



**Before The  
State of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of [Student]

**DECISION**

v.

DHA Case No. DPI-18-0004

DPI Case No. LEA-18-0004

[District]

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The Parties to this proceeding are:

[Student]

[District], by

Attorney JoAnn M. Hart  
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Madison, WI 53701-0927

**PROCEDURAL HISTORY**

On February 2, 2018, the Wisconsin Department of Public Instruction (DPI) received a request for a due process hearing under Wis. Stats. Chapter 115 and the federal Individuals with Disabilities Education Act (IDEA) from [Parent] (the "Student's mother") on behalf of [Student] (the "Student") against the [District] (the "District"). DPI referred the matter to the Wisconsin Division of Hearings and Appeals for hearing.

The due process hearing was held in [City], Wisconsin, on July 9, 10 and 11, 2018. The record closed on August 14, 2018. The decision is due by August 28, 2018.

### ISSUES

1. From September 21, 2017 to October 16, 2017, did the District's placement of the Student violate the Student's right to receive a free, appropriate public education in the least restrict environment?
2. Does the District's placement of the Student set forth in the individualized education program dated February 3, 2018, violate the Student's right to receive a free, appropriate public education in the least restrictive environment?
3. Prior to implementing the Student's placement and individualized education program in September 2017 and February 2018, did the District fail to provide the Parent (the Student's mother) with prior written notice, as required by 34 CFR § 300.503?

### FINDINGS OF FACT

1. The Student is a 16-year-old (d.o.b. [XX/XX/XXXX]) child with a primary disability of autism and a secondary disability of speech and language impairment who has been found eligible to receive special education and related services. (Ex. 4, 15, 18, 19)
2. The Student attended school in the District for early childhood programming and during grades second through fifth. (Tr. 1, pp. 43-45) He was homeschooled during kindergarten and first grades and, after fifth grade, attended school in the State of Iowa. During the 2015-2016 and 2016-2017 school years, the Student attended school in the [District 1] in Wisconsin. (Tr. 1, pp. 44-47; Tr. 2, p. 16)
3. The most recent educational evaluation of the Student was conducted in February 2016 by the [District 1]. The District determined that the Student continued to meet the educational disability criteria in the areas of autism and speech and language impairment. (Ex. 19) As part of the evaluation, the Kaufman Test of Educational Achievement, Third Edition, was administered, and the Student's composite scores in reading, math and written language ranked below the first percentile. *Id.*
4. At an individualized education program (IEP) meeting in February 2016, the [District 1] proposed modifying the Student's IEP to increase the amount of specially designed instruction the Student would receive in reading in a special education setting from 73 minutes per week to 315 minutes per week. (Ex. 8) The Student's mother opposed the [District 1's] proposal to provide the Student with increased instruction in a special education setting, and the proposed revised IEP was not implemented. *Id.*
5. The Student's mother also obtained a neuropsychological evaluation of the Student by a private clinician, [Neuropsychologist], Ph.D., L.P., in February 2016. [Neuropsychologist] administered the Preschool Language Scale-Fifth Edition to measure the Student's ability to understand and use language. [Neuropsychologist] reported that

the Student's overall receptive language abilities were estimated to be at a four year, three month-old level, and his overall expressive language skills were estimated to be at a two year, seven month-old level. (Ex. 20) In making recommendations for the Student, [Neuropsychologist] noted the following:

It will be important to teach to [the Student's] strengths, many of which fall in the nonverbal/visual-spatial domain. As long as curriculum can be modified for him in a meaningful and appropriate way and he remains engaged in instruction, [the Student] could participate in a regular education setting for math. An ideal setting would be to have both a special education teacher and regular education teacher present during instruction. ... Communication is a barrier to [the Student's] academic progress and ability to fully participate in school setting.

*Id.*

6. The Student's parents are divorced and have joint legal custody of their children, including the Student. On January 13, 2017, [WI County Circuit Court Judge], in [WI County] County Circuit Court, issued an Order Amending (Divorce) Judgment that, among other things, denied the Student's mother's request to move the children's primary residence to [City], Minnesota and ordered that the parents had joint legal custody, except that the Student's mother had decision making authority related to the Student's and another sibling's educational programs. (Ex. 10)
7. On August 31, 2017, [WI County Circuit Court Judge] issued an Order that denied the Student's mother's motion to change the children's school district, transferred specific decision making authority for the children's education to the Student's father on "a temporary basis," and ordered the Student's mother to return the primary residence of the Student and another minor sibling to the [City], Wisconsin area by September 7, 2017. The Order specified that, except as specifically modified therein, the Court's previous Order regarding custody and placement of the minor children should remain in full force and effect. (Ex. 9)
8. Sometime prior to the start of the 2017-2018 school year, the Student's mother enrolled the Student in the [District 2] in Minnesota. (Tr. 1, p. 97)
9. On September 18, 2017, [WI County Circuit Court Judge] held a telephone hearing with the Student's parents and found the Student's mother in contempt of court for moving the children's (including the Student's) primary residence from the [District 1] without the father's permission or court order, for failing to return the Student and another sibling to [City 1], Wisconsin by September 7, 2017, and for enrolling the Student and another sibling in school in [City 2], Minnesota. The court further ordered that the primary placement of the children be with the Student's father. The Order did not modify or suspend the court's prior Order dated August 31, 2017 that granted specific decision-making authority for the children's education to the Student's father on a temporary basis. The court issued the written Order on September 22, 2017. (Ex. 11)

10. The Student's father provided the District with copies of the court's Orders dated August 31, 2017 and September 22, 2017. (Tr. 2, pp. 21-24)
11. The 2017-2018 school year had already begun in the District by the time the Student moved to his father's residence in [City], Wisconsin and enrolled in high school in the District. (Tr. 3, p. 56)
12. On or about September 20, 2017, the Student's father enrolled the Student in the District and met with [Director of Student Services], the Director of Student Services, and [Special Education Teacher], the Student's special education teacher and case manager, to discuss implementing the Student's prior IEP from the [District 1]. They discussed that a practical difficulty in implementing the [District 1] IEP was that [District 1's] class schedule operated on a seven-period system while the District's high school uses a four block schedule, meaning each class/block is approximately 80 minutes in length. The Student's father expressed concerns about the block scheduling because the Student had difficulty staying in class, and he also expressed concern that the Student had not been receiving enough special education instruction in [City 1]. (Tr. 2, pp. 27-28, 290; Tr. 3, pp. 57-58) The Student's father and the District agreed that, for a two-week period of time until an IEP team meeting could be held, the Student's IEP would be changed to provide him with special education services during two blocks per day. (Tr. 2, pp. 290-291; Tr. 3, pp. 61-62) Under the [District 1] IEP, the Student had received 54 minutes per day of specially designed instruction in a special education setting, as well as 30 minutes per week of speech and language services in a special education setting, in addition to other direct and indirect services in the regular education setting. (Ex. 22)
13. The Student began attending school in the District on September 21, 2017. (Ex. 7)
14. On September 22, 2017, the District sent the Student's parents written Notice of Changes to IEP Without an IEP Team Meeting. The Notice stated that the Student's father had met with [Special Education Teacher], the special education teacher, and had agreed to change the Student's IEP due to his transition into the District and that, as of September 25, 2017, the Student would receive special education during two blocks per day in reading, writing, math and pre-teaching of curriculum for general education classes (health and physical education), with an IEP meeting to be held in two weeks. (Ex. 23)
15. On September 26, 2017, the District sent the Student's parents a written Invitation to a Meeting of the [Student's] IEP Team tentatively scheduled for October 3, 2017. (Ex. 24)
16. On September 28, 2017, the Student's mother filed an IDEA complaint with DPI regarding the District's development and implementation of the Student's IEP and placement without her involvement and notice. On November 28, 2017, DPI issued a complaint decision. (Ex. 7) DPI determined that, although a school district can adopt an IEP from a transferring school district without holding an IEP meeting if the IEP can be implemented as written, the agreement by the Student's father and the District to change

the Student's IEP constituted a change of placement because of the increased amount of special education services the Student was to receive in a special education classroom during the two week period of time that the IEP would be in effect. DPI stated that, because the [District 1] IEP and placement were not implemented as written, the District should have held an IEP meeting to determine a change in the Student's IEP and placement and should have provided the parents with written notice of the change prior to implementation. However, DPI also determined that, pursuant to the court's August 31, 2017 Order granting the father specific decision making authority for the Student's education, the Student's father was the parent under the IDEA regulations, and therefore, the District had properly involved the parent (the father) in the development of the IEP and had properly afforded the parent (the father) the opportunity to be involved in the IEP process in September 2017. *Id.*

17. On October 3, 2017, the District held an IEP team meeting to review, revise and develop an IEP for the Student and to determine the Student's continuing placement. Both parents attended the IEP meeting. The IEP team was unable to finalize the IEP at that meeting so another meeting was scheduled for October 12, 2017, with a written invitation to the continued IEP meeting provided to the parents on October 10, 2017. (Tr. 2, pp. 34-36; Ex. 24)
18. On October 11, 2017, [WI County Circuit Court Judge] issued an Amended Order awarding primary physical placement of the children, including the Student, to the father and ordering joint legal custody to the parents. The Amended Order did not grant either parent specific decision making authority regarding the Student's education. (Ex. 12)
19. On October 12, 2017, the IEP team completed the Student's IEP and placement. The Student's mother attended the IEP meeting and agreed with the IEP and placement. The IEP was implemented on October 16, 2017 and had an end date of February 2, 2018. (Tr. 2, pp. 36, 38)
20. The Student's October 2017 IEP provided that the Student would receive specially designed instruction in reading and writing for 25 minutes per day and in math for 18 minutes per day, both to be provided in the special education classroom. In addition, the Student would receive adaptive physical education for 45 minutes per week, social skills and speech/language services in the regular education setting and have a one-on-one educational assistant with him for 431 minutes per day in all school settings. The IEP also required that the Student would receive occupational therapy once per month for 60 minutes, and the IEP included numerous supplementary aids, services and accommodations that the Student would receive on a daily basis in regular education settings and throughout all school settings. (Ex. 24)

21. [Director of Student Services] observed the Student in regular and special education classes eight or nine times (approximately once per month) between October 2017 and the end of the school year and observed that the Student was more engaged and active in his learning in the special education classroom and interacted primarily with his aide in regular education teachers, not with the regular education students and only sometimes with the regular education teachers. (Tr. 2, pp. 42-43)
22. Between October 16, 2017 and mid-January 2018, the Student's special education teacher and some of his regular education teachers expressed concerns to [Director of Student Services] about the Student's IEP and placement. [Special Education Teacher] expressed concerns that the Student's language deficits prohibited him from interacting with peers or being purposefully engaged in English and math in the regular education setting. The Student's regular education math teacher told [Director of Student Services] that the regular education students had moved way beyond the work that the Student was doing, that the pace of the class was too much for the Student to grasp, that he was receiving individualized instruction in the back of the classroom and was not able to use language to interact with peers in class. (Tr. 2, pp. 46-47)
23. After the October 2017 IEP was implemented, the Student's mother expressed concerns about the Student's behavior of leaving classrooms during class time. In response, the District hired [District Psychologist], Ph.D., a licensed clinical psychologist with the Autism and Behavior Center, to observe the Student in school and provide recommendations. (Ex. 25) The Student's behavior was also discussed at monthly behavior intervention meetings with his teachers and the Student's mother. (Tr. 2, pp. 50-51)
24. On January 17, 2018, the District convened an IEP team meeting to address the concerns raised by staff about the appropriateness of the Student's IEP and because the October 2017 IEP had an expiration date of February 2, 2018. (Tr. 2, pp. 51-53) The following people attended the IEP meeting: the Student's mother, the Student's father, the step-mother, the step-father, the Student, the case manager/special education teacher [Special Education Teacher], another special education teacher, a regular education teacher, the school psychologist, the speech and language pathologist, the occupational therapist, and [Director of Student Services] as the local education agency (LEA) representative. (Ex. 4)
25. During the January 17 IEP meeting, District staff members expressed their concerns about the Student's IEP being inappropriate, discussed how his language deficits impacted his learning and how, even with modifications and accommodations being provided in the regular education curriculum and classroom, the Student was unable to grasp all concepts, especially abstract ideas. (Ex. 4; Tr. 2, pp. 55-56)
26. The Student's father expressed concern during the January 17 IEP meeting about the Student being frustrated in regular education classes where the curriculum was beyond

his functional level and stated that he would like the Student to work on more functional academic and vocational skills. (Ex. 4)

27. The Student's mother expressed concerns at the IEP meeting(s) in January about the Student regressing academically, socially and behaviorally and indicated that she would like the Student to be educated in the regular education curriculum 100% of the time, including receiving specially designed instruction/special education services in the regular education environment. Further, the Student's mother indicated that the District did not have enough data to support its position of wanting to increase the amount of specially designed instruction the Student would receive in the special education classroom. (Ex. 4; Tr. 2, pp. 54-55)
28. At the January 17 IEP meeting, the District proposed increasing the amount of specially designed instruction the Student would receive in the special education setting to 40 minutes per day in both language arts and math and to 40 minutes twice per week in adaptive physical education. (Ex. 4; Tr. 2, pp. 58-60) The proposed change meant that the Student would receive specially designed instruction in the special education classroom during one block per day and would be in the regular education classroom(s) for the other three blocks of instruction per day, except for twice per week when he would be pulled out to receive 40 minutes of adaptive physical education, although he would continue to receive physical education in the regular education setting as well. (Tr. 2, pp. 61-64) The IEP team did not reach consensus and finalize the IEP at the January 17 meeting because the Student's mother did not agree with the proposed change of increasing the amount of specially designed instruction that the Student would receive in a special education setting. (Tr. 2, pp. 59-60)
29. Because the IEP team did not reach consensus, another IEP team meeting was scheduled for January 30, 2018, which was the next date all team members were available. (Tr. 2, pp. 61-62) The same 12 people participated in the second IEP meeting on January 30. (Ex. 4) The District staff members and the Student's father continued to agree on the proposed changes to the IEP that were discussed at the January 17 meeting, and the Student's mother did not agree. (Tr. 2, p. 62)
30. On February 1, 2018, the District provided the Student's mother with a copy of the revised IEP, with an expected implementation date of February 3, 2018, because the prior IEP had an end date of February 2, 2018. (Tr. 2, pp. 67-68)
31. On February 2, 2018, the Student's mother filed a request for a due process hearing. The District continued to implement the Student's October 2017 IEP in accordance with the "stay put" provision of the IDEA.

## DISCUSSION

### Burden of Proof

The U.S. Supreme Court has ruled that the burden of proof in an administrative hearing challenging an IEP is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). As the complainant in this matter, the burden of proof is on the Student's mother. The Student's mother must "cite credible evidence that the choice[s] the school district made cannot be justified." *Sch. Dist. v. Z.S.*, 184 F.Supp.2d 860, 884 (W.D. Wis. 2001), *aff'd* 295 F.3d 671 (7<sup>th</sup> Cir. 2002).

### Lack of Standing as a Parent

Federal regulations define who qualifies as a parent under the IDEA. In this case, the relevant sections of the federal code state:

(b)(1) Except as provided in paragraph (b)(2) of this section, the biological or adoptive parent, when attempting to act as a parent under this part and when more than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child

(2) If a judicial decree or order identifies a specific person under paragraphs (a)(1) through (4) of this section to act as the "parent" of a child or to make educational decisions on behalf of the child, then such person or persons shall be determined to be the "parent" for purposes of this section.  
34 CFR § 300.30 (b)(1) and (2).

The federal regulations also dictate who has the legal right to file a due process hearing request. Specifically, a parent or public agency may file a due process complaint on any of the matters ... relating to the identification, evaluation or educational placement of a child with a disability, or the provision of a free, appropriate public education (FAPE) to the child. 34 CFR § 300.507 (a)(1); *See also* Wis. Stats. § 115.80 (1).

In addition, the federal regulations require that written notice must be provided to the parents of a child with a disability a reasonable time before the public agency: (1) proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or (2) refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 CFR § 300.503 (a).

In this case, there is no dispute that the [WI County] County Circuit Court issued an Order on August 31, 2017 that granted decision making authority regarding the Student's



education to the Student's father on a temporary basis. Under Wisconsin law, the circuit court acted within its authority by ordering joint legal custody yet granting one party power to make specified decisions regarding the child(ren). *See* Wis. Stats. § 767.41 (6)(6)(b). The court's Order remained in effect until October 11, 2017, when it issued an Amended Order that granted joint legal custody to the parents and did not specifically grant either parent decision making authority regarding the Student's education.

During the hearing, the Student's mother stated several times that she and the Student's father had joint legal custody under the August 31, 2017 Order, which is true. Nevertheless, the fact that they had joint legal custody does not trump the court's Order granting the father specific decision making authority regarding the Student's education on a temporary basis. Frankly, in light of the mother having previously been granted the decision making authority regarding the Student's education under prior court orders, it would appear that she was well aware of the meaning of the August 31 Order.

Pursuant to the applicable federal regulations, there is no question that the Student's father was the "parent" of the Student from August 31 to October 11, 2017, for matters governed by the IDEA. During that time, the Student's mother did not meet the definition of "parent" under the IDEA and the federal regulations. Because she was not the parent under the IDEA from August 31 to October 11, 2017, the District was not legally required to invite her to IEP meetings, provide her with prior written notice or include her in the development or revision of the Student's IEP and placement during that time period. The Student's mother lacked standing as a parent under the IDEA to file a due process hearing request related to the Student's IEP and placement and prior written notice during that time frame. Consequently, issue 1 as it relates to the Student's placement from September 21 to October 11, 2017 must be dismissed, and the part of issue 3 that relates to the District's alleged failure to provide prior written notice to the Student's mother in September 2017 must be dismissed.

As of October 11, 2017, both parents had authority to make decisions regarding the Student's education. The Student's initial placement in the District lasted until October 16, 2017, as set forth in issue 1. There were four school days between October 11 and October 16, 2017. The issue of whether the District violated the Student's right to receive FAPE in the least restrictive environment during those four days will be addressed in the next section of the decision, along with issue 2.

#### Free, Appropriate Public Education in the Least Restrictive Environment

The IDEA and Wisconsin special education law require that children with disabilities are educated in the least restrictive environment (LRE). *See* 20 USC § 1412 (a)(5); Wis. Stat. § 115.79. The IDEA's implementing regulations state that, to the maximum extent possible, "children with disabilities, including children in public or private institutions or other care facilities, [should be] educated with children who are nondisabled." 34 CFR § 300.114 (a)(2)(i). Special classes, separate schooling or other removal of children with disabilities from the regular education environment should occur only if the nature or severity of the disability is such that

education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR § 300.114 (a)(2)(ii).

A child may be removed from the regular education environment when the school district has taken reasonable measures to satisfactorily education the child in the regular education setting but the child was unable to receive a satisfactory education in the “mainstream.” *See Board of Educ. Township High Sch. Dist. No. 211 v. Ross*, 486 F.3d 267, 47 IDELR 241 (7<sup>th</sup> Cir. 2007); *Beth B. v. Van Clay*, 282 F.3d 493 (7<sup>th</sup> Cir. 2002). A student’s individual need for a more restrictive placement trumps a purely mechanical approach to the LRE requirements in the IDEA, and a school district is not required to try each placement on the continuum of educational settings for a student. *See Letter to Anonymous*, 53 IDELR 127 (OSEP 2009).

Here, the Student’s mother alleged that the placement proposed by the District in the IEP dated February 3, 2018 violated the Student’s right to receive FAPE in the LRE.

The February 3, 2018 IEP increased the amount of specially designed instruction that the Student would receive in a special education setting. Specifically, the IEP called for the Student to receive 40 minutes per day of specially designed language arts instruction and 40 minutes per day of specially designed math instruction in a special education setting and 40 minutes twice per week of adaptive physical education in a special education setting. (Ex. 4) The Student would receive specially designed instruction in the special education classroom during one block per day and would be in the regular education setting for the other three blocks of instruction per day, except for twice per week when he would be pulled out to receive 40 minutes of adaptive physical education. He would continue to receive physical education in the regular education setting as well. The IEP did not remove the Student from the regular education environment entirely. In fact, the Student would continue to spend the majority of his time each week being educated in a regular education setting.

The Student’s teachers who were on his IEP team testified regarding why they believed the Student needed to receive additional services in the special education setting in order to receive an appropriate education to meet his needs. [Special Education Teacher], the Student’s special education teacher, credibly testified that he believed the Student needs more direct instruction in the special education classroom to be able to make more progress and increase his skills in math and language arts. (Tr. 2, pp. 272, 296-297) [Special Education Teacher] further testified about concerns he had regarding the Student receiving instruction in the regular education English 10 classroom, based upon his observations of the Student in that classroom. [Special Education Teacher testified that when he observed the Student in English 10, the Student looked to his aide for answers, answered questions based upon a pattern of letters alphabetically rather actually answering the question, plugged his ears during lectures by the teacher, did not engage in class activities and did not interact with regular education peers in the class. (Tr. 2, pp. 273-275, 294-295)

[Special Education Teacher] further testified he had not observed the Student plug his ears when in the special education classroom or imitate undesirable behavior of other special education students when in the special education classroom. (Tr. 2, p. 282, 295) [Special

Education Teacher] testified that, even with assistance and modifications, the Student sometimes did poorly on assessments and needed more assistance in the regular education classroom because the Student did not understand abstract thoughts and communication used in that setting. (Tr. 3, pp. 35-36) Finally, [Special Education Teacher] testified that if he were to provide direct instruction to the Student in the library, the Student would not have much opportunity to interact with regular education students in the library because they would be working on different curriculum and doing their own research or studying. (Tr. 2, pp. 316-317)

[Adaptive Physical Education Teacher], the Student's adaptive physical education teacher, testified regarding his experience teaching the Student and the information he gathered and data he tracked regarding the Student's progress during the school year. [Adaptive Physical Education Teacher] credibly testified that he believed the Student needed more direct instruction in an adaptive physical education/special education setting in order to be able to make more progress in the regular education physical education curriculum and setting. (Tr. 3, pp. 100-103) [Adaptive Physical Education Teacher] testified that he did not think the Student would be successful in regular education physical education without receiving additional special education services in adaptive physical education. (Tr. 3, p. 104) As a result, [Adaptive Physical Education Teacher] proposed at the January 2018 IEP meetings that the Student's IEP be revised to include additional adaptive physical education services in a special education setting. (Tr. 3, p. 100)

[Speech and Language Pathologist], the Student's speech and language pathologist, testified regarding her work with the Student and the data she gathered about his progress, as well as her observations of the Student in English 10 during the school year. She credibly testified that based upon how much the English 10 curriculum needs to be modified for the Student and the poor progress he made in the class, she believed that he was not receiving educational benefit by being placed in the regular education English 10 class. (Tr. 3, p. 146) She further testified that she believed the February 3 2018 IEP was appropriate for the Student and was more appropriate for him than the October 2017 IEP. (Tr. 3, pp. 146-147)

[Director of Student Services], the District's Director of Student Services, testified that she believed the Student could not be appropriately educated in the high school's regular education classrooms for math and language arts, even with modifications and supplementary aids and services provided to the Student. (Tr. 2, p. 176)

The Student's father testified that he was in agreement with the changes to the Student's IEP proposed at the January 2018 IEP meetings and that he agreed with the placement in the February 3 IEP. (Tr. 3, pp 64-65) He also testified that he had thought the [District 1's] proposal to increase the amount of special education instruction in the Student's IEP during the 2016-2017 school year would have been valuable for the Student, but he did not have educational decision making authority regarding the Student's education at that time. (Tr. 3, pp. 59-60) The father sent the District an email on February 4, 2018 explaining why he believed the Student needs to have more instruction in the special education setting in order to progress and succeed. (Ex. 38)

[Psychologist], M.A., is a licensed psychologist who has worked in the area of autism since 1972. (Ex. 32) At the District's request, she observed the Student at school, reviewed his

education records and IEPs and assessments, reviewed samples of his written work and interviewed [Special Education Teacher] and [Speech and Language Pathologist]. [Psychologist] testified extensively and persuasively about how and why she formed the opinion that the Student could not be appropriately educated or meaningfully participate in regular education English 10, English 11, math 10 or math 11 classes, even if additional modifications and accommodations were provided to him in the classes. (Tr. 2, pp. 212-213) In [Psychologist's] opinion, the February 3 IEP is appropriate and would allow the Student to make progress towards his annual goals. (Tr. 2, p. 209)

The Student's mother testified that she believed the District needed to try other approaches and examine more data before changing the Student's placement to a more restrictive environment. (Tr. 1, p. 55) She further testified that she viewed the District's proposal to provide more direct instruction to the Student in the special education classroom as the District segregating him because of his disability. (Tr. 1, p. 68) Based upon her testimony, it was evident that the Student's mother believed the District did not have sufficient data and did not consider what additional supports or accommodations could be provided to the Student before it proposed increasing the amount of instruction he would receive in the special education classroom. (Tr. 1, pp 68-69)

[Psychologist 1], Ph.D., L.P., a licensed psychologist and certified behavioral analyst, testified that he had reviewed the February 3, 2018 IEP and behavior intervention plan and "did not find that there was alignment with what [he] would expect with regard to data collected and informed decision-making in a systemic way." (Tr. 1, p. 37) He further testified that it was not clear if there was "ongoing systemic tailoring of [the Student's] supports through the school year" by the District. (Tr. 1, p. 38) [Psychologist 1] did not observe the Student in school, did not meet the Student and did not interview the Student's teachers or District staff who work with the Student.

Based upon the record as a whole, I find that the Student's mother failed to meet her burden of proof and present credible and persuasive evidence to show that the District's proposed IEP for the Student violated the Student's right to receive FAPE in the LRE. Neither her testimony or [Psychologist 1's] testimony convincingly showed that the District proposed increasing the Student's instruction time in the special education classroom without having sufficient data to support the change and without considering additional supports and accommodations for the Student.

The District had been utilizing numerous supports, modifications and supplemental aids for the Student in the regular education environment. The District's witnesses who worked with and taught the Student credibly testified that they did not believe the October 2017 IEP was appropriate to meet the Student's needs or to allow him to make appropriate progress towards his goals. All of District staff on the IEP team and the Student's father believe that the February 3, 2018 IEP is appropriate and that the Student needs the additional instruction in the special education setting to allow him to make progress and increase his skills. [Psychologist] also agreed that the proposed IEP is appropriate for the Student and that the Student's placement in regular

education language arts and math classes was not appropriate for him and did not allow him to make appropriate progress.

Because the Student could not be educated satisfactorily to meet his individual needs in regular education high school math, English and physical education classes, removing him from some regular education settings to increase his direct instruction in the special education classroom is appropriate to meet his needs and does not violate LRE requirements. Moreover, under the proposed IEP, the Student will still spend the majority of his school week in the regular education environment. Therefore, I find that the District's placement of the Student set forth in the February 3, 2018 IEP does not violate the Student's right to receive FAPE in the LRE.

Between October 11 and October 16, 2017, the revised [District 1] was in effect for the Student, pursuant to the agreement reached between the District and the Student's father when the Student transferred into the District. During those four school days, the Student's mother had decision making authority regarding the Student's education, and she has alleged that the temporary IEP violated the Student's right to receive FAPE in the LRE.

Under the temporary IEP, the Student received instruction in the special education setting for two out of four blocks per day, which equals 160 minutes per day. This was a significant increase in the amount of time he spent in the special education classroom, compared to the 54 minutes of special education services that he had received under the prior IEP in the [District 1]. I find that the IEP in effect for the Student from October 11 to October 16, 2017 did not provide the Student with FAPE in the LRE. However, there is no evidence on the record showing that the Student was denied meaningful educational benefit during those four days. There is no evidence on the record indicating that the Student suffered harm or needs compensatory education or services as the result of being educated in the special education classroom for two blocks per day during that time. DPI previously issued a decision requiring the District to take corrective action to ensure that it follows proper legal procedures and requirements when adopting or revising an IEP and placement for a transfer student. (Ex. 7) The temporary IEP is no longer in effect, and there is no meaningful relief that this forum can grant to the Student for the District violating his right to receive FAPE in the LRE from October 11 to October 16, 2017.

#### Prior Written Notice

As stated previously herein, school districts are required to provide written notice to the parents of a child with a disability a reasonable time before the public agency: (1) proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or (2) refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 CFR § 300.503 (a).

The Student's mother argued that the District did not provide her with proper prior written notice of its intent to implement the Student's revised IEP and placement on February 3, 2018. The mother's argument was unpersuasive, and she failed to meet her burden of proving

that she did not receive prior written notice of the February 3 IEP and placement as required by law.

It is undisputed that the Student's mother attended and participated in both IEP meetings on January 17 and January 30, 2018. It is also undisputed that she was aware that the October 2017 IEP listed an end date of February 2, 2018. She did not agree with the IEP team regarding the changes proposed in the February 2018 IEP. Because of the lack of consensus, the second IEP meeting was scheduled, and January 30, 2018 was the next date that all IEP team members were available.

The District provided the Student's mother with a copy of the IEP on February 1, 2018. Although it was only two days prior to the intended implementation date of the IEP, the circumstances that led to the IEP being finalized at that late date were apparent to the Student's mother. Moreover, the Student's mother filed a request for a due process hearing on February 2, 2018, which indicates that she was not prevented from and was fully capable of exercising her legal rights under the IDEA. In addition, the Student's mother presented no evidence showing that the Student's right to FAPE was violated or that he failed to receive meaningful educational benefit because his mother received written notice of the proposed IEP two days prior to its intended implementation date. The District continued to implement the October 2017 IEP for the Student, pursuant to the "stay put" provisions of the IDEA, and the February 3 IEP was not implemented. The District did not fail to provide the Student's mother with prior written notice of the February 3, 2018 IEP.

All of the arguments presented by the parties were carefully considered by the undersigned administrative law judge. Any arguments and evidence on the record that were not specifically mentioned were determined to not merit comment in the decision.

#### CONCLUSIONS OF LAW

1. From August 31, 2017 to October 11, 2017, the Student's mother lacked standing as a parent under the IDEA to file a due process hearing request related to the Student's IEP and placement and prior written notice during that time period. Consequently, issue 1 as it relates to the Student's placement from September 21 to October 11, 2017 must be dismissed, and the part of issue 3 that relates to the District's actions from September 21 to October 11, 2017 must be dismissed.
2. From October 11 to October 16, 2017, the District's placement of the Student violated the Student's right to receive a free, appropriate public education in the least restrictive environment. The temporary IEP and placement is no longer in effect, and there is no meaningful relief that this forum can grant to the Student for this four-day violation of the least restrictive environment provision of the IDEA.
3. The District's placement of the Student set forth in the individualized education program dated February 3, 2018, does not violate the Student's right to receive a free, appropriate public education in the least restrictive environment.

4. The District provided the Student's mother with written notice, as required by 34 CFR § 300.503, prior to implementing the Student's placement and individualized education program in February 2018.

ORDER

It is hereby ordered that the due process hearing request in this matter is dismissed.

Dated at Madison, Wisconsin on August 28, 2018.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705-5400  
Telephone: (608) 266-7709  
Fax: (608) 264-9885

By: \_\_\_\_\_  
Sally Pederson  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS**

**APPEAL TO COURT:** Within 45 days after the decision of the administrative law judge has been issued, either party may appeal the decision to the circuit court for the county in which the child resides under §115.80(7), Wis. Stats., or to federal district court pursuant to U.S.C. §1415 and 34 C.F.R. §300.512.

A copy of the appeal should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

**The Division will prepare and file the record with the court only upon receipt of a copy of the appeal. It is the responsibility of the appealing party to send a copy of the appeal to the Division of Hearings and Appeals. The record will be filed with the court within 30 days of the date the Division of Hearings and Appeals receives the appeal.**