculum or methodology and such claims, if made at the hearing, are time-barred.

17. The Petition makes no allegations that the school district based *Student*'s 07/08 IEP on his IQ or his area of eligibility as TMD rather than based on an assessment of his specific needs and abilities, and such claims, if made at the hearing, are time-barred.

Procedural Due Process

1. The school district was in constant communication with *Mother* through one-on-one conversations, telephone calls, and e-mails.

2. The school district properly informed *Mother* of her rights as a parent by giving her the Handbook on Parents' Rights.

3. The school district properly and timely notified *Mother* of IEP meetings and changes to the IEP.

4. The school district made every attempt to accommodate *Mother* when scheduling IEP meetings, including the third of four of the 07/08 IEP meetings.

5. *Mother* had an opportunity to participate in all IEP meetings and was an active participant at the 07/08 IEP meetings, including the third meeting where she participated by telephone for part of the meeting. *Mother*'s advocate was physically present on her behalf at all four of the 07/08 IEP meetings.

6. There was no violation of procedural due process rights because *Mother* was not able to participate in the third meeting in person. *Mother* had an opportunity to meaningfully participate in the 07/08 IEP meetings.

7. Claims that the 07/08 IEP should have specific curriculum or methodology fail to state a claim for which relief may be granted.

8. The school district provided *Student*'s education records to *Mother*.

9. There were misunderstandings concerning whether *Mr. G*'s personal notes and notebook were a part of *Student*'s education records and this information was produced after filing of the due process petition.

10. The failure to provide *Mother* with *Mr. G*'s personal notes and notebook did not prevent *Mother* from meaningful participation in *Student*'s IEP meetings.

11. The failure to provide *Mother* with *Mr. G*'s personal notes and notebook did not have any effect upon the IEP team's decisions concerning *Student*'s IEP and there are no deficiencies in the 07/08 IEP as a result of this failure.

12. *Student* was not denied a free appropriate public education ("FAPE") for violations of procedural due process.

Substantive Due Process

1. The preponderance of the evidence shows that the IEP team considered a continuum of education settings and services when determining placement for *Student*.

2. The preponderance of the evidence shows that *Student* is receiving education in the least restrictive environment.

3. Claims that the 07/08 IEP was deficient because the present levels of performance (PLOP) stated in the 07/08 IEP are inadequate or that the IEP goals are not measurable are not supported by the preponderance of the evidence.

4. Claims raised at the hearing that ESY was not considered prior to the 07/08 IEP were not supported by the preponderance of the evidence.

5. Claims raised at the hearing that the school district failed to provide *Student* with the SCOS so that his 07/08 IEP was deficient were not supported by the preponderance of the evidence.

6. Claims raised at the hearing that *Student*'s IEP was based on his IQ or his area of eligibility as TMD rather than based on an assessment of his specific needs and abilities were not supported by the preponderance of the evidence.

7. The preponderance of the evidence showed that the school district considered the private occupational and physical therapy assessments provided by *Mother* when developing the 07/08 IEP.

8. *Mother* refused permission to allow the school district to conduct occupational and physical therapy evaluations specifically designed to apply the private occupational and physical therapy assessments to the school setting.

9. The preponderance of the evidence shows that the school district did not fail to provide and *Student* was not denied occupational therapy that was needed to obtain an education.

10. The preponderance of the evidence shows that the school district did not fail to provide and *Student* was not denied physical therapy that was needed to obtain an education.

Order on Motion for Directed Verdict:

This motion was incorrectly referenced as a Motion for Directed Verdict pursuant to Rule 50, is more properly nominated a Motion to Dismiss pursuant Rule 41(b) and, therefore, will be treated as such here.

After careful consideration of the oral arguments made, case law submitted, testimony heard, documentary evidence admitted, and the entire record herein, and based upon the preponderance of the evidence, the Undersigned entered an Order, dated June 13, 2008, stating in pertinent part:

> 1. The statutory exceptions to the one-year statute of limitations set forth in N.C.G.S. § 115C-109.6 do not apply. Any claims arising prior to December 31, 2006 are time-barred. …
>
> 2. Claims that the parents were denied full participation in *Student*'s education were not proven by a preponderance of the evidence. …
>
> 3. Claims that the IEP was defective because the present levels of performance are not measurable were not proven by a preponderance of the evidence. …
>
> 4. Claims that *Student* was not placed in the least restrictive environment were not proven by a preponderance of the evidence. …

5. Claims that *Student*'s placement was based on his IQ were not proven by a preponderance of the evidence. …

6. Claims that the IEP did not specify teaching methodology or curriculum fails to state a claim for relief. …

7. Claims concerning ESY were not raised in the Petition nor proven by a preponderance of the evidence. …

8. Claims concerning occupational therapy were not proven by a preponderance of the evidence. …

9. Claims concerning physical therapy were not proven by a preponderance of the evidence. …

10. Claims concerning Respondent's failure to provide a safe environment and appropriate behavioral interventions for *Student* were sufficiently raised. …

POST-MOTION HEARING AND RESPONDENT'S CASE IN CHIEF

Claims that *Student* was denied a free appropriate public education ("FAPE") because he was not provided a safe educational environment and is entitled to compensatory educational services were not dismissed. Therefore, Respondent's case in chief was limited to addressing the sole remaining claims that *Student* was not provided a safe educational environment and appropriate behavior interventions.

FINDINGS OF FACT RELATED TO THE CLAIMS THAT RESPONDENT FAILED TO PROVIDE FAPE BY FAILING TO PROVIDE A SAFE EDUCATIONAL ENVIRONMENT AND APPROPRIATE BEHAVIORAL INTERVENTIONS

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interest, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. Wherefore, based upon the preponderance of the evidence, the Undersigned makes the following Findings of Fact, Conclusions of Law and Decision, which is tendered to the North Carolina Superintendent of Public Instruction.

1. *Student* was diagnosed with Down Syndrome, a genetic disorder, at two weeks old. From shortly after birth until he was three years old, *Student* received early intervention services that included nutritional consultation, speech services, sign language training, occupational therapy ("OT") and physical therapy ("PT") in the home. When he became older, he began receiving OT, PT and speech therapy services outside the home from private providers.

2. *Student* first entered the Cabarrus County Schools ("school district") as developmentally delayed. In December 2004, an evaluation was conducted that included a psychological evaluation, the Brigance Inventory of Early Development and an adaptive behavior evaluation. *Student* had aged out of his current area of identification as developmentally delayed and his area of eligibility was changed to trainably mentally disabled ("TMD"). Pet. Ex. 28, 29, 32, 34, and 36.

3. *Mother* disagreed with the change in area of eligibility because she believes that *Student* is being labeled which could result in the school district not challenging him to meet his potential.

4. Due to his medical issues, *Student* misses anywhere from 20 to 30 days of school each year.

5. *Student* has had behaviors that were considered in every IEP since 2004. Pet. Ex. 15, 35, 47, 97, and 180.

6. During the 2005-06 school year ("SY 05/06"), *Mother* sent a letter to the school district stating her concerns about *Student*'s behavior.

7. In January 2005, *Mother* sent a letter to the school district superintendent alleging that *Student*'s math assistant, Ms. R, pinched him during a timeout in the teacher's office. Pet. Ex. 40. An investigation found no evidence to support the allegation. Pet. Ex. 41.

8. In January 2006, *Student*'s special education teacher, Ms. E, requested assistance with whistling, laughing and attention-seeking behaviors. Pet. Ex. 53

9. *Mr. T* observed *Student* and prepared the February 2006 Behavior Report. He made several recommendations including consistency and a reinforcement plan. He also noted pitfalls to avoid such as not preplanning, taking disruptions personally and making sure reinforcement and consequences are consistent and not delayed. Pet. Ex. 54.

10. Prior to the start of SY 06/07, *Mother* started using *Ms. M.* to assist her. *Ms. M.* attended several meetings with *Mother*, beginning with an IEP meeting on September 13, 2006 to determine whether *Student* needed temporary homebound services due to illness. Pet. Ex. 67, 68, 69, 74, 76.

11. Although *Mother* views *Ms. M.*'s participation to be positive, it is clear from *Ms. M.*'s own testimony that she takes an antagonistic approach in all of her dealings with the

school district. For example, in reference to IEP team decisions in general, she testified, "I always appealed everything." Tr. Vol. IX, p. 45. Rather than appreciating the fact that the large number of education professionals at *Student*'s IEP team meetings was an effort by the school district to better assess *Student*'s unique needs and *Mother*' concerns, *Ms. M.* stated "I felt like because the school system had so many people and I think even stated at one meeting that maybe we should bring my whole church congregation so we can take a vote against them and maybe get something done … ten people to push whatever agenda they had already set in place." Tr. Vol. IX, p. 48.

12. Shortly after *Student* returned to Elementary School A from homebound in October 2006, *Mother* began to have concerns regarding consistency in handling *Student*'s behavior. She learned that *Student*'s lead teacher had not seen *Mr. T*'s March 2006 Behavior Report as it was missing from *Student*'s file. Pet. Ex. 79, 87.

13. On November 6, 2006, *Student*'s lead teacher changed to *Mr. G*.

14. Prior to becoming *Student*'s teacher, *Mr. G* had taught middle school students in juvenile detention centers.

15. *Mr. G* taught a self-contained classroom for the school district for the period of November 2006 to December 2007.

16. Shortly after *Mr. G* became his teacher, *Student* began stating that "G hurt him." Tr. Vol. X, p. 23-24.

17. *Mother* became concerned that *Student* was coming home and reporting that other children hit him and pushed him.

18. *Mother* became concerned that *Student* was spending excessive time in the school's office and not receiving instruction. Pet. Ex. 79.

19. *Mr. G* testified that *Student* had hit teachers, stood on tables and crawled under tables, and hit other students.

20. *Mr. G* testified that *Student* was learning but that he "probably wasn't making as great as gains [sic] what I would hope because we had so many behavior problems." Tr. Vol. V, p. 129.

21. On January 1, 2007, *Mother* requested an IEP Meeting. Pet. Ex. 106.

22. *Student*'s agenda was used to communicate between school and home.

23. On January 8, 2007, *Mr. G* wrote the following in *Student*'s agenda:

> … He is usually hit by girls for touching. Sometimes they do not do anything [sic] tell him to stop. When he is hit, they can not hit him hard. This can happen

0-4 times a day. The girls basically slap him on his arms or hands. This does not keep him from touching them. … Pet. Exh. 79

24. *Mother* is upset by this note and understands it to say that *Mr. G* has given other children permission to hit *Student*.

25. *Mr. G* testified that he did not tell *Mother* that the children were permitted to hit *Student*, that he did not instruct the children to hit *Student*, and that his statement referred to the children's physical ability to hit *Student* hard. When questioned by the school district's counsel, he stated that he had actually instructed the other children to hold *Student*'s hands down if *Student* touched them. *Student* would touch girls in the chest area and they didn't like it.

26. *Mother* has heard *Mr. G*'s explanation concerning the language of this note, but she believes that he has given other children permission to hit *Student*.

27. *Student*'s class participated in Community Based Training (CBT) field trips during the school year. *Mother* did not send *Student* on CBT Trips because she was concerned for *Student*'s safety due to the lack of information she received regarding *Student*'s behavior. Pet. Ex. 86.

28. *Mother* voiced her concerns regarding *Student*'s safety on numerous occasions to numerous school staff and administrators. Instead of addressing those concerns or making other arrangements, the principal instructed *Mother* to keep *Student* home on those days. Pet. Ex. 79, 86. When *V.S.* learned of this situation, he called the principal and told her that if *Student* did not participate in CBT that he should still be at school doing other work.

29. On January 18, 2007, *Mother* wrote to *Mr. G* and informed him that *Student* was coming home saying that he had been hurt, that *Student*'s behavior at home was deteriorating, and that *Student* was crying and upset about school. *Student* stopped wanting to go to school and began having physical ailments such as migraine headaches and stomach aches. Pet. Ex. 108.

30. An IEP meeting was held on January 25, 2007. After the meeting, *Mr. T* developed a classroom-wide behavioral documentation system along with a standardized home note that would be used for every child in *Student*'s classroom. It was his understanding that this was requested so that consistent information was sent home to parents and because *Student*'s parents questioned the information they were given, consuming teacher and staff time trying to answer their questions. A letter explaining the behavioral documentation system was sent home to all of the parents of students in *Mr. G*'s classroom along with a sample of the daily home note. This behavioral documentation system was a variation of systems he has used for other schools and classrooms. The behaviors addressed in the classroom system included following directions, keeping hands to self, respecting other's property, speaking appropriately, and staying in area. R. Ex. 18; Pet. Ex.116, 118, 142 and 143.

31. After the January 25, 2007 IEP Meeting, *Mr. T* observed *Student* in class and prepared the March 2007 Behavior Report. Data was recorded from January 30, 2007 through February 28, 2007 based on 15-minute intervals on tally sheets. *Mr. T* noted more on-task behavior than off-task and touching involving tickling, but no aggressive touching. Behavioral recommendations addressed inappropriate touching and noisemaking and included timeout, office referrals and calming timeouts as consequences to be implemented by staff. Pet. Ex. 119.

32. By this time, the school district was aware of the conflict in the relationship between *Mother* and *Mr. G*, *Student*'s behaviors, and allegations that *Mr. G* was improperly handling behavior issues in the classroom at Elementary School A.

33. *Mr. G* did not consistently report *Student*'s behaviors to *Mother*. For example:

> On March 19, 2007, *Mr. G*'s tally sheets contain notes concerning yelling and touching. Pet. Ex. 126, p. 1204. The daily home note only discusses touching.
>
> On April 4, 2007, *Mr. G* recorded on the tally sheet that *Student* hit another student. The daily home note has no information concerning this incident. Pet. Ex. 118, pp. 661-62; and Ex. 126, first page. On April 16, 2007, *Student* was suspended from school for hitting this student. Pet. Ex. 126, last page.
>
> On April 18, 2007, the tally sheet records spitting and hitting. The daily home note has no notes. Pet. Ex. 118, p. 665; Ex. 143, p. 1207.
>
> On May 11, 2007, the tally sheet records hitting. The daily home note has no notes. Pet. Ex. 118, p. 673; Ex. 143, p. 1210.
>
> On May 18, 2007, the tally sheet records spitting. The daily home note has no notes.
>
> Pet. Ex. 118, p. 182; Ex. 143, p. 1211.

34. *Mr. G* only reluctantly conceded that a parent should be told about this kind of behavior.

35. The contentious nature of the relationship between *Mr. G* and *Mother* is clearly demonstrated by their handwritten notes concerning the incident on March 19, 2007. The daily home note contans this note by *Mr. G*: "*Student* did not keep his hand to himself. He touched other students besides the one we talk about in meetings. He would leave his seat to bother other student." *Mother* returned the daily home note with these comments: "When I questioned *Student* about the above he could not tell me anything about leaving his seat. He did say he touched (L) but nobody else. When questioned further his response was 'Don't know'. He, however, was very adamant about stating again & actually showing me that *Mr. G* grabbed him by both arms (upper part). He stated 'G hurt me.' What message is being sent to *Student*?

Do we need to meet again? It is my understanding per *Mr. T*'s report that *Student* is to be confronted in a 'direct non-confrontation manner.' What has changed?" Pet. Ex. 126, p. 1204.

36. There is no documentation in the record herein that the allegations that *Mr. G* hurt *Student* were reported or investigated.

37. In his testimony, *Mr. G* tried to justify his failure to provide information by saying *Mother* knew about the April 4, 2007 incident, but then conceded that she might not have known about it.

38. *Mr. G* acknowledged that the March 2007 Behavior Report states "Parents will be advised on the home note of the office referral." Pet. Ex. 119, p. 2. No daily home notes mention an office referral even though *Student* had been referred to the office on more than one occasion.

39. There were continual complaints from *Mother* concerning a lack of communication. *Mr. G* testified that "the problem with the home notes is it became a continual battle back and forth of who was telling the truth and who wasn't telling the truth about what happened that day." Tr. Vol. V, p. 60-61. He expressed general frustration concerning the daily home notes and *Mother*' handwritten responses on them.

40. Ms. K also communicated with *Mother* through daily summaries concerning *Student*'s school work and behavior. She changed the format of her daily summaries from written narrative comments to checking off applicable preprinted comments because it was difficult for her to keep up with writing the daily summaries and because she felt it was "becoming an unfavorable or not a positive path" between her and *Mother*. Tr. Vol. III, pp. 215-16, 260. The narrative comments were not productive because *Mother* always responded in a negative way. For example, in a daily summary, dated December 18, 2007, Ms. K described an incident where *Student*'s inappropriate behavior caused an injury to her. *Mother* returned the daily summary to Ms. K with handwritten comments that excused *Student*'s behavior and criticized her. Pet. Ex. 144, p. 793.

41. *Mr. G* was not truthful in at least part of his testimony during examination by Petitioner's counsel, to wit:

> Q. You don't recall *Mother* expressing concern that he was being grabbed tightly, that he was reporting that he was being grabbed tightly by you?
>
> A. No, first I've heard of it. I heard nothing about that.
>
> Tr. Vol. V, p. 91

Earlier in the same day of day of testimony, *Mr. G* had been questioned concerning a daily home note, dated March 19, 2007. *Mother* had returned this daily home note to *Mr. G* with a handwritten note that includes the following allegation made by *Student*:

> … He, however, was very adamant about stating again & actually showing me that *Mr. G* grabbed him by both arms (upper part). He stated, "G hurt me."
>
> Pet. Ex. 118, p. 649.

42. *Student* received Extended School Year ("ESY") services for five weeks during the summer 2007 at ELEMENTARY SCHOOL A. His behavior goal was continued, however, there were no daily home notes or tally sheets for the ESY period. Pet. Ex. 127.

43. During that summer, *Mother* obtained independent psychological, occupational therapy, physical therapy and speech evaluations which she provided to the school district. Pet. Ex. 133, 134, 135, and 136.

44. The school psychologist performed a psychological evaluation of *Student* in July 2007 which showed that socialization skills are a strength for *Student* but that if he is exposed to children with aggressive behaviors, he will imitate them which could cause him to regress in that area. Pet. Ex. 135.

45. *Student* began the fourth grade for the 2007/2008 school year ("SY 07/08") at Elementary School B.

46. *Mr. G* was *Student*'s lead teacher again.

47. At the beginning of SY 07/08, *Mother* expressed concerns about behavior interventions in the classroom and about behaviors of other students towards *Student* that had started the previous year to the school principal, *Ms. Principal*. *Mother* also expressed concern that *Mr. G* was not providing appropriate behavior interventions in the classroom.

48. At this time, the Elementary School B staff were aware that the conflict in the relationship between *Mother* and *Mr. G*, *Student*'s behaviors, and allegations that *Mr. G* was improperly handling behavior issues in the classroom had continued from Elementary School A to Elementary School B.

49. *Student* exhibited some of the same behaviors from the previous school year and continued to come home complaining of other students hitting him and *Mr. G* hurting him.

50. The behavior documentation system for SY 07/08 that had been implemented the previous year at Elementary School A was continued at Elementary School B. Pet. Ex. 143.

51. In October, 2007, the 15-minute Data Sheets were changed to address off-task, touching, and not in assigned area behaviors. *Mother* was provided the 15-minute Data Sheets at the November 2, 2007 IEP meeting.

52. *Mr. G* testified that there was a "behavior plan in place but – I mean I've not looked at that – I have not looked at that document, no." Tr. Vol. IX, pp. 176.

53. Crisis Prevention Institute (CPI) is a system utilized by Respondent to train its employees on proactive de-escalation and, if needed, proper restraint procedures.

54. *Mr. G* did not receive CPI Training until October, 2007.

55. *Ms. Principal* was aware of on-going altercations between *Student* and three other boys during SY 07/08. Some instigated by *Student* and some by the other boys.

56. *Ms. Principal* and *Mother* corresponded on more than one occasion in October 2007 concerning *Mother*' concerns that *Student* had come home from school with bruises. *Mother* reported more incidents of scratches, bruises, bite marks and other injuries as the year progressed. Pet. Ex. 151 and 152.

57. *Mother* did not receive incident reports regarding those injuries.

58. In November 2007, *Mother* took photographs of these injuries when *Student* came home. See Pet. Ex. 202 A through 202 K. Whenever *Student* was injured, *Mother* received telephone calls from the school, usually the day it happened.

59. Four facilitated IEP meetings were held in October, November and December 2007 for the purpose of preparing the 07/08 IEP.

60. At this time, the school district was aware that the conflict in the relationship between *Mother* and *Mr. G*, *Student*'s behaviors, and allegations that *Mr. G* was improperly handling behavior issues in the classroom that had been reported at Elementary School A were continuing at Elementary School B.

61. At one of the IEP meetings in November 2007, *Student*'s behavior of running as a safety issue was discussed. There was discussion concerning *Student*'s behavior challenges and needs. *Ms. Principal* raised the issue that transition times were difficult for *Student* and came up with a transition plan to address his running. Pet. Ex. 179, p. 949.

62. On November 27, 2007, *Student* attempted to run from the school on three separate occasions. *Mother* requested information concerning these incidents and *Ms. M.* asked *Mr. G* to provide it to her. Pet. Ex. 182.

63. In preparation for the IEP meetings, *Mr. T* analyzed data recorded on the tally sheets of the behavior documentation system up to October 12, 2008. The IEP team discussed *Student*'s behaviors based on the data and compared his current behavior to the goals stated in the 06/07 IEP. After the IEP meeting, *Mr. T* changed the tally sheets to conform with the behavior goal in the 07/08 IEP. The 07/08 IEP Behavior Goal has four objectives or benchmarks:

1. *Student* will stay on task for 20 min. for 4/5 intervals on a daily basis using redirection a) proximity b) visual cues c) verbal cues

2. *Student* will stay in designated area for 20 min. for 4/5 intervals on a daily basis using re-direction a) proximity b) visual cues c) verbal cues

3. Based on data collected during 2nd quarter, *Student* will decrease aggressive behavior by 50% per week using redirection a) proximity b) visual cues c) verbal cues d) use of alternate location in classroom

4. *Student* will ingage [sic] in noise making behavior in the classroom no more than 3 times per instructional session using re-direction a) proximity b) visual cues c) verbal cues

5. Progress will be measured by: For all objectives 1) teacher made data sheets 2) progress reports.

Pet. Ex. 180, p. 263.

64. The benchmarks do not identify the specific interventions to be used or what works best with *Student*. Neither the IEP nor the March 2007 Behavioral Report mention sign language.

65. In the classroom, data was recorded for the IEP objectives concerning on task behaviors on the tally sheets. Data for the third benchmark would be recorded on the tally sheet. The phrase "aggressive behavior" included touching, hitting and tickling. Data for the fourth benchmark for noisemaking would be recorded on the tally sheet. The tally sheet is a subjective method for collecting data. After the facilitated IEP meetings, the tally sheet was changed to include attempted hitting and hitting.

66. *Mother* testified that she "tried to educate" the school about what she learned from *Student*'s pediatrician, the Down Syndrome Association, and a private psychologist about how to respond to *Student*, and that she "challenged" *Mr. T* about the information contained in his Behavioral Report provided to her at the November 5, 2007 IEP meeting.

67. *Mother* uses sign language as a behavior intervention with *Student*. Likewise, *Student* uses sign language at times to communicate emotions and his needs. *Student* can communicate and responds with sign language and it is a method used successfully in addressing his behavior. Only one or two teachers or administrators were familiar or even used sign language with *Student*. None of the behavioral reports or *Student*'s 07/08 IEP mention sign language as an intervention to be utilized for *Student* even though his 07/08 IEP does state that visual cues should be used for behavior re-directions. Pet. Ex. 180; R. Ex. 4.

68. *Mr. G* began learning sign language to communicate with *Student* during SY 07/08.

69. At some time in December 2007, *Mother* complained that *Student* had some scratch marks on his shoulder and neck area caused by *Mr. G*. *Ms. M.* conducted an investigation and gave her results to Human Resources. Subsequently, *Mr. G* was removed from the classroom and is currently employed in a clerical position in the school district's bus garage.

70. After *Mr. G* departure, *Student*'s extreme behaviors had not improved

71. Starting in mid-December 2007, *Ms. K.C.* replaced *Mr. G* in the classroom and became the lead teacher in January 2008.

72. *Ms. K.C.* has observed scuffles between *Student* and other boys. These incidents involved both boys hitting each other.

73. *Ms. M.M.* has observed *Student* in the classroom setting, "getting out of his chair, crawling on the floor, going up under the table." Tr. Vol., VI, pp. 111, 136.

74. During one observation, *Ms. M.M.* saw him try to attack another student: "He went from his desk to another student's desk and tried to grab the student around the upper shoulders, around the neck, and pulled him out of the seat onto the floor." Tr. Vol., VI, pp. 111-12.

75. *Ms. K.C.* requested assistance in her classroom because an assistant was leaving her classroom. *Student*'s running had been a concern for a while but she had not noticed an increase in this behavior.

76. On January 30, 2008, a meeting was held with *Mother* and *Ms. K.C.*'s classroom staff. The types and use of restrains were discussed and *Mother* was told that she would be notified if *Student* was ever restrained. At this meeting, a list of positive behavior interventions was developed. Pet. Ex. 90.

77. On January 31, 2008, *Ms. M.* observed Ms. *S.* inappropriately interrupt a conversation between *Ms. K.C.* and *Mother*, "losing her temper" and criticizing *Student*. Pet. Ex. 189.

78. On February 1, 2008, *Mother* asked *Ms. K.C.* about an incident that had occurred the previous Thursday morning when Ms. *S.* "pulled him", causing a bruising on *Student*'s neck/shoulder area. Pet. Ex. 189.

79. On February 20, 2008, *Student* ran from the cafeteria to outside, away from the school building. A staff member ran after him and her finger scratched *Student*'s upper shoulders when she stopped him. This incident was investigated by *Ms. M.* and an Incident Report was completed. Pet. Ex. 194.

80. The Incident Report for February 20, 2008 was the first such report ever completed.

81. *Mother* was not aware that an Incident Report had been completed until *Mr. T* testified about it in this hearing. Subsequently, *Mother* requested and received a copy of the Incident Report.

82. Now, an Incident Report is completed and sent home for every incident that occurs.

83. In February 2008, *Mother* took photographs of injuries such as scratches, bruises, and bite marks when *Student* came home. See Pet. Ex. 202 A through 202 K. Whenever *Student* was injured, *Mother* received telephone calls from the school, usually the day it happened.

84. On her own initiative, *Ms. M.K.* went to the Crisis Team to request a Crisis Assistant because of the February 20, 2008 incident when *Student* ran out of the school building.

85. On February 28, 2008, *Ms. M.* sent a letter to *Mother* advising her that a Behavior Crisis Assistant was being assigned to *Student* on a short-term temporary basis as of March 3, 2008. Pet. Ex. 195.

86. In March 2008, a crisis assistant was put in place for *Student*. A crisis assistant is a temporary one-on-one assistant for a child under the direction of the classroom teacher and works in collaboration with the teacher.

87. *Mother* had many concerns about the effect of the crisis assistant on *Student* and the classroom. In response to her concerns, the school district made arrangements so that the crisis assistant was only present in *Ms. K.C.*'s classroom.

88. *Mother* did not feel a crisis assistant was needed because the daily home notes do not indicate it was necessary.

> Q. Okay. And what was your concern about having a crisis assistant assigned?
>
> A. That she would undue [sic] all that we have worked so hard to do. I felt like putting a one-on-one worker with him was changing him to one-on-one making him most restrictive. I felt like it best needed to be an IEP meeting if nothing short of a conversation with mom. I was given—I wasn't given any of that. And I asked for detail. To date I don't have that detail.
>
> Tr.Vol. X, p. 51

89. Since the crisis assistant began, *Student* has been injured three times and has continued to run.

90. In March 2008, *Mr. T* prepared another Behavior Report because he was concerned that the school district was not being consistent with addressing *Student*'s behaviors (March 2008 Behavior Report). R. Ex. 18.

91. At some point, *Mr. T* wrote a behavioral procedures outline so that staff could be consistent with their interventions. This outline, however, is not the equivalent of a behavior intervention plan ("BIP"). R. Ex. 18, p. 81.

92. *Mother* was not consulted on the March 2008 Behavior Report and did not know of its existence until receiving it as part of Respondent's Exhibit Book for this hearing.

93. Determining how to address behavior should include parental input and a parent is an important person to consult in addressing consequences for a child.

94. The school district began conducting a functional behavior assessment ("FBA") of *Student* after March 17, 2008 upon the direction of the Hon. Julian Mann II. The case was assigned to *Ms. M..P.*.

95. *Ms. M..P.* testified that a BIP and the IEP behavior goals are meant to work together, but that they do not have to be identical. Participants in the FBA are *Mother* and the IEP team with *Ms. M..P.* acting as the facilitator for the FBA, all of whom compose the FBA team.

96. A functional behavior assessment (FBA) is an information-gathering process that looks at the function of a child's behavior. It is an assessment tool used to determine the reasons for a child's behavior so that appropriate interventions and consequences can be developed to change the child's behavior. Once the function of the behavior is established, an individualized behavior intervention plan (BIP) is developed. The BIP should contain replacement behavior(s) for the inappropriate behaviors and strategies to teach the child the replacement behavior(s) as well as rewards for exhibiting the replacement behaviors. The BIP would also contain consequences for inappropriate behavior, identify who is responsible for what and identify how progress is to be measured.

97. Since the FBA has begun, *Ms. M..P.* has witnessed an incident when *Student* was injured by another student.

98. Dr. S.M.P witnessed another child grabbing *Student* on March 28, 2008. *Student* did not react aggressively but looked unhappy.

99. As of the date of *Ms. M..P.*'s testimony on May 30, 2008, the FBA team had met twice. The initial information-gathering process had begun and she had directed participants on how to observe and take notes for the next FBA meeting. The two behaviors targeted for in-depth consideration were out of area and participation. These areas affect safety and access to education. The biggest safety concern for *Student* is leaving an area such as running out of a classroom. The FBA will consider other students' aggression towards *Student* which may cause out of area behavior or the ability to participate in education.

100. The IDEA does not require a FBA for every exceptional child with behavior issues.

101. A parent or teacher may request a FBA.

102. The FBA is being conducted because *Mother* requested it.

103. At the final date of hearing on May 20, 2008, Respondent had not completed the FBA process.

104. Toward the end of SY 07/08, *Ms. M.M.* and *Ms. K.C.* observed some progress in *Student*'s behavior: he listened more; responded better to redirection; and his physical interactions with other students was more playful in nature.

105. Ms. K testified that *Student* is making progress under his 07/08 IEP goals.

106. *Mother*, although justifiably upset about the situation at Elementary School B, gave contradictory testimony:

> On May 2, 2008, *Mother* testified that she requested detailed information about *Student*'s behavior because she had received notes from school that "he was hitting people" and she "had never seen *Student* hit another child … not even his little sister."
>
> Tr.Vol. IX, pp. 200-01.
>
> On May 19, 2008, *Mother* testified that "I have actually seen him push. I have seen him hit his sister." Tr.Vol. X, p. 18. She even described *Student* as using his sister as a "punching bag."
>
> Tr.Vol. X, p. 161.

107. *Mother* denied telling the school that *Student*'s behaviors would never improve unless she was physically present in the classroom. Tr.Vol. X, p. 162. On January 18, 2007, *Mother* wrote the following note in *Student*'s agenda:

> *Mr. G/*Ms. S -Apparently *Student* is not responding to your "techniques". As I have stated on numerous occasions I am not there, am prevented from interveining [sic] w/ the proper response to his "behaviors" therefore I expect this to continue. He does not see you or any [sic] else as ultimate authority because Mom has not been there to reinforce [sic] the expectations of his classroom. I am his ultimate authority. The continued refusal to let me be involved in his daily "behaviors" leads me to believe that you are not interested in doing what is best for *Student*. Previous years experience have proven my involvement to be beneficial to everyone involved. *Student* responded & corrected his "behaviors". Thus ending the drama. Needless to say *Student*'s academics are failing & his behavior @ home has escalated. I have asked for an IEP but it has yet to be scheduled. What you have me do?
>
> Pet. Ex. 179, pp. 381-82.

108. *Mother* believes that her note has been misread by the school district. She conceded that she could work together with the school without being physically present and that daily home notes and *Student*'s agenda were going home daily for communication.

109. *Mother* is quick to negatively respond to the words of others, but does not appreciate the impact of her own language on other people.

110. After hearing the testimony and observing the demeanor of *Mother*, it is clear that she has an unbending nature and is passionate about her child.

111. After hearing the testimony and observing the demeanor of *Mr. G*, it is clear that he, too, has an unbending nature as well as a callous manner.

112. While it is understandable that a change from Elementary School A to Elementary School B could mean a lapse in communication of problems from one school building to another, the testimony does not support this contention, nor would it be excusable.

113. The conflict and depth of the strife between *Mr. G* and *Mother* as well as concerns about classroom behavior interventions and *Student*'s behaviors were known to the staff at Elementary School A during SY 06/07.

114. The conflict and depth of the strife between *Mr. G* and *Mother* as well as concerns about classroom behavior interventions and *Student*'s behaviors were made known to the staff at Elementary School B at the very beginning of SY 07/08.

115. Complaints alleging a teacher is improperly touching a child are serious indeed and should have been documented and investigated when they were first made, and the parents notified of the investigation.

116. All complaints alleging physical injury or restraint should have been documented and investigated, and the parents notified.

117. The school district was inconsistent in following the behavioral recommendations of its own experts.

118. The school district was inconsistent in providing information or documentation to the parents concerning incidents and behavioral recommendations.

119. There is no doubt that the facts of *Student*'s behavior, inappropriate teacher actions, parent and teacher strife, combined with the failure of the school district to respond timely and thoughtfully to the situation, failure to document, investigate or notify the parents of incidents, detrimentally affected *Student*'s educational progress.

120. It is clear, based upon a preponderance of the evidence, that Respondent Cabarrus County Schools failed to provide a safe environment and appropriate behavioral

interventions for School Year 2006/07 and School Year 2007/08 for the Minor Petitioner, *Student*.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and the preponderance of the evidence, the Undersigned makes the following Conclusions of Law:

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Sections 150B and 115C of the North Carolina General Statutes and the Individuals with Disabilities Improvement Act (IDEA 2004), 20 U.S.C. § 1400 *et. seq*. and implementing regulations (34 C.F.R. Part 300).

2. There is no dispute that *Student* is currently a child with special needs pursuant to N.C. Gen. Stat. § 115C-109 and is entitled to a free and appropriate public education (FAPE) pursuant to IDEA 2004 (20 U.S.C. § 1412(a)(1); 34 C.F.R. 300.121), the North Carolina General Statutes, the North Carolina Procedures Governing Programs and Services to Children with Disabilities (North Carolina Procedures). *Student*'s current area of eligibility under IDEA 2004 is intellectually disabled (ID).

3. Petitioners have the burden of persuasion in this case. *Schaffer v. Weast*, ___ U.S. ____ (2005).

4. The IDEA defines FAPE as that which provides a disabled student with personalized instruction and sufficient support services to enable the student to benefit from the instruction. *Board of Education v. Rowley*, 485 U.S. 176, 203 (1982); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990).

5. North Carolina places great significance on education. The public policy regarding special education is "to provide full educational opportunity to all children with disabilities who reside in the State." N.C. Gen. Stat. 115C-106.1 (2006). [1] North Carolina law requires that special education must ensure that a child with special needs "has an opportunity to reach [his] full potential." *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 983 (4th Cir. 1990).

6. The North Carolina Supreme Court has recognized a constitutional right to a "sound, basic education" for all students, whether disabled or not. *Hoke County v. State*, 358 N.C. 605 (2004) (quoting *Leandro v. State*, 346 N.C. 336, 347 (1997)).

7. IDEA 2004 explicitly states that the goal of the law is "to provide students with disabilities an education that is designed to meet their unique needs and prepare them for further education, employment or independent living." 20 U.S.C. § 1400(d)(1)(A) (2004).

[1] On July 10, 2006, the General Assembly rewrote North Carolina's special education statutes. The previous law stated that that the public policy of the state was "to ensure every child a fair and full opportunity to reach his full potential. . . ." N.C. Gen. Stat. 115C-106 (a) (1997).

8. The IDEA requires that children with disabilities be offered a FAPE. A child is deprived of FAPE if the school system violates the IDEA's procedural requirements to such an extent that the violations detrimentally impact upon the child's right to a free, appropriate public education or, if the IEP that is developed by the school is not reasonably calculated to enable the child to receive educational benefit. *Bd. of Educ. of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-7 (1982); *Hudson v. Wilson*, 828 F.2d 1059, 1063 (4th Cir. 1987).

9. The IDEA requires that an individualized education program (IEP) be "developed, reviewed, and revised" that includes, among other things, the child's present levels of educational performance and measurable annual goals that include benchmarks or short-term objectives. *See* 20 U.S.C.§1414(d)(1)(A). Present levels of performance should include "how the child's disability affects the child's involvement and progress in the general curriculum." *Id.* at 1414(d)(1)(A)(i). The free appropriate public education mandated by the IDEA must be designed for the specific needs of the child through the IEP, which is "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." *School Committee of the Town of Burlington v. Dept. of Educ.*, 471 U.S. 359, 368 (1985)

10. "[I]n the case of a child whose behavior impedes the child's learning or that of others," the IEP team must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior" in order to ensure that FAPE is provided. 20 U.S.C. § 1414(d)(3)(B).

11. There is no state or federal requirement that a functional behavior assessment or behavior intervention plan be a part of a student's IEP. 71 Fed. Reg. 46629.

12. North Carolina's state policy is to "[i]mprove student achievement, attendance, promotion, and graduation rates by employing positive behavioral interventions to address student behavior in a positive and safe manner." N.C. Gen. Stat. § 115C-391.1.

13. North Carolina also prohibits the use of "aversive procedures" and only allows physical restraint, mechanical restraint, seclusion or isolation in limited "reasonable" circumstances. *Id.*

14. Furthermore, North Carolina requires that parents be notified and provided with written incident reports regarding:

1. Any use of aversive procedures.

2. Any prohibited use of mechanical restraint.

3. Any use of physical restraint resulting in observable physical injury to a student.

4. Any prohibited use of seclusion or seclusion that exceeds 10 minutes or the amount of time specified on a student's behavior intervention plan. N.C. Gen. Stat. § 115C-391(j).

15. The school district failed to provide *Student* with the positive behavioral supports and interventions he needed as part of his IEP.

16. The school district was aware of continuing complaints concerning a teacher hurting a student and failed to act timely in addressing the situation.

17. The school district was aware of continuing complaints concerning a student's behavior that was causing injury to himself or others and failed to act timely in addressing the situation.

18. The school district failed to document incidents and give copies of the documentation of the incidents to the parents.

19. The school district failed to provide *Student* with FAPE by failing to provide a safe environment and appropriate behavioral interventions for SY 06/07 and SY 07/08.

20. Petitioner has proven by a preponderance of the evidence that Respondent failed to provide Petitioner with a free appropriate public education by failing to provide a safe environment and appropriate behavioral interventions for SY 06/07 and SY 07/08.

21. Petitioner is entitled to receive compensatory services.

22. Evidence in the record shows that Petitioner's behavioral problems and the school's insufficient response to it, negatively affected Petitioner's academic progress. It is clear to the undersigned that while the Functional Behavioral Assessment has begun and will result in a Behavior Intervention Plan, that Petitioner is entitled to more in order to regain the lost ground in his educational achievement.

23. Unfortunately, the record is devoid of any evidence concerning any specific service to be ordered for any particular period of compensation.

24. Therefore, Undersigned decides that the IEP team should consider what additional service(s) could be provided to Petitioner to assist him academically for SY 08/09 in compensation and include this service in Petitioner's IEP for SY 08/09.

NOTICE

In order to appeal this Decision, the person seeking review must file a written notice of appeal with the North Carolina Superintendent of Public Instruction. The written notice of appeal must be filed within thirty (30) days after the person is served with a copy of this Decision. G.S. 115C-116(h) and (i).

This the 29th day of August, 2008.

_____

Selina M. Brooks
Administrative Law Judge