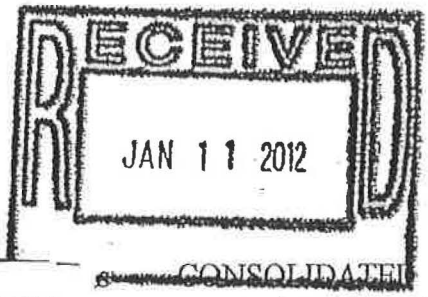

State of Mississippi
Office of Special Education

In Re: Due Process Hearing Complaint on Behalf of [redacted] CONSOLIDATED
In Re: Due Process Hearing Complaint on Behalf of [redacted] Case No.: 812011-6

MEMORANDUM OPINION AND ORDER

This matter addresses separate, yet practically identical, requests for a due process hearing on behalf of boys. The young are [redacted] of whom are currently grade students in the [redacted]. are eligible for special education and related services under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA") under the category of autism. The primary crux of the continuing disagreements between the parties arose during the summer of 2010, prior to the boy starting their grade year. On or about September 13, 2010, the parents filed administrative complaints with the Mississippi Department of Education on behalf of boy The complaints were investigated by the Office of Special Education ("OSE"), findings were made, corrective actions were issued, and a series of letters between MDE and the District ensued. In light of continuing disagreements, the parents filed the subject due process complaints on July 30, 2011.

The due process complaints that are the subject of this hearing set forth ten issues. As noted above, the issues are identical for boy . The District raised a separate issue concerning the parents' request for an independent educational evaluation regarding the District's functional behavioral assessment. The issues were further clarified in correspondence from the hearing officer dated September 6, 2011, following the pre-hearing conference. See HO-1. There are essentially three categories of issues within which most of the material disagreements fall:

Category 1: Procedural issues concerning whether the District failed to provide timely access to educational records and a list of educational records, failed to provide adequate written prior notice, refused the use of assistive technology (Kurzweil) and placement in the general education setting without proper written notice of refusal, and/or predetermined placement fo[redacted] in an inclusion classroom. In addition, did these alleged procedural violations impede the provision of FAPE, impede the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate education, or cause a deprivation of educational benefit?

Category 2: Issues concerning services provided/not provided and the IEPs developed during the course of and as a result of the August 20, 2010 (concerning [redacted] / both imp[redacted]ented), March 11, 2011 [redacted] / implemented), May 18, 2011 [redacted] / not implemented due to stay-put) and July 25, 201[redacted] / not implemented due to stay-put). The specific items at issue concern the use of laptop computers to access the Kurzweil system, placement in an inclusion classroom, the appropriateness of the learning strategies/resource class, provision of special education services by an inclusion teacher, provision of speech and language services, and development and implementation of behavior plans.

Category 3: This is the District's issue. Did the District have adequate grounds to deny the parents' request for an independent education evaluation regarding the District's functional behavioral assessment?

The relief sought by the parents is an order from the hearing officer requiring that [redacted] remain in the general education classroom with special education and support services provided as needed. The parents also request that the District be required to allow the boy to use the Kurzweil system via laptop computers. Lastly, the parents request positive behavior reinforcements and an appropriate Behavior Intervention Plan be implemented by the District.

I. Background Facts

[redacted] are [redacted] who have always attended school in the [redacted] boy have eligibility rulings of [redacted] and are considered "[redacted]" on the [redacted]. Thus far, [redacted] have received education services in the general education

setting with special education supports, supplementary aids, and related services. These services are detailed in more depth in the IEPs that are a part of the record.

Just prior to the beginning of the [redacted] grade school year, T.K. Martin Center performed an assistive technology evaluation and recommended consideration of the use of a computer for written expression and for independent practice in math reasoning. It further recommended the Kurzweil computer system as it helps struggling readers and struggling writers.

The District purchased the Kurzweil system with it becoming available to [redacted] in late February or early March 2010. The District purchased the network version of Kurzweil so that it would be available to all students. Importantly, the network version requires internet access which was initially provided at the elementary school via a wireless hotspot. The boys were permitted to use laptops during class and access Kurzweil via the laptops. The made good grades during the school year, performing well before and after Kurzweil.

As will be discussed below, however, issues arose with the use of laptops toward the latter part of fifth grade. An IEP meeting was held in April for the purpose of discussing the upcoming school year. An IEP meeting was held in May 2010 for the purpose of adopting behavior plans for [redacted] to address behavioral issues for the remainder of the school year. Apparently, the issues regarding the laptops were not conveyed to the parents during these meetings or any other time during that school year.

When [redacted] entered the [redacted] grade in August of 2010, the school's computer system was not functional. Kurzweil was not available for approximately three weeks. Thereafter, Kurzweil was only available on the desktop computers located in the classroom. The

teachers allowed access to Kurzweil during independent study time and partner study time. There were questions raised as to whether material was timely scanned into the Kurzweil system.

An IEP meeting was held in August 2010 to discuss some of the issues involving [redacted]'s IEP. The meeting started after lunch and lasted until approximately 4:30 p.m. During the meeting, the District explained that the laptops were a distraction in the class and that Kurzweil would be provided via desktops in the classroom. The Present Levels of Performance section of the 2010-2011 IEP was amended to reflect that the teachers will determine when the auditory trainer would be used and that the parents will provide laptops and updates for written assignment and/or use with Kurzweil. The modifications/accommodations section was amended to state that [redacted] will utilize learning aids such as computers as needed and determined by the teacher. The language goals were removed at the parents' request because they felt that the SWAT class was covering those issues. The behavioral objectives were modified slightly, keeping the use of promise cards at the request of the parents. A letter was sent to the parents on September 28, 2010, outlining the areas of disagreement raised by the parents during the IEP meeting.

Aggrieved, the parents filed an administrative complaint on September 13, 2010, with the Office of Special Education. Mediation was unsuccessfully held on September 10, 2010. During the mediation, the District requested permission to conduct a comprehensive re-evaluation on [redacted]. Parents denied the request. The District filed its response to the administrative complaint on September 27, 2010.

On September 30, 2010, the District filed a due process hearing request following the parents' refusal to allow a comprehensive re-evaluation. Please see the decision of [redacted], Due Process Hearing Officer, 111 LRP 18235, regarding the details and disposition of this

particular matter. In short, the order permits the District to perform its own re-evaluation. According to the parties, the decision is on appeal to the U.S. District Court.

On December 17, 2010, the Office of Special Education issued its findings and required corrective action. The District filed its responses to the findings on January 18, 2011, and February 2, 2011. The District did not agree with most of the findings, believing the findings were not consistent with the IDEIA and FERPA. The District further believed that the Office of Special Education failed to take into consideration information provided by the District and based findings on erroneous information from the parent. Rather than continuing to contest the findings, the District submitted its corrective action plan on February 14, 2011.

Beginning in February 2011, the District attempted to hold an IPE meeting to address the corrective action plan. The IEP meeting was held on March 11, 2011. Changes to the IEP included an agreement to conduct a functional behavior assessment, a pragmatic language assessment, and remediation in math through a special education teacher coming into the classroom and after-school tutorial. The behavioral goals and objectives were removed from the IEP at the parents' request. The District once again asked for a comprehensive re-evaluation, and the parent denied the request. The pragmatic language assessment was completed on April 1, 2011. The functional behavior assessment was completed May 10, 2011.

On April 14, 2011, another IEP was held to consider extended school year services for [redacted] qualified. The District agreed to pay for summer programs at Mississippi State University to satisfy this requirement. The parents also agreed that the District's offer in this regard satisfied their request for compensatory services.

An IEP meeting was held on May 18, 2011, for the purpose of developing IEPs for [redacted] for seventh grade. The only IEP discussed was [redacted]'s due to time constraints.

[redacted]'s IEP meeting was postponed and subsequently held on July 25, 2011. Draft behavior plans were presented by the District at the IEP meetings. The parents requested that [redacted] consult with [redacted] behavior consultant for the parents, to revise the draft behavior plans. This was done.

For the [redacted] grade year, the District proposed placement for [redacted] in the general education setting, with special education supports through a full-time special education teacher along with a learning strategies class for tutorial support. The parents objected to the placement, particularly the inclusion teacher and the learning strategies class. The parents filed the instant due process requests, invoking stay-put. This prohibited the District from implementing the learning strategies class and formally adopting the behavior plans which utilized the learning strategies class.

[redacted] are currently in all general education classes with limited support from a full-time special education teacher. Notably, the March 2011 IEP is still governing special education and related services.

II. Analysis and Decision

A school district is required to provide a "basic floor of opportunity" that "consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the [disabled] child." Board of Educ. v. Rowley, 458 U.S. 176, 201 (1982). The school district "need not provide its disabled students with the best possible education, nor one that will maximize the student's educational potential." Houston Indep. School Dist. v. V.P., 582 F.3d at 583 (citing Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 247 (5th Cir. 1997)). "Nevertheless, the educational benefit to which [IDEA] refers and to which an IEP must be geared cannot be a mere modicum or de minims; rather, an IEP must be likely to

produce progress, not regression or trivial educational advancement." Michael F., 118 F.3d at 248. "In short, [a school district] must provide its students with 'meaningful' educational benefit." Houston Indep. Sch. Dist. v. V.P., 582 F.3d at 583.

A two-pronged inquiry must be conducted when determining if a student received sufficient educational benefit. The first prong is whether the school district has complied with the procedural requirements of IDEA. In matters alleging procedural violations, the parent must establish that the procedural inadequacies impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a).

The second prong is whether the IEP was "reasonably calculated to enable the child to receive educational benefits." Id. at 583-84. The Fifth Circuit has "set out four factors that serve as "indicators of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA." Id. at 584. "[T]hese factors are whether (1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) positive academic and non-academic benefits are demonstrated." Id.

A. Issues Regarding Alleged Procedural Violations

The procedural violations alleged by the parents in their due process complaints are: (1) the District failed to provide timely access to educational records and failed to provide a list of educational records; (2) failed to provide adequate written prior notice of refusal of services; (3) failed to provide written notice of refusal following the August 20, 2010 IEP meeting concerning the refusal of assistive technology (Kurzweil) and refusal to place [redacted] the general

education setting; and (4) predetermined placement for [redacted] in an inclusion classroom.

(1) The Alleged Failure to Provide Timely Access to Educational Records and Failure to Provide a List of Educational Records

There is considerable dispute regarding the requests for records, lists of records, and what access was provided by the District. The records at issue include "marble charts," MCT2 practice tests, teacher records and notes and class work. Ms. [redacted] testified that she made numerous requests for information without success. The parents also contend the District failed to provide a complete list of all education records collected, maintained or used by the District. The District offered testimony refuting the allegations. Further, the findings of the Office of Special Education[1] (in response to similar allegations raised by the parents in their administrative complaint) state that the District provided parents with access to educational records. However, OSE initially believed that some documentation was missing from the record set, apparently based on information from the parent. More specifically, OSE referenced emails about [redacted] behavior logs/records by M[redacted] email reports of observations by [redacted] report by [redacted] and IEP minutes from the August IEP meeting. Follow-up communications between the District and OSE on December 13, 2010, and January 18, 2011, provide that either no such documentation existed or was given to the parents.

In short, there is proof the records were made available and proof that some records were not made available. However, the most important question is whether the lack of access to the records impeded the child's right to FAPE, significantly impeded the parents' opportunity to

[1] If an administrative complaint investigation is rendered before the due process hearing, the results of the complaint investigation are not binding on the hearing officer. Instead, the findings may be used as evidence at the hearing. OSEP Memo 00-20 (2000).

participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefit. The answer to this question is much more straightforward than parsing through and weighing all the evidence to determine if a record was or was not provided.

First, the parents contend that the lack of access impacted their ability to understand the boy deficits such that they could meaningfully participate in choosing placement options. There is no proof establishing this point. To the contrary, the evidence demonstrates that the parents have been extensively involved with their children's education. The parents are extremely knowledgeable of deficits. Indeed, the parents have independently had assessed by various specialists over several years. The testimony further demonstrates meaningful participation by the parents at every IEP meeting.

Second, the parents argue that the lack of access impacted their ability to work with children's psychiatrists to timely address behavioral issues impacting performance. More specifically, Ms. testified that the lack of information impacted the parents' ability to monitor the effect of new medications being tried by a new doctor. Outside of Ms. testimony, there was no proof establishing the requisite proof of educational impact. For example, there was insufficient proof linking any medication changes to a particular behavior or performance that was the subject of educational information allegedly withheld. In other words, the testimony regarding this issue, in large part, was conclusory.

(2) The Alleged Failure to Provide Adequate Written Prior Notice

In the parents' due process complaint they contend that the did not provide written notice regarding refusal of proposal of services as required under IDEA 2004. During the pre-hearing conference, the parents' clarified the issue. At issue are services

requested by the parents and denied during the March 11, April 14, and April 20, 2011 IEP meetings. More particularly, the services allegedly refused without proper written notification include (1) the use of assistive technology and supports demanded by the parents and (2) placement in the general education setting in the manner requested by the parents.

Notably, there was very little evidence offered at the hearing relevant to this issue. Having reviewed the testimony and having searched the documentation, there is insufficient proof on which to find violations. Some question does remain in my mind regarding appropriate notices, if any, following the March 2011 IEP meeting. The April 14 meeting concerned ESY wherein it was determined that the boys qualified. There is no record of any April 20, 2011 meeting. I do recall testimony and argument regarding notice of refusal after the May and July 2011 IEPs meetings. However, those IEP meetings were not identified during the pre-hearing conference as being at issue.

Assuming, *arguendo*, that the District failed to provide adequate written notice of refusal following any of the above IEP meetings, such failure would be harmless. The parents have been in attendance at each meeting and have actively participated. At various times, the parents were represented by counsel and/or advocates. There is no proof that the parents were not fully apprised of the decisions made at each IEP meeting. In fact, the testimony reflects that Ms. _____ was intimately familiar and knowledgeable concerning the actions of the IEP team.

(3) Alleged Inadequacy of the Written Notice Provided After the August 20, 2011 IEP Meeting

Essentially, the parents argue that the written notice of refusal provided by the District on September 28, 2010, was inadequate in that it only listed two areas of disagreement, i.e., the use of the Smartpen and behavior goals. According to the parents, the notice was inadequate because it did not describe the evaluation procedures, assessments, records or reports used as a

basis for refusing the Smartpen or increasing the mastery level of the behavior goal. The parents further argue that the written notice did not contain the District's request for a comprehensive evaluation, decision to not allow the boys to access Kurzweil via laptop, reduction of the mastery levels of IEP goals, removal of speech language services, and parent concerns regarding behavior plans.

Not only must the parent establish the actual violation, there must be proof on which the hearing officer can conclude that the violation impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefit. Rather than expend numerous pages discussing and determining whether a violation occurred as the parents' suggest, this matter can be quickly resolved by asking if the violation, as described by the parents, was harmless.

It is unquestionably clear from the testimony that the parents were actively involved in the August 20, 2010, IEP meeting. In addition, the parents had the assistance of their psychiatrist and advocate. Moreover, the parents filed a comprehensive administrative complaint on September 13, 2010, prior to the receipt of the District's allegedly deficient notice. The complaint included the same issues and concerns, and the parents were not impeded by the lack of notice. Further, there was no deprivation of educational benefit. Accordingly, any prejudice that may have occurred from the alleged violation is harmless.

(4) Did the District Predetermine Placement for [redacted] in an Inclusion Classroom?

This allegation concerns the proposal during the July 25, 2011, IEP meeting that [redacted] receive special education services through a full-time special education teacher in the general education classroom. This issue was discussed at length during the IEP meeting. The

parents were provided the opportunity for input and gave significant input. Moreover, the disagreement is not really over placement in an inclusion classroom, but the amount and type of supports [redacted] receive while in the general education setting. There is no proof to establish that the District predetermined this placement. To the contrary, the testimony reveals that this issue was emphatically discussed and a large part of the substantive portion of this due process. Just because the IEP team choose to act on a recommendation rejected by the parent does not mean the decision was predetermined.

B. Issues Regarding Specific Special Education and Related Services

The parties' material disagreements over placement and programming issues essentially began in or around August 2010, just prior to the [redacted] starting [redacted] grade. There was considerable testimony regarding what transpired prior to that meeting and the months that followed. The testimony highlights, in my opinion, a significant deterioration of the parties' working relationships.

For instance, during the [redacted] grade year following an assistive technology evaluation from the T.K. Martin Center (July 14, 2009), the District purchased the Kurzweil System that was implemented in late February or March 2010. The 2009/2010 IEP was modified to allow, among other things, the use of computers for written expression as applicable. In addition, the following statement was added to the Summary of Present Level(s) of Performance: "Parent will provide laptops for written assignments. The school district will be providing the Kurzweil System for use during the school year." [redacted] made commendable progress during the fifth grade, significantly *before and after* Kurzweil was introduced. An IEP meeting was held in April to discuss the upcoming sixth grade school year. No changes were made to the IEP regarding Kurzweil, and Mrs. [redacted] testified that she was under the impression that the

boy would continue using the laptops in the de as before. A subsequent IEP meeting was convened in May 2010 to add a behavior plan for the remainder of the 2009/2010 school year as a result of behavioral issues.

entered the h grade the following August. At that time, Quitman Junior High's computer system was not functional due to a variety of problems. Kurzweil was not available in any form for the first three weeks of school. brought their laptops to class, but the Kurzweil system was not functional.[2] Mrs. testified that at this time she was unaware of any issues the District (through its teachers, administrators, or IEP committee members) had with using the laptops. When the District relayed its concerns spanning several months regarding the continued use of the laptops in the classroom (something the parent strongly feels is essential to her children's success) and relayed its request for a comprehensive re-evaluation[3], one can understand how the parent, under these circumstances, would have doubts and concerns regarding the District's actions. This is exacerbated by the fact that the parents simultaneously learned at this time that internet access was not available at the junior high nor planned for the near future. Kurzweil was not and would not be functional on the laptops, and this is arguably contrary to what was orally communicated the previous year. Further, some of the District personnel relaying the concerns in August meeting had never observed using the laptops with Kurzweil functioning.

[2] According to the District's technology coordinator, it was not feasible to install wireless hotspots at the junior high. There were no plans in place to provide wireless access so the laptops could access Kurzweil.

[3] Previously in April 2010, the IEP committee opted to perform a short form re-evaluation citing no need for additional testing at that time. Four months later the IEP team requested a full comprehensive re-evaluation. The request for a comprehensive re-evaluation is the subject of the prior due process proceeding wherein the hearing officer found the District was entitled to conduct its own comprehensive evaluation as that term is defined under the IDEIA. While this hearing officer agrees with the reasoning and the final decision in that matter, it is understandable how a parent may initially be confused under the circumstances of this matter. Contrary to the parents' position in their brief, the mere fact that the IEP committee requested a comprehensive re-evaluation in August after completing a short form re-evaluation in April is not an admission that the previous decision was in error or denial of FAPE. See Schaffer v. Weast, 554 F.3d 470 (4th Cir. 2009).

Viewing the other side of the coin, the parents have and continue to maintain a hardline position that laptop computers are the solution to [redacted]'s problems. For example, Mrs [redacted] testified that if she thought the desktop use of Kurzweil would suffice, "we would not be here." However, no evidence has been produced establishing that [redacted] laptops are a necessary component of FAPE. Particularly absent is proof that the laptops are necessary for the [redacted] to receive meaningful educational benefit under the IEPs. As will be discussed below, there is credible evidence from both sides of the table that laptop computers are not essential. Perhaps maintaining this hardline position under the circumstances has hindered communication and collaboration between the District and the parents since the dispute arose.[4]

One should not be surprised that the parties are at loggerheads. For instance, the manner in which the decisions unfolded regarding the laptops is disappointing. While there are important lessons the District should learn from the experience to hopefully avoid similar breakdowns in relationships, the perceptions created during the course of events do not automatically equate to a denial of FAPE. As with all the issues, the testimony must be objectively viewed and weighed according to the educated judgment of the hearing officer.

Having considered the lengthy testimony regarding Kurzweil and hundreds of pages of documents presented during the hearing, I am not persuaded by a preponderance of the evidence that the laptops are necessary for FAPE. I do not believe the laptops are the reason for and/or the solution to the current problems. There are several reasons undergirding this decision, some of which are summarized as follows:

- The assistive technology assessments performed by T.K.Martin as well as the testimony of the parents' experts regarding assistive technology, establish that the [redacted] can benefit from the use of assistive technology.

[4] That being said, I have no doubt whatsoever that the parents have acted in what they believe is the best interest of their

- The Kurzweil System was recommended by T.K. Martin, although no recommendation required that it be provided via laptop computers. There was considerable testimony offered by the parents establishing a preference for laptops. However, those preferring laptops had not observed them being used in the classroom and were unaware of other educational influences in the specific classrooms that must be considered in this decision.
- testimony was compelling. She is one of the few professionals who has taught the , observed performance and behavior with and without Kurzweil, and observed their performance with and without laptop computers. According to , the laptops ultimately became more of a burden than a benefit. The laptops were disruptive and led to behavioral issues. She attributes the ' academic progress during the grade to extensive teaching, testing, re-teaching and re-testing. She pointed out that the would not have done as well without the four hour block of time in her class – as designed in the elementary setting. Furthermore, she believes the would have benefitted from inclusion services and a resource/tutorial class. In essence, she was doing as much of that type teaching as she could which resulted in additional time away from other students.
- The testimony of demonstrated the necessity of considering how assistive technology fits into the particular educational setting and teaching model. While k never observed using the laptops with Kurzweil, she has used Kurzweil via the desktop in her classroom. She explained that during instruction and modeling time, she needs to focus on her. She testified that she is a living version of Kurzweil – underlining, reading, coding, and reinforcing. Allowing laptops during instruction and modeling would not be beneficial. Kurzweil comes into play during independent work time. Using the desktop during this time alleviates distractions and does not negatively impact other accommodations in the IEP. In short, Kurzweil via desktop was a viable option in her classroom.
- The District has not refused Kurzweil, nor has it totally refused to support the parents with the use of laptops (e.g., for homework and home use). The Kurzweil program is being provided to for use during independent work or partner study. It is used as deemed appropriate by the classroom teachers.[5] Interesting, however, documentation reflecting MCT2 scores show that since using Kurzweil in 2009, 's writing scores, reading scores and overall math scores declined.
- provided special education support to in the classroom during the sixth grade. I found her testimony compelling. She testified that struggled in the sixth grade because of the lack of intensive instructional and tutorial support to address their needs. The academic rigor and pace are greater in junior high. struggled to keep up. Her testimony left the indelible impression

[5] The parent has argued that there is no evidence that the District implemented Kurzweil in any form during the sixth grade. This is inaccurate. Kurzweil was non-functional the first three weeks of school. Afterwards, there is credible testimony that Kurzweil was being used, albeit not like the parents desired. The parent has countered this testimony with a finding by the Office of Special Education that some information had not been scanned into the system at the time of a site visit. While I do not dispute the finding by OSE, the finding is limited in scope. There has been insufficient proof to establish this occurred with significant frequency and involved substantial amounts of material. Further, there is insufficient proof to establish a nexus between the times Kurzweil was not accessible and some resulting educational deprivation. In addition, there is substantial compelling testimony that the struggles are the result of other factors.

that this is something that having a laptop with Kurzweil during instructional time will not correct.

Accordingly, the parents' request that this hearing officer require the District to use the laptop version of Kurzweil and to allow access to their laptops during class is denied.

The second issue raised regarding special education programming (or services) alleged that the District did not provide services of a special education teacher in the sixth grade until after March 11, 2011. This issue is quite interesting. Ms. admitted that she did not want the services of a special education teacher in the general classroom in either the fifth or the sixth grade. Even now, the parents do not want full-time special education services in the general classroom or a pull-out class. Apparently, this never became an issue until raised by the Office of Special Education during its independent investigation.

Undisputedly, were struggling in the sixth grade. Their grades declined significantly. Performance declined. Their teachers testified that special education supports were needed and that an inclusion teacher would be beneficial. However, the IEP team conceded to the wishes of the parent. The District acknowledges that it should not have allowed the IEP to go forward for the 2010-2011 school year without a full-time special education teacher in the classroom for . I agree. This was a serious mistake on the part of the IEP team. Simply consider the amount of one-to-one support required in the fifth grade, the increased rigor of junior high, and the change in instructional time and class scheduling. It is not surprising that 's academic performance declined during the sixth grade. However, the District corrected the problem in March 2011. Furthermore, the District offered compensatory services. The parties agreed that the summer programs (2011) the parents desired would serve as

compensatory services.[6] The District paid for those as agreed. The District also offered to re-assess the academically following the summer programs. The parent denied the request. Accordingly, this issue has been resolved.

The third issue regarding services concerns the development and implementation of behavior plans for [redacted]. The parents fault the District for the alleged decline in behavior from fifth grade through the present and criticize the behavioral supports provided during this time.

The testimony and documents reveal that an IEP meeting was held in May 2010 to develop a behavior plan for [redacted]. The subsequent 2010-2011 IEP (sixth grade) also contained strategies to address behavior. There was no disagreement at this point over how behavior was to be addressed. Further, the testimony did not reveal any behavior issues bearing on FAPE not being addressed.

During the March 2011 IEP meeting, the parents requested the removal of the behavior goals and objectives because they believed they were not measurable. The IEP team agreed to conduct a functional behavior analysis. The District retained who performed an FBA and developed draft behavioral intervention plans. Those plans were presented at the May 2011 and July 2011 IEP meetings. At the request of the parents, consulted with the parents' behavior consultant s' draft plans were revised, and now included practically all the recommendations and revisions requested by n. The parties could not agree, however, over [redacted]'s IEPs, primarily because of other reasons, (i.e., not using Kurzweil on the laptops, using an inclusion teacher in the general

[6] The parents also contended in the due process complaint that the District did not provide compensatory services fo [redacted] in a timely manner. More specifically, the parents feel that compensatory services were not provided for math, language and social skills. The parents further stated during the pre-hearing conference that the failure included the District's decision to not allow laptops with Kurzweil and electronic submission of work. The discussions above are relevant to this issue as well. There is no basis for relief on these grounds.

education classroom, using a learning strategies class for [redacted] (which was also a part of the behavior plan)). The parents filed for due process before either IEP (including any behavior plans) was implemented. Stay-put provisions, therefore, required the District to look back to the March 2011 IEP that was in place at the time due process was filed. The behavioral goals and objectives had been removed from that IEP as the parties worked toward developing new plans for the ı grade year.

After considering the testimony and, again, numerous documents concerning this issue, it is my opinion that in the time leading up to the filing of the due process complaint, there is no evidence to find that the District failed to implement any behavioral goals or plans in the IEPs. Further, there is insufficient evidence to find that the District otherwise was failing to address behavior resulting in a denial of FAPE during this time period.

There was testimony concerning a continued decline in behavior after started seventh grade which is after the filing of the due process complaint. District personnel testified that were attempting to implement the parts of the draft behavioral plan proposed for the seventh grade that were possible under stay-put. Cross-examination revealed notable inconsistencies in this regard. Significant portions of the plan, such as reinforcement during a learning strategies class, were unable to be implemented. Behavior remains an issue. However, it must be remembered there is no enforceable behavior plan in place at this time and stay-put makes us look back to the March 2011 IEP. Indeed, the current due process proceeding and the stay-put provisions have tied hands to a marked degree. Further, more disagreement over implementation has arisen since the fall. Under the circumstances, I cannot fault the District for not implementing the behavioral plans.

Based on the testimony, it is my opinion that the behavior plans offered by the District (SD-5) are appropriate. Now that this proceeding has concluded, these plans should be implemented as intended by the District last summer. Further, the law requires that the IEP committee monitor and make all revisions that are in the best interest of the children and necessary to ensure the delivery of FAPE.

The fourth issue falling under this portion of the analysis concerns the parents' contention that the District failed to provide speech and language services as part of the IEP until after March 2011. Interestingly, speech and language were part of the educational program until removed at the parents' request in August 2010. The parents believed the SWAT program handled pragmatic language skills. After this issue was raised by the Office of Special Education during its investigation, the District conducted a pragmatic language assessment in April 2011. The IEP was modified to include consultative language services and the same services were offered in the proposed IEPs for the seventh grade.

The parents had the burden of proof on this issue, and did not demonstrate specifics on how the absence of speech and language services from August 2010 until April 2011 impacted FAPE. In fact, this was something the parents maintained was unnecessary during the relevant time period. Moreover, the issue has now been addressed and corrected.

Another issue mentioned by the parents during the pre-hearing conference concerned the failure of the District to allow participation in the PAWS program. The parents contend this is a necessary support for [redacted] to advance appropriately toward IEP goals and continue in the general education setting. There was insufficient evidence on this issue to meet the parents' burden of proof on this issue.

C. Issues Regarding Least Restrictive Environment

This issue is the other primary impetus of the due process complaint. The parents want [redacted] in a general education class with "high functioning" students. They contend that the "inclusion class" where [redacted] are currently placed is not a general education classroom. Further, the parents do not want a special education teacher in the general education class full time on the belief that this creates too restrictive an environment.

At the core of this dispute is the term "inclusion classroom." Suffice it to say, the parents' understanding of inclusion differed greatly than the District's understanding of inclusion. Essentially, the parents believe that [redacted] should be placed in the general education setting without other specials needs children and with special education support as needed. The parents argue that [redacted] learn better, are more stimulated, and more encouraged when learning alongside higher functioning students in this manner. [redacted] the children's psychiatrist, testified regarding a preference for a learning environment like the one in fifth grade. That opinion, admittedly, is without observation or knowledge of the significant factors bearing on the [redacted] grade setting.

While not a legal term, inclusion refers to a commonly applied education model where students with special needs are included in the same classroom with non-disabled peers. While different schools apply variations of the inclusion model, it involves instruction in the classroom by a full-time general education teacher and a full-time special education teacher. According to the policies of the State Board of Education, a general education setting is defined as a classroom where no more than fifty percent of the students have IEPs. Accordingly, the inclusion of special needs students in a general education classroom within this guideline does not change the nature

of the class. The record demonstrates that [redacted]'s classes were general education classes pursuant to State policy.

The August 2010 and March 2011 IEPs required that the [redacted] work toward mastery of the specified goals and objectives in the general education setting. Further, the IEPs provide that supplementary aids, services and personnel supports are to be provided in the general education setting. There is no evidence establishing that the District failed to comply with these directives. The "inclusion classroom" where [redacted] were placed was a general education setting.

Semantics aside, the real issue is not inclusion versus general education. Essentially, the parents do not like the current class, believing the other general education classes contains "higher functioning" students and less special needs students. Generally speaking, the District has discretion as to scheduling. To prevail, the parents must demonstrate that [redacted] can only receive meaning educational benefit in "the other" general education class. The parents have not done so.

The parents offered the testimony of [redacted], the after-school tutor. She testified that she did not believe the [redacted] needed to be around lower-functioning students or students with behavior issues. She opined that the [redacted] needed to be in the general education setting. On cross-examination, it became apparent that her belief as to the nature of the [redacted] grade class was mistaken. Furthermore, she was unaware of any of the functioning levels of any of the other students in the class. To this end, [redacted] the [redacted] principal, testified that more students in [redacted]'s current classes scored proficient and advanced on the MCT-2 test than any other classes.

The other part of the least restrictive environment dispute concerns the District's proposed IEPs for [redacted] grade. [redacted] of the IEPs calls for a full-time special education teacher

to provide supports in the general education setting and also provides for a learning strategies course. The learning strategies course would be a "pull-out" period where the special education teacher works with [redacted] and approximately five other students with IEPs. The parents have objected to the learning strategies class on the basis that it is not the least restrictive environment. Having considered the testimony and the voluminous IEP documentation and assessment data, I respectfully disagree.

It is undisputed that [redacted] have struggled and continue to struggle. The educational professionals that have worked directly with [redacted] unanimously agree that the would benefit from a class such as the learning strategies. Considering [redacted] present performance levels and deficits, additional supports are warranted. The parents recognize the benefits of such supports inasmuch as the parents provide extensive private tutoring two to three times per week. Substantial evidence supports that the risk that [redacted] would not benefit academically and behaviorally from a learning strategies class is highly unlikely. The preponderance of the evidence submitted at the hearing demonstrates that the learning strategies class is appropriate. Accordingly, the proposed placement in the learning strategies class is not overly restrictive.

D. Did the District Have Adequate Grounds to Deny the Parents' Request for an Independent Education Evaluation Regarding the District's Functional Behavioral Assessment?

conducted the functional behavioral assessment at issue. She is a licensed school psychologist with extensive experience conducting FBAs. She testified regarding how the FBA was developed. She discussed the preparation of the resulting behavior plans and collaboration with [redacted] agreed with those plans.

There was insufficient proof contradicting the appropriateness of the FBA. There was no proof that it was conducted improperly. There was no proof contradicting the formulation of opinions. In fact, the FBA was an integral part of the BIPs collaboratively developed by ; and .

The testimony and documentation at the hearing demonstrate that the FBA conducted by was appropriate. Accordingly, there is no basis on which to require the District to provide for an independent evaluation by the parents.

III. Conclusion

In light of the applicable law, the evidence supports the conclusion that the parents have not met their burden of proof on the issues presented in these due process complaints. Furthermore, the functional behavior assessment conducted by on behalf of the District was appropriate. There is no basis for requiring the District to provide an independent evaluation.

The District is directed to convene IEP meetings for to implement IEPs for consistent with the decisions contained herein. This should be done within ten business days of receipt of this Memorandum Opinion and Order.

DATED: January 6, 2012

T. Michael Cronin
Hearing Officer