

**THREE MEMBER DUE PROCESS HEARING PANEL  
EMPOWERED PURSUANT TO 162.961 R.S.MO.**

**HEARING DECISION**

**STUDENT'S NAME:**

**PARENTS' NAMES:**

**PARENTS' REPRESENTATIVE:**

**Mr. Stephen Walker  
Attorney at Law  
23245 Fairmount Blvd.  
Beachwood, Ohio 44122**

**LOCAL EDUCATION AGENCY (LEA):**

**West Platte County R-II School  
District  
1103 Washington  
Weston, MO 64098-1048**

**AGENCY'S REPRESENTATIVE:**

**Ms. Teri B. Goldman  
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36 Four Seasons Center, #136  
Chesterfield, MO 63017**

**HEARING DATES:**

**June 26, 27, 28 and 29;  
December 3, 4, 5, 6 and 7 of 2001;  
and January 7, 8 and 9 of 2002.**

**DATE OF REPORT:**

**February 28, 2002**

**HEARING OFFICERS:**

**Patrick O. Boyle, Chair  
Marilyn McClure and  
Jerry Wright**

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**ISSUE**

Parents disagree with the diagnostic conclusion reached by the IEP team under a three-year reevaluation made during January 2001 of a student receiving special education and related services from the LEA. The multi-disciplinary team proposed that the student be classified as mildly mentally retarded. Parents believe that the student should be classified as a child with autism or physically/other health impaired.

Parents further contend that students prior diagnosis under the language disordered criteria was incorrect and resulted in a failure by the LEA to identify the student's needs and a failure to provide a free appropriate public education for the school years 1999-2000 and 2000-2001.

## TIME LINE

The LEA filed a request for a due process hearing which was received by the Missouri Department of Elementary and Secondary Education (DESE) on January 30, 2001. This request sought a ruling that student's reevaluation of January 2001 was appropriate and, the LEA would not be required to pay for an independent evaluation of student. On March 2, 2001 the time for decision was extended to May 14, 2001 at the request of the LEA and without objection from the parents.

On March 5, 2001 the parents filed a request for a due process hearing on a proposed change of services dated February 28, 2001, which would have placed the student in a resource room for math instruction rather than continued instruction in the regular education class room. An order was entered consolidating the parent's request with the LEA request.

The time for decision was further extended to July 2, 2001 at the LEA request and without objection from the parents.

On May 8, 2001 the time for decision was extended to July 30, 2001 at the parents' request and without objection from the LEA.

By orders dated April 11 and May 8 the hearing was scheduled for June 26-29, 2001. On June 18, 2001 the parents mailed an amendment and supplement to their due process request and raised the issue that a free appropriate public education (FAPE) had not been provided to the student for the school years 1999-2000 and 2000-2001.

Hearings were held from June 26-29, 2001 on the LEA request.

On July 26, 2001 the time for decision was extended to January 31, 2002 at the request of the LEA. By orders entered on August 2 and October 16 hearings were originally set for December 3-14 and then reset for December 3-9. Hearings were held from December 3-9, 2001 and, by order of December 10 additional hearings were set for January 7-9, 2002. On December 10 the time for decision was extended to February 18, 2002 by consent of the parties.

Hearings were held on January 7-9, 2002 and the time for decision was extended to February 28, 2002 at the request of the LEA by order dated January 11, 2002.

Decision is timely rendered herein as of February 28, 2002.

## **FINDINGS OF FACT**

1. This matter involves the evaluation and education of student and is before the three-member due process hearing panel empowered pursuant to 20 U.S.C. Section 1415 and R.S.Mo. Section 162.961.

2. Petitioner L.E.A. initially brought this action on or about January 29, 2001 as the result of a request for an independent evaluation by parents. In response to that parental request, the LEA initiated this due process proceeding and raised as its sole issue whether the LEA's January 8, 2001 reevaluation of student was appropriate such that the LEA was not required to pay for the requested independent evaluation.

3. On or about March 20, 2001, parent initiated a due process proceeding to challenge the IEP team's determination that student should be placed in a special education setting for math instruction.

4. The LEA requested consolidation of the two matters. The two matters subsequently were consolidated. A hearing in the consolidated matter was set for June 26-29, 2001.

5. On or about June 18, 2001, Stephen Walker, attorney for the parents, filed Parents' Defense, Counterclaim and Supplementation of Issues. In that pleading, Mr. Walker raised the following as the parents' issues:

- (1) Whether the Lea's current and previous diagnosis of student were correct;
- (2) Whether the LEA conducted appropriate and sufficient evaluations to identify student's needs and whether the LEA thereafter adequately included that information in a properly drafted IEP;

- (3) Whether the LEA's IEP (date unidentified) appropriately set forth how student's disability affected student's academic program and her ability to participate in the general curriculum;
- (4) Whether the LEA failed to provide student with a free appropriate public education for the 1999-2000 and 2000-2001 school years. More specifically, whether the academic component of the program offered for those years was adequate and the services offered sufficient to meeting student's unique needs, whether the related services offered were sufficient to meet student's unique academic and functional needs, and whether the LEA failed to implement the IEP as written and modified the program without notice to, or participation with, the parents.
- (5) Whether certain notices of action provided by the LEA dated May 19, 2000 were sufficient.

In that pleading, the parents do not identify the relief requested except to be identified as the prevailing party and to be reimbursed for attorneys' fees and costs incurred in obtaining independent evaluations.

6. On or about June 20, 2001, Mr. Walker supplemented and/or amended the previously filed statement of issues. That supplementation did not modify or add to the issues previously identified. Neither of Mr. Walker's statement of issues indicates whether parents' issues regarding the change in placement for math instruction remained a viable issue.

7. Student is a student with disabilities for purposes of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Section 1400 et seq.

8. Student is now a -year-old (DOB: ) student who resides with her parents in the LEA.

9. On or about March 1992, the LEA initially evaluated student to determine her eligibility for special education services. At that time, student was referred due to delays in development and speech. As a result of the initial evaluation conducted by the LEA, student was determined to be eligible for early childhood special education based on significant delays in speech, language and cognitive ability. Parent signed agreement with that decision.

10. On or about March 24, 1994, the LEA indicated a need to reevaluate student because she was approaching kindergarten age and the LEA needed to determine a categorical diagnosis. The reevaluation showed that, at that time, student was functioning with a language age of 2 years, 4 months, a delay of 33 months. On the Vineland Adaptive Behavior Scales, student was assessed at a standard score of 69, a ranking in the second percentile. As a result of the evaluation that was conducted, the multidisciplinary team concluded that student met the eligibility criteria to be diagnosed as language disordered. The team also concluded that student would benefit from occupational therapy services due to her delays in motor skills. The parents did not legally challenge that diagnosis.

11. During the 1994-95 school year, student received special education services through the Early Childhood program. The parents did not legally challenge that program or placement.

12. On or about May 18, 1995, students' IEP team developed an IEP for the 1995-96 school year. At that time, student was placed in kindergarten. The IEP called for student to receive speech/language special education services for 930 minutes per week, occupational therapy for 45 minutes per week and regular education for 1125 minutes per week. The placement called for student to be mainstreamed in an afternoon kindergarten class. The parents did not legally challenge that program or placement.

13. On or about May 22, student's IEP team developed an IEP for the 1996-97 school year. That IEP called for student to receive speech/language therapy for 180 minutes per week and increased her time in regular education to 1900 minutes per week. The parents did not legally challenge that program or placement.

14. On or about April 1997, the LEA proposed a three-year reevaluation of student. As part of that reevaluation, the LEA administered the Adaptive Behavior Evaluation Scale on which student received a quotient of 76. The speech and language testing conducted showed that student remained significantly delayed in those areas. The LEA also administered the WISC-III as a measure of intelligence. On that test, student received a verbal IQ of 65, a performance IQ of 81, and a full scale IQ of 71. The LEA also administered the Leiter, a nonverbal measure of intelligence. Student received a full scale score of 92 on that instrument. At hearing the LEA's psychological examiner, testified that, based on his review of the 1997 Leiter protocol, the examiner at the time

may have used the Arthur Adaptations which would have inflated student's score. At that time, according to the examiner, the Arthur Adaptations would not have been appropriate in light of student's chronological age. Based on the results of all testing completed, the multidisciplinary team concluded that student continued to meet the criteria to be diagnosed as language disordered. At the conclusion of the meeting to review the evaluation information, parent signed that she was in agreement with the evaluation and diagnosis. The parents did not legally challenge that diagnosis at the time or within two years of that determination.

15. On or about May 28, 1997, student's IEP team met to prepare an IEP for the 1997-98 school year. That IEP calls for student to receive language therapy for 600 minutes per week and regular education for 1340 minutes per week. The IEP also calls for student to receive 50 minutes per week of occupational therapy. The parents did not legally challenge that program or placement.

16. On or about April 1, 1998, the LEA prepared a reevaluation plan to conduct further evaluations of student. On or about April 6, 1998, parent corresponded with the LEA to note concerns that she was having regarding student's education. In that correspondence, parent requested a full educational and psychological evaluation to assess student's problems in reading, written expression and attention. More specifically, parent request that student be tested for dyslexia and attention deficit disorder. The LEA agreed to conduct further testing at parent's request.

17. On or about April 25, 1998, parent corresponded with the LEA regarding the evaluation. In that letter, parent indicated that she did not believe that student had attention deficit disorder. Notably, parent wrote “The consensus of the testing, the staff, and my specialist at this meeting, is a severe language delay. I totally agree with this.”

18. On or about June 2, 1998, a multidisciplinary team reviewed the results the reevaluation requested by parent. As a result of the testing, the team concluded that student continued to meet the qualifications for services through the language program with additional services in the area of occupational therapy. In addition, the team concluded that student required additional support for reading issues. An addendum to the evaluation report was added in August 1998 to encompass additional academic testing. In October 1998, parent indicated her agreement to the addendum to that report. The parents did not legally challenge the 1998 diagnosis given to student and did not challenge that diagnosis within two years of that determination.

19. On or about June 25, 1998, student’s IEP team prepared an IEP for the summer of 1998. That extended school year IEP called for 240 minutes a week of tutoring in areas of concern.

20. On or about August 25, 1998, student’s IEP team met to prepare an IEP for the 1998-99 school year (student’s third grade year). As a result of that meeting, the team concluded that her placement should be changed and that her time in special education should be increased to 55% of her day. The parents did not legally challenge that change in placement.

21. On or about September 10, 1998, the LEA proposed to conduct an additional reevaluation of student at her parents' request.

22. On or about October 7, 1998, the LEA provided the parents with a notice of action in which the LEA refused the parents request for student to be provided after-school tutoring. The parents did not legally challenge this refusal.

23. On or about March 24, 1999, student's IEP team developed an IEP for the 1999-2000 school year (student's fourth grade year). The parents did not legally challenge that IEP within two years of its development.

24. Student's mother participated in the development of that IEP. That IEP calls for student to receive 810 minutes per week in special education resource instruction, 90 minutes per week in language therapy, 45 minutes per week in occupational therapy and 1200 minutes per week in regular education. The present level of the IEP notes that, in March 1999, student was in third grade and attended the regular classroom for social studies, P.E., music and class within a class (CWC) math. Based on testing completed in that same month, student appeared to be reading at the 2.3 grade level and performing math at the 3.3 grade level. The present level further notes that student's language skill had improved and her sentence length was now between six and eight words. In addition, the present level notes that student's expressive language skills had significantly improved and that she was now able to initiate and carry on a conversation. The present level notes that student's on-task time had improved and that her more appropriate

behaviors had resulted in increased inclusion. With regard to reading, the present level notes that student's ability to sound out one syllable words with short and long vowels at her instructional level was 95%, but that she continued to have difficulty with blends.

25. Student's IEP calls for student to use a calculator when appropriate in math and to use a computer with spell check for papers and assignments when appropriate. The IEP also includes the following modifications or accommodations: modified or reduced assignments, modified or reduced testing, use of a scribe to record answers when necessary, use of manipulatives, charts or calculators, and receipt of a copy of notes when necessary. Student's IEP contains goals and objectives in the areas of written expression, reading decoding; language and semantics; handwriting; study skills; school-related behaviors (homework); sensory integration and motor planning. The parents did not legally challenge the March 1999 IEP until Mr. Walker's statement of issues dated June 2001.

26. On or about May 26, 1999, parent initiated a due process proceeding against the LEA. The sole issue raised in that matter was student's need for extended school year during the summer of 1999. *Id.* Notably, parent did not otherwise challenge the March 1999 IEP nor did she challenge student's diagnosis. On or about November 22, 1999, parent withdrew the due process request.

27. On or about August 1999, student's fourth grade special education teacher, administered parts of the Brigance Inventory of Basic Skills as an informal reading screening to begin the 1999-2000 school year. The teacher previously had administered

the test to student in March 1999. The results of the August 1999 administration showed that student was at the 2.5 grade level in word recognition, at the 2.8 grade level in basic sight vocabulary, and at the 1.8 grade level with regard to discretion words. Id. More importantly, the August 1999 administration showed that student had progressed from the 1.6 grade level to the 2.5 grade level from September 1998 to August 1999 in the area of word recognition, from 1.7 to 2.8 in the area of basic sight vocabulary during the same time, and from 1.1 to 1.8 in the area of direction words.

28. On or about December, 1999, parent indicated to the LEA that she was having student tested by the staff of the Kansas University Medical Center and requested that student's teachers write a report stating her classroom behavior, academic performance, learning style and remediation strategies attempted. On or about December 20, 1999, the District's Special Education Director, "Director", corresponded with parent to indicate the LEA's willingness to participate in that assessment. Significantly, in that letter, the director indicated that the KU staff could schedule an appointment to conduct interviews with student's teachers. The director testified that such interviews were never requested or conducted, and that, at that time, she was not aware of the purpose of the testing.

29. On or about January 7, 2000, after receiving a release of information giving the LEA permission to communicate with KU, the LEA provided a one page summary of student's classroom behavior and other information as requested by parent. Notably,

that information was not utilized by the KU staff in writing its report regarding student and, apparently was not reviewed by the KU staff that assessed student and reached conclusions regarding her purported educational needs.

30. On or about January 10, 2000, the director informed parent that, per a request from the KU Medical Center, she was sending a copy of student's current IEP and Diagnostic Summary. A review of the KU report indicates that KU staff relied on the cognitive testing conducted by the LEA as reported in that Diagnostic Summary. KU did not conduct its own cognitive testing.

31. On or about January 19, 2000, parent corresponded with the director. In that letter, parent indicates that she is expecting to receive testing results from the Kansas City Regional Centers. Parent did not share the results of the testing conducted by the Kansas City Regional Center with the LEA until July 31, 2001. The psychological assessment performed by the Regional Center on November 29, 1999, was conducted to determine student's eligibility for services from that agency. Although the report provided by parent to the LEA does not include the signature page or the name of the psychologist who performed the assessment, the parent's advocate, testified at hearing that psychologist Michael Buchanan conducted the assessment. The report generated by the Regional Center indicates the psychologist's behavioral observations. Notably, the psychologist indicated that student made "excellent eye contact and displayed joint attention skills. She often smiled responsively at appropriate times . . . She appeared to be reasonably relaxed and to put forth an adequate level of effort." The psychologist also

administered the Vineland Adaptive Behavior Scales. Parent served as the informant. On that test, student received a composite score of 48. As noted by the psychologist, “to diagnose mental retardation, deficits must be found on both intellectual test results and adaptive skills, and student displays deficits in both areas.”

32. Because parent expressed some concerns with previous findings that student had some sensory integration deficits, the psychologist administered the Childhood Autism Rating Scale with parent as informant. As the result of the information provided by parent, the psychologist noted that “student initiates affection with family members, and she interacts well with other children on a one-to-one basis or in a small group . . . She tends to use some phrases over and over, but this could be the result of verbal skills deficits.” On the CARS, student received a total score of 21.5. As noted by the psychologist, that score “falls in the non-autistic range, and it is well below the minimum score required for a mild degree of autism. No stereotyped behavior or restricted pattern of interests were noted.” Based on the testing conducted and reviewed, the psychologist made a diagnosis of mild mental retardation and, as a result, qualified student as eligible for services from the Missouri Department of Mental Health. Importantly, the psychologist recommended that parent share this evaluation with the LEA. Although the LEA was made aware of the evaluation at an IEP meeting, the parent’s advocate indicated to the IEP team at that time that parent would not share the report or the results with the team because parent determined the results to be invalid.

33. The Panel expresses its concern that parent refused to provide this relevant information to the team at the time that it was first made available to her.

34. On or about January 27, 2000, the LEA proposed to conduct additional evaluation of student at parent's request. Parent requested adaptive behavior testing and the LEA accommodated that request by administering the Adaptive Behavior Evaluation Scale ("ABES"). Three of student's teachers rated her with respect to adaptive behavior. Student's scores ranges from 67-72.

35. On or about March 1, 2000, the LEA assessed student's sensory needs at parent's request. LEA's contracted occupational therapist had parent complete the Sensory Profile to assess this area.

36. On or about March 7, 2000, the University of Kansas Medical Center conducted a psychological evaluation of student. The examiners were R. Matthew Reese, Ph.D. and Linda S. Heitzman-Powell, MPH. Dr. Reese testified at hearing via telephone. During his testimony, Dr. Reese acknowledged that LEA personnel had no input into the evaluation that was conducted. However, Dr. Reese indicated that the KU staff typically does seek input from school staff for the type of evaluation that was conducted on student. Such input was not sought with regard to student because parent did not grant permission for that to occur.

37. KU administered three instruments: the Autism Diagnostic Observation Schedule-Generic (ADOS-G); the Autism Diagnostic Interview (ADI), and the Behavior Assessment System for Children (BASC). As noted supra, KU relied on the LEA's

previous cognitive testing and, in particular, on the Leiter test scores. At hearing, Dr. Reese indicated that the administration of the ADOS occurred in a conference room at the KU Medical Center. He described the test as a package of materials that was administered to student by Ms. Heitzman-Powell in a contrived and clinical setting. The various test materials were presented to student to determine if certain behaviors could be elicited in that setting. While M. Heitzman-Powell administered the test, Dr. Reese observed through a one-way window, while at the same time interviewing parent using the ADI. The entire process took approximately three hours. LEA personnel had no input into any of the test instruments administered by KU and KU staff did not observe student in the school setting, not did they interview or converse with student's teachers.

38. The psychological evaluation report prepared by Dr. Reese generally indicates that student exhibits symptoms of and meets the diagnostic criteria for autism as indicated only by the measures used. During cross-examination when Dr. Reese was asked to give detailed explanations of what he observed student doing during the assessment that led to those conclusions, he found it necessary to refer to the notes that were taken during the assessment as the evaluation report did not contain such information.

39. In the impressions section of the report, Dr. Reese notes that student demonstrates characteristics that are consistent with a diagnosis of autism based, in part, on a split between her verbal and nonverbal cognitive abilities. The evaluation report

further indicates that the individuals involved in providing student's educational program should be trained in "high functioning Autism/Asperger's Disorder." At hearing, Dr. Reese conceded that he would not diagnose student as having Asperger's Disorder and that his report could be misleading in that regard.

40. The Panel finds that the KU report and Dr. Reese's testimony are not credible with respect to 's educational diagnosis under the IDEA. First, the KU evaluation and report showed that there was no input from school personnel and, thus, the Panel finds that the information gleaned is not particularly relevant to a school setting. Second, as Dr. Reese acknowledged, the testing conducted at KU was contrived and did not assess student as she presents on a typical day in the school setting. Third, the testing performed at KU merely represents student as she presented for approximately three hours in a clinical setting. Fourth, KU staff tested in only one area (autism), to the exclusion of all others. The IDEA very specifically requires that testing be conducted in all areas of suspected disability in determining whether a student meets eligibility criteria for an IDEA diagnosis. Indeed, it appears to the Panel that the KU staff began with a preconceived idea that student would meet the DSM-IV criteria for autism and specifically was looking for symptoms of that disorder. Such a predetermination is impermissible under the IDEA. For these reasons, the Panel finds that the KU testing is not dispositive and should be discounted in determining student's educational diagnosis.

41. On or about March 1, 2000, the LEA sent the parents written notification from an IEP conference for March 9, 2000 to review and revise student's IEP, to review current evaluation information and to discuss ESY programming. On or about March 13, 2000, parent agreed to extend the deadline for student's IEP to April 21, 2000 because of her inability to meet on March 9.

42. On or about April 13, 2000, the LEA provided the parents with written notification of an IEP meeting for April 19, 2000. Subsequently, parent requested that the meeting be postponed because her advocate was unable to attend on April 19. At the same time, parent enclosed a copy of the KU psychological evaluation for the District to review.

43. On or about April 19, 2000, the LEA provided the parents with written notification of an IEP meeting for May 5, 2000. On or about April 25, 2000, parent corresponded with the director to inform her that she was unable to attend the scheduled meeting. On or about April 27, 2000, the director corresponded with parent to inform her that the LEA would hold the IEP meeting on May 5 and further informed her that the LEA was changing the time of the meeting to accommodate her work schedule. On or about April 28, 2000, the LEA provided a second written notification for the IEP meeting scheduled for May 5. On or about May 4, 2000, the LEA provided parent with written notification to postpone the scheduled meeting to May 16, 2000. On or about May 8, 2000, the LEA provided a second written notification for the May 16 meeting.

44. On or about May 15, 2000, parent corresponded with the LEA to acknowledge the May 16 meeting and provided a copy of an evaluation conducted by Collier Therapy Consultants on April 28, 2000.

45. The Collier Therapy report indicates that student was diagnosed with autism in March 2000 and shows that the therapist administered tests with respect to visual perceptual skills, school functioning, visual-motor integration and sensory. Significantly, the report indicates that the school functioning assessment is “a questionnaire given to school staff who work with the individual receiving services.” However, at hearing, Terry Collier testified that school personnel did not complete the assessment nor did school staff have any input into the Collier Therapy evaluation or report. The sensory profile given utilized only parent as an informant and no school personnel had input into the area of the assessment. Although Ms. Collier testified that she believed that student was autistic, she acknowledged that she was not qualified to make that diagnosis. Most significantly, Ms. Collier testified that she could confirm autism with student within 30 minutes (and perhaps 5 minutes) of meeting her. The Panel finds that Ms. Collier’s testimony regarding student’s educational diagnosis is not credible. First, she acknowledged that she is not qualified to make that diagnosis. Second, the Panel emphatically disagrees that a diagnosis can and should be made in as little as 30 minutes. Finally, the Panel finds troubling the fact that Ms. Collier began with a preconceived diagnosis of autism and completely excluded information from school personnel in her evaluation.

46. Collier Therapy personnel prepared goals and objectives for student in the area of occupational therapy for a home-based program. The goals and objective included catching a ball, putting together puzzles, and initiating conversation with the therapist for socialization purposes. The Panel finds that the occupational therapy goals and objectives included in the Collier program are remarkably similar and those included in the LEA's IEPs and further finds that the Collier Therapy goals and objectives support a finding that the LEA's occupational therapy goals and objectives for student were appropriate.

47. Christy Boss, a then-employee of Collier Therapy, conducted an observation of student in the school environment. However, the Panel finds that Ms. Boss's observation report did not objectively describe what student did on that date, but included a great deal of subjective interpretation. Thus, the Panel concludes that Ms. Boss's observations were not credible with respect to student in the school environment.

48. On or about May 16, 2000, student's IEP team met and concluded that she did not meet the criteria for extended school year. This determination was not challenged by the parents in this due process proceeding.

49. On or about May 17, 2000, the LEA provided the parents with written notification of an IEP meeting for May 18 to conclude the meeting begun on May 16.

50. On or about May 16 and 18, 2000, student's IEP team met and prepared an IEP for the 2000-01 school year (fifth grade). Parent and her advocates, attended and participated in the meeting. The IEP calls for student to receive 560 minutes per week of

special education resource instruction, 90 minutes per week of language therapy, 45 minutes per week of occupational therapy and 1405 minutes per week of regular education. The extensive present level notes that student was being mainstreamed for social studies, handwriting, art, PE, library, computer, lunch and recess and was receiving class within a class support for science, English and math. The present level also notes that the team considered the KU psychological evaluation at the May IEP meeting and further notes that the impressions of the KU staff were that student demonstrated characteristics consistent with a diagnosis of autism. The present level notes student's most recent IQ test showed a full scale IQ of 71, in the borderline range. The present level also includes the results of the most recently administered Woodcock Reading Mastery test in which student performed below her criterion level on numerous subtests. As a result of the testing reviewed, the team concluded that student met the eligibility criteria for learning disabilities in the area of reading.

51. The present level of the IEP also includes student's scores in the various language tests administered by the LEA and also includes the test results from the ABES conducted in February 2000. The present level further indicates that student's weakness on the ABES was in the area of task-related behaviors. The present level also indicates that student sometimes needs redirection to follow through with a task, has appropriate social skills when addressing familiar adults, and initiates conversations with peers in small group settings. The present level also notes that student learns best with a multi-

modal approach and that auditory learning alone in her weakness. The PLP also indicates that student needs instructions repeated or restated for clearer understanding, that language needs to be simplified and that student has difficulty applying skills learned in isolation. The PLP also indicates difficulties in sequencing and copying, moderate visual perceptual deficits that may affect handwriting, organizational skills and the ability to retrieve information from the blackboard. The PLP indicates that student responds well to praise and encouragement. In the PLP, parent is noted as reporting that student struggles socially, but student's teachers reported appropriate social interactions. Because of parents' concerns in this area, the PLP notes that the LEA initiated a lunch buddy program to broaden her circle of friends.

52. The present level reports student's reading scores from the Brigance given in August 1999 and March 2000. The testing showed that student was able to produce all beginning consonant sounds and that, when reading orally, student did not always generalize skills when decoding. She was able to answer literal comprehension questions, but interpretive questions were more difficult. At that time, the PLP shows that student was working in a third grade reader, and was able to do workbook pages at that level independently with 80% accuracy or above. The PLP further notes that student could write sentences of various types with a length of four words. In math, while doing multiplication, student used charts and was able to independently multiply three-digit numbers of one-digit. However, the PLP also notes that student needed assistance in

some math areas. She was having a difficult time with organizational skills and, therefore, her teachers had added visual cues to assist her. The PLP notes that writing skills continued to be an area of concern. In language, she was using complete sentences, could state the months and name some holidays. However, student needed assistance with content vocabulary and had difficulty with idioms. The present level of this IEP contains numerous parental concerns as expressed by parent.

53. The Panel finds that the present level of performance of the May 2000 IEP fully complies with IDEA's requirements.

54. The May 2000 IEP contains measurable goals and benchmarks in the following areas: demonstrating understanding of semantic concepts including stating meanings of multiple meaning words; describing objects/actions in sentence form and retelling stories in correct sequence; using pragmatic language skills by initiating and carrying on conversation with someone other than close friends or teachers; joining in activities and participating in those for the duration; appropriately determining the feelings of others; verbalizing ways to greet; demonstrating improved handwriting and motor planning skills; increasing sensory awareness; improving visual perceptual skills; completing daily assignment book independently, improving organizational skills; improving peer socialization skill; and increasing reading skills.

55. The May 2000 IEP notes that student is not eligible for extended school year and indicates numerous accommodations that are in place for student during group standardized testing situations. The IEP also contains the following modifications and

accommodations: modified or reduced assignments and testing, a scribe to record answers, the use of manipulatives, charts, a calculator, a tape record and a computer as appropriate, the provision of copies of notes and modified or reduced homework assignments.

56. On or about May 19, 2000, the District provided the parents with a notice of action in which the LEA refused to change student's diagnosis to autism due to student's failure to meet the criteria established by Missouri for that diagnosis. The notice indicates that, in making this decision, the team reviewed the results of the KU psychological evaluation and the Collier Therapy report.

57. On that same date, the LEA provided the parents with notices of action refusing increased occupational therapy minutes, a personal aide, and a change in diagnosis to physically/other health impaired.

58. The Panel notes that, in Mr. Walkers' amended statement of issues, the parents purport to challenge the various notices of action provided in May 2000. However, the Panel notes that the parents failed to provide any evidence that the notices were legally insufficient or inadequate.

59. Student's special education teacher testified extensively at hearing with regard to implementation of student's IEP during the 1999-2000 school year. The Panel finds the teacher's testimony with regard to student's education needs and progress during the 1999-2000 school year to be credible.

60. Student's speech/language therapist during the 1999-2000 school year testified extensively regarding student's progress during the school year. The Panel also finds that testimony to be credible.

61. During the 1999-2000 school year, student received A's, B's and C's in her academic courses. In addition, she showed progress on each of her IEP goals and objectives and met many of the objectives.

62. On or about July 1, 2000, parent corresponded with the director and requested changes to the IEP developed in May 2000. On or about August 7, 2000, the director responded and indicated that those changes could only be made through an IEP meeting. In response, the director scheduled an IEP meeting for August 30, 2000 when LEA staff were again under contract.

63. On or about August 30, 2000, student's IEP team once again reconvened for the purpose of considering the changes requested by parent in her July 1 letter. The revised IEP developed on August 30 indicates that the team agreed to almost every change requested by parent. At hearing, parent conceded that those changes were made by the team in August. Parent attended and participated in the August meeting with her advocates. With the exception of the changes requested by parent, the IEP was not changed in any substantive way.

64. On or about September 28, 2000, the District provided the parents with a written notification of an IEP conference for October 5, 2000.

65. On or about October 4, 2000, Matt Reese prepared correspondence to parent indicating that, in his opinion, student met the DSM-IV criteria for autism and the educational definition for autism. His letter does not indicate the basis for these conclusions and, therefore, the Panel finds his correspondence not to be credible with regard to diagnosis.

66. On or about October 5, 2000, student's IEP team met to review her IEP. Parent and her advocates were present and participated. No changes were made to the IEP.

67. On or about October 5, 2000, the LEA provided parent with two notices of action. Those notices indicated the LEA's intent to reevaluate student using the CARS. The LEA also proposed that student's time in special education be minimally changed.

68. On or about November 8, 2000, the LEA provided the parents with a written notification for an IEP conference for November 16.

69. On or about November 13, 2000, parent corresponded with the director regarding the administration of the CARS. In that correspondence, parent indicates her enthusiasm over the LEA's retention of an autism consultant, and requested that the consultant remain involved even after the testing was complete.

70. On or about November 15, 2000, the LEA proposed a three-year reevaluation of student. The proposed reevaluation also was based on parent's request that student's educational diagnosis be changed to autism. On or about November 16, 2000, the team developed an evaluation plan.

71. On or about November 29, 2000, parent corresponded with the director to indicate that she did not want the LEA to administer the WISC-III test of intelligence to student as part of the reevaluation and to which she previously had consented. She further indicated that she would prefer that a nonverbal intelligence test such as the Leiter be given. On or about November 30 parent, after speaking with her autism specialist, decided to reinstate her consent for the WISC-III.

72. On or about December 22, 2000, the LEA provided the parent with written notification of an IEP conference for January 11, 2001. On or about January 3, 2001, that date was changed to January 8, 2001.

73. Student's IEP team met on January 8, 2001, to review the results of her evaluation. Parent and her advocate attended and participated. LEA's autism consultant also attended. The LEA prepared a diagnostic summary to reflect the results of the evaluation. The diagnostic summary reflects that the LEA administered the WISC-III and the Leiter, a nonverbal intelligence test. On the WISC-III, student received a verbal IQ of 59, a performance IQ of 68 and a full scale IQ of 60. On the Leiter, she received and IQ of 69. The summary also reflects that student had adaptive behaviors scores on a February 2000 administration of the ABES ranging from 67-72 and ranging from 79-88 on a December 200 administration. Various witnesses testified that the December 2000 scores reflect the IEP supports in place for student as well as the progress she had made with regard to her adaptive skills. On the Woodcock-Johnson, an academic achievement

test, student received standard scores ranging from 48-88. However, with the exception of her math scores, student's scores ranged from 48-74. On the Woodcock Reading Mastery test, student received standard scores ranging from 50-80, with a total reading score of 58. On the Key-Math revised, she received standard scores ranging from 55-66, with a total score of 55. At hearing, various witnesses testified that the Woodcock Reading Mastery and Key-Math tests assess on a more indepth basis that does the Woodcock-Johnson and more appropriate diagnostic tools for students. On the CARS, student's teachers rated her from total scores of 22-27, all within the nonautistic range. In contrast, parent rated her at 35, within the mildly moderately autistic range. As a result of all the testing conducted, the multidisciplinary team concluded student met the criteria to be classified as mildly mentally retarded. Parent signed her disagreement with the diagnosis.

74. On or about January 8, 2001, the LEA provided the parents with a written notice of action changing student's diagnosis from language disordered to mental retardation.

75. On or about January 16, 2001, parent corresponded with the director and indicated her disagreement with the change and requested an outside evaluation. On or about January 19, 2001, the director responded to parents' letter, indicated that the LEA was treating her request as one for an independent evaluation and provided a copy of the LEA's independent evaluation policy.

76. On or about January 29, 2001, the LEA initiated a due process proceeding with regard to the parents' request for an independent evaluation.

77. On or about January 31, 2001, the LEA provided the parents with written notification of an IEP conference for February 6, 2001. On or about February 6, 2001, student's IEP team met and prepared an IEP based on the results of the January 8 diagnostic summary. However, that IEP indicates that it cannot be implemented due to the IDEA's stay-put provision. Parent and her advocate attended and participated. The IEP contains goals and objectives in reading, math skills, visual perceptual skills, sensory awareness, organizational skills, peer socialization, and semantic language concepts. The IEP calls for student to receive 540 minutes of resource instruction, 390 minutes per week of CWC instruction, and 45 minutes and 90 minutes respectively of occupational and language therapy.

78. On or about February 28, 2001, the LEA provided the parents with a written notice of action proposing a change in student's placement by increasing her time in special education for math. That decision was supported by the testimony of student's math teacher for the 2000-01 school year. As the teacher noted, student was not able to grasp the math concepts being taught in regular education due to cognitive limitations and the addition of a paraprofessional or CWC class would not have provided the necessary support. Thus, the teacher's conclusion that student needed to receive math instruction in a special education room.

79. On or about March 2, 2001, the parent initiated a due process proceeding to challenge the IEP team's decision to change student's placement for math instruction to a special education setting. Parent did not challenge student's diagnosis nor any other aspects of student's educational programs. On or about April 6, 2001, the two matters were consolidated.

80. During the 2000-01 school year, student made progress with regard to her IEP goals and objectives and received average or above average grades in her courses.

The testimony of teachers supports the conclusion that student's IEPs were fully implemented (with the exception of the changed math placement due to stay-put) during the 2000-01 school year and that student received meaningful educational benefit during that school year.

81. On or about July 31, 2001, parent provided the LEA with a copy of the Kansas City Regional Center's evaluation indicating that student met criteria to be diagnosed as mildly mentally retarded and did not meet criteria to be diagnosed as autistic.

82. At hearing, the parents presented reports from Dr. Culver and Dr. Ellerbeck. The Panel finds that those reports were never presented to student's IEP team for consideration with respect to her educational diagnosis and, therefore, are not relevant to the Panel's determination.

83. The Panel also finds that Dr. Battisti's evaluation and report were not presented to student's IEP team at the time that the team determined her educational diagnosis in January 2001 and, thus, Dr. Battisti's conclusions also are not relevant on this matter.

## DECISION AND RATIONALE

### **I. The LEA's 2001 Reevaluation Was Appropriate and Parents' Therefore, Are Not Entitled To An Independent Evaluation At Public Expense.**

The IDEA requires each school district to “ensure that a full and individual evaluation is conducted for each child being considered for special education and related services” and that such an evaluation be conducted “before the initial provision of special education and related services.” See 34 C.F.R. Section 300.320(a), 300.531. In addition, at least once every three years, a school district must reevaluate each child with a disability, if warranted by conditions. See 34 C.F.R. Section 300.536. The IDEA and the Missouri State Plan for Part B of the IDEA contain extensive provisions describing how the evaluation process should be carried out. See 34 C.F.R. Section 300.530-543; State Plan at 61-65.

Included among the IDEA's extensive procedural safeguards is a provision that allows the parents of a child with a disability to request an independent evaluation (“IEE”) at public expense if the parent disagrees with an evaluation obtained by a school district. See 34 C.F.R. Section 300.502. When a school district is presented with a parent request for an IEE at public expense, the district may either pay for the IEE as requested, or initiate a due process proceeding to demonstrate that its evaluation is appropriate. See 34 C.F.R. Section 300.502(b)(2). If a district initiates a due process proceeding and prevails, the parent may obtain a independent evaluation, but not at public expense. See 34 C.F.R. Section 300.502(b)(3).

When assessing the adequacy of a district's evaluation, the Hearing Panel need only determine whether that evaluation meets the criteria set forth by the IDEA. This inquiry should focus primarily on procedural compliance, rather than delve into the substance of the evaluation itself. Specifically, the IDEA requires that: (1) The evaluation must be conducted by qualified persons; (2) the testing and assessment materials and procedures must be selected and administered so as not to be racially, culturally, or sexually discriminatory, and should be provided and administered in the student's primary language or other mode of communications; (3) any standardized tests used must have been validated for the specific purpose for which they are used; (4) testing must be administered by trained and knowledgeable personnel in accordance with any instructions provided by the procedure of the tests; (5) evaluation materials must be tailored to assess specific areas of educational need, rather than merely provide a single general intelligence quotient; (6) tests must be selected and administered so as to ensure that the results will accurately reflect the aptitude or achievement level of a child with impaired sensory, manual, or speaking skills; (7) no single procedure may be used as the sole criterion for determining whether a child is disabled, or for determining an appropriate educational program for the child; (8) the child must be assessed in all areas related to the suspected disability; (9) the evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs; (10) the evaluator must use technically sound instruments that may assess the relative contribution

of cognitive and behavioral factors, in addition to physical or developmental factors; (11) the evaluator must use assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child. See 34 C.F.R. Section 300.532.

The evidence in this case demonstrates that the LEA's reevaluation of student satisfies the criteria set forth by the IDEA. Thus, the parents are not entitled to an IEE at public expense because the LEA's reevaluation was appropriate. In November 2000, student's IEP team met to discuss her reevaluation and develop an evaluation plan. Parent and her advocates participated in that meeting. The comprehensive reevaluation that resulted from the meeting included testing and observation in the following areas:

- Motor – sensory issues were assessed by the LEA's occupational therapist using a sensory profile; visual motor integration and perception were assessed by the occupational therapist using the Developmental Test of Visual-Motor Integration, the Bruininks-Oseretsky Test of Visual Motor Proficiency and the Motor Free Visual Perception Test.
- Cognitive – the Wechsler Intelligence Scale for Children-III and the Leiter International Performance Scale were administered by the school psychological examiner.
- Adaptive Behavior – the Adaptive Behavior Evaluation Scales were administered by interviewing a regular education teacher; the District's speech/language therapist; and student's special education teacher, and

were readministered in December 2000 through assessment of six additional teachers and therapists serving student.

- Academic Achievement – the Woodcock-Johnson Psycho-educational Battery-Revised, Woodcock Reading Mastery Test-Revised, Key Math-Revised, were administered to student.
- Speech/Language – the LEA’s speech/language pathologist administered the Expressive One-Word Picture Vocabulary Test (Revised), the Receptive One-Word Picture Vocabulary Test, the Oral and Written Language Scale, the Language Processing Test, and the Test of Auditory Reasoning and Processing Skills.
- Social/Emotional/Behavioral – the Behavior Evaluation Scales – 2 and Bark’s Behavior Rating Scale were completed by six teachers and student’s mother.
- Other – the Childhood Autism Rating Scales were completed by seven teachers, the student’s mother, and the LEA’s outside autism consultant, observed student on three occasions.

The evidence shows that the LEA’s reevaluation was sufficiently comprehensive to identify all of student’s special education and related services needs and included information provided by the parents. See 34 C.F.R. Section 300.532(b), (f), (g) and (h). The assessment tools used were technically sound and all testing was conducted by

trained and knowledgeable personnel according to appropriate instructions. See 34 C.F.R. Section 300.532(c) and (I) Assessments that were not conducted under standard conditions contained a description of the extent to which they varied from standard conditions. See 34 C.F.R. Section 300.532(c)(2). The tests used also were selected and administered so as to accurately reflect student's aptitude, abilities and skills. See 34 C.F.R. Section 300.532(e). The evidence showed that the LEA's comprehensive reevaluation satisfied the IDEA's evaluation requirements. After the testing and observations were completed, student's IEP team met to discuss the results, determine continued eligibility and diagnosis, and prepare a diagnostic Summary. The parents fully participated in the process. The LEA appropriately considered information that the parents provided and responded to issues and concerns that they raised. Because the LEA's reevaluation is appropriate, the parents are not entitled to an IEE at public expense.

As an advisory to the parties the panel notes that 34 CFR 300.536 and Section III of the Missouri plan require that an IEP of each child with a disability be reviewed annually and, that a reevaluation of each child, in accordance with 34 CFR 300.532 - 300.535, be conducted if the parent requests a reevaluation. This student's needs appear to be changing and, her progress under her IEP should be closely monitored.

**II. The L.E.A. Provided Student With a Free Appropriate Public Education At All Relevant Times.**

Whether or not student's diagnosis should include autism, is of little practical consequence because a child's diagnosis does not dictate the special education services that are to be provided. As noted in the federal regulations, "the services and placement needed by each child with a disability to receive FAPE must be based on the child's unique needs and not the child's disability." 34 C.F.R. Section 300.300(a)(3)(ii) There are no ramifications of the diagnosis of autism that are not already addressed within student's IEP.

The Key inquiry in determining whether a district is providing FAPE is to assess "whether a proposed IEP is adequate and appropriate for a particular child at a given point in time." Burlington v. Dep't of Educ., 736 F.2d 773, 788 (1<sup>st</sup> Cir. 1984), *aff'd*, 471 U.S. 359 (1985). As stated by one court:

The IDEA does not promise perfect solutions to the Vexing problems posed by the existence of learning disabilities in children and adolescents. The Act seems more modest goals; it emphasizes an appropriate, rather than an ideal education; it requires an adequate, rather than an optimal, IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred needs not reach the highest attainable level or even the level needed to maximize the child's potential.

Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1<sup>st</sup> Cir. 1993).

Thus, the determination of whether an IEP is appropriate and reasonably calculated to confer an educational benefit must be measured from the time it was offered

to the student. Fuhrmann v. East Hanover Bd. Of Educ., 993 F.2d 1031, 1035 (3d Cir. 1993). As noted by the Fuhrmann court, “[n]either the statute nor reason countenance ‘Monday Morning Quarterbacking’ in evaluating the appropriateness of a child’s placement.” 993 F.2d a 1040.

Parents’ arguments that the IEPs failed to include a sufficiently specific present level of performance or goals and objectives is without merit. The IDEA and the Missouri State Plan both require IEPs to contain a “statement of the present levels of educational performance” and “a statement of annual goals, including short-term instructional objectives, as well as appropriate objective criteria and evaluation procedures and schedules for determining, on a t least an annual basis, whether instructional objectives are being achieved.” 20 U.S.C. Section 1401(20). The federal regulations in effect at the relevant time provide no more specific detail regarding the content of such requirements. Clearly, the relevant IEPs in this case complied with the statute, the Missouri State Plan and the relevant federal regulations.

However, even assuming that the present level of performance was not sufficiently detailed (an incorrect assumption), student still was offered a FAPE pursuant to that IEP. See Clarion-Goldfield Comm. Sch. Dist., 22 IDELR 267 (SEA Iowa Oct. 18, 1994) (finding that IEP contained legally sufficient statement of present level of educational performance and complied with the regulations because it indicated strengths and weaknesses and, although more information could have been included, it referred to

the primary areas of the student's goals); Philadelphia Sch. Dist., 21 IDELR 1193 (SEA Oct. 1, 1994) (denying parents' request for private school reimbursement and concluding that lack of specificity regarding certain aspects of student's IEP did not render that IEP inappropriate).

The same holds true for the goals and objectives/benchmarks contained in the relevant IEPs. More specifically, Question 37 of Appendix C to 34 C.F.R. Pt. 300 (the IDEA federal regulations in effect prior to May 1999) addresses goals and short-term instructional objectives and specifically notes that the "goals and objectives in the IEP are not intended to be as specific as the goals and objectives that are normally found in daily, weekly, or monthly instructional plans." Rather, as noted in Question 38, "the annual goals in the IEP are statements that describe what a child with a disability can reasonably be expected to accomplish within a twelve month period in the child's special education program." In light of this legal guidance and the evidence presented, it is clear that the relevant IEPs comply with the IDEA, the Missouri State Plan and this informal guidance.

The evidence at hearing conclusively demonstrates that each of student's IEPs has provided FAPE. Each IEP contains the requisite components required by the IDEA and the Missouri State Plan. Further, each IEP contains goals and objectives/benchmarks that address each of student's disability related needs. Most significantly, student's mother indicated agreement with the goals and objectives and the programming and placement decisions provided in each of the IEP's. Moreover, the LEA conclusively has established FAPE in this proceeding by virtue of student's passing grades in her regular education

courses as well as the progress reports that show progress and/or mastery of her IEP goals and objectives. Interestingly, the parents presented no evidence to contradict such progress. Thus, not only has the LEA established the student's IEPs were reasonably calculated to provide FAPE, the undisputed evidence shows that student received educational benefit during the time she has been served by the LEA.

Finally, the Panel concludes that, although Mr. Walker's statement of issues indicates challenges to the various related services provided to student, the parents failed to provide any evidence to support that the related services contained in the relevant IEPs were not reasonably calculated to allow student to benefit from her special education.

As an advisory to the parties, the panel believes that the student's education will be maximized if the parents and the LEA act collaboratively rather than as adversaries. The LEA should attempt to communicate clearly to the parents what the student's present level of performance is and, how progress towards IEP goals will be measured. Further, the panel notes that the Missouri State Plan permits mediation in the absence of a due process request, Part V, Mediation C. Such mediation could be undertaken with the consent of all parties.

FAPE has been evaluated to date on the basis of the Federal standard set forth in Bd of Education of Hendrick Hudson Cent. School Dist v. Rowley, 458 U.S. 176, 102 S Ct 3034, 73 L Ed. 2d 690 (1982). A question now exists as to whether or not Missouri has a higher standard for FAPE under the terms of 162.670 R.S.Mo. Many issues remain unresolved concerning the Missouri standard. Who has the burden of proof to show that

the capabilities of a handicapped child have or have not been maximized and, what standards are used to make this decision? In the instant case the L.E.A. has met the requirements set forth in the Federal Individuals with Disabilities Act (IDEA) as implemented by the State of Missouri plan for Part B of IDEA.

### **III. The Special Education Classroom Is Student's LRE for Math**

#### **Instructions.**

One element of a FAPE is that the disabled student must be educated in the least restrictive environment ("LRE") and the IDEA provides that a more restrictive environment is appropriate when 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." 20 U.S.C. 1412. The LRE determination is made in accordance with the child's abilities and needs. See OSEP Mem. 95-9, 21 IDELR 1152 (1994).

In the instant case, the evidence supports the IEP team's decision to change student's placement for math instruction to a special education classroom. The evidence shows that, in spite of her cognitive limitations, student was able to be mainstreamed for math until the concepts were beyond her ability to understand. At that point, the LEA implemented numerous accommodations to maintain her in a mainstreamed setting, including CWC, modified curriculum and accommodations. However, during the 2000-01 school year, it became apparent to student's teachers and the IEP team members that

student's cognitive ability was beginning to impact her ability to benefit from a regular education environment for math. Accordingly, the team at that time recommended a change to a resource setting. Due to IDEA's stay-put provision, that change of placement was not implemented. However, the evidence at hearing demonstrates that requires a more restrictive setting to benefit from her math instruction.

### **Appeal Procedure**

Either party has the right to appeal this decision within 30 days to a State Court of competent jurisdiction pursuant to Chapter 536 of the Revised Statutes of Missouri, or to a Federal Court.

Panel Members Supporting Decision

Panel Members Opposing Decision

Patrick O. Boyle

Marilyn McClure

Jerry Wright

### **Dissenting Opinion**

I was discouraged for the parties involved in this hearing by the litigiousness of this due process. These issues could have been resolved through other avenues had a party not been so eager to initiate this litigation. This matter, also, exceeded what one would consider a reasonable time frame to conduct the hearing for a child whose education is essentially stifled pending the outcome.

This panel's Findings of Fact includes:

2. Whether the LEA's January 8, 2001 reevaluation of student was appropriate.
3. Whether the IEP's team determination that student should be placed in a special education setting for math instruction.
5. (1) Whether the LEA's current and previous diagnosis of student were correct.  
(2) Whether the LEA conducted appropriate and sufficient evaluations to identify student's needs and whether the LEA thereafter adequately included that information in a properly drafted IEP.  
(3) Whether the LEA's IEP appropriately set forth how the student's disability affected student's academic program and her ability to participate in the general curriculum.  
(4) Whether the LEA failed to provide student with a free appropriate public education of the 99-00 and 00-01 school years. More specifically, whether the academic component of the program offered for those years was adequate and the services offered sufficient OT meeting student's unique needs, whether the related services offered were sufficient to meet student's unique academic and functional needs, and whether the LEA failed to implement the IEP as written and modified the program without notice to, or participation with, the parents.  
(5) Whether certain notices of action provided by the LEA dated May 19, 2000, were sufficient.

### **My decision and rationale:**

First, One must realize that designing a "special education" individualized program is a sequential process; that is, IDEA requires this plan must first address a student's present level of educational performance. This section of the IEP is to include: "a statement of the child's present levels of educational performance, including – (I) how the child's disability affect the child's involvement and progress in the general curriculum; . . . 20 USC 1414(d)(1)(A)(i)"

It is important to notice the term "including". Here, the team is not limited as to what is developed and described in this section that lay the foundation for this child's education. This section is to include current evaluation information as well as information provided by the parent and teachers. This section needs to be comprehensive and detailed in order to allow for an appropriate program for the student.

Second, the team develops measurable annual goals individualized to meet the child's unique needs. These needs are determined by what is included in the "present level of performance". A student's program is intended to move forward from this point.

In regard to Findings of Fact 2 (LEA single issue) and 5 (parent issues (2), (3), (4))

In the matter before us, several of the school personnel who were members of the IEP team testified that they had little or no experience with autism.

Since the foundation of the IEP is the "present level of educational performance", and in this matter it mentioned the parent's submission of a March 2000 report from KU (that student demonstrates characteristics that are consistent with a diagnosis of autism).

20USC1414(C) Additional requirements for Evaluation and Reevaluations

(1)(B) on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine-

- (i) whether the child has a particular category of disability, as described in section 1402(3), or, in case of a reevaluation of a child, whether the child continues to have such a disability;
- (ii) the present level of performance and educational needs of the child . . .

It is not clear why the IEP team failed to utilize what had already been provided to them by the parent, i.e. the March 2000 KU report, upon review of existing information.

The resulting reevaluation (based on the "present level of educational performance") must be sufficiently comprehensive to identify all of the child's special education and related services needs. The KU report was not considered by the IEP team to be part of this reevaluation process. It was mentioned, but not properly considered. Failure to include this renders this reevaluation not comprehensive in identifying "all"; therefore, the parent request for an independent educational evaluation at public expense is proper.

In the matter before us, a reevaluation plan was developed that did not include thorough consideration of IDEA criteria in determining:

- “(8) the child must be assessed in all areas related to the suspected disability;
- (9) the evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs; . . .” 20USC1414(b)(3).

It is not clear why the LEA did not place weight on the March 2000 KU report. The LEA evaluation plan included for a Childhood Autism Rating Scale (CARS) to be administered and to be completed by the parent. The parent completed this evaluation. A number of teachers also completed it although their involvement was not indicated on the evaluation plan.

As you can see, these fundamental flaws in the reevaluation process (omission of assessing “in all areas related to the suspected disability,” and “the evaluation must be sufficiently comprehensive to identify all of the child’s special education and related services needs, and inadequate review of existing data) results in the loss of integrity of the IEP and the IEP process and subsequently appropriate programming. Therefore, goals based on the outcomes of such an incomplete “reevaluation” would not and cannot be reasonably calculated. This lack of recognition of who a child is and what the child’s needs are results in the inability of an IEP team to formulate reasonably calculated goals. The entire IEP would therefore be illegitimate as would the child’s program on which it is based.

20USC1414(c) Additional requirements for Evaluation and Reevaluations

(1)(B) on the basis of that review, and input from the child’s parents, identify what additional data, if any, are needed to be determine-

- (i) whether the child has a particular category of disability as described in section 1402(3), or, in case of a reevaluation of a child, whether the child continues to have such a disability;
- (ii) the present level of performance and educational needs of the child; . . .

It is not clear why the IEP team failed to utilize what had already been provided to them by the parent, i.e. the March 2000 KU report, when they reviewed existing information.

This panel member would order two years of compensatory services which provide FAPE and two extended school years’ services to be provided to the student that would be provided in a schedule and arrangement agreeable to the parent. Compensatory services can be conducted before and/or after regular school hours, off-site, during breaks, and during the summer weeks before and after the already instituted “extended school year”. However, if these services are not expended prior to the student’s 22<sup>nd</sup> birthday, then the compensatory services are to extend beyond the 22<sup>nd</sup> birthday, but not to be provided beyond the student’s 23<sup>rd</sup> birthday. Compensatory service hours expended will be recorded and tracked by parent and the school district’s counselor in the building whether the student is enrolled.

In regard to Findings of Fact 5, parent issue (1), and 36, 37, 38, 39, 40:

Previous IEP teams who serviced this youngster apparently did not apply the IDEA requirement of consideration of potential suspected disabilities either, since a suspected disability has gone without consideration until recently by the parent who is pursuing such (the student is now at the end of her elementary years). This student may have been identified earlier if a comprehensive evaluation or reevaluation had been conducted in the past which relied on the requirements of IDEA in order to

“identify what additional data, if any, are needed to determine-

- (i) whether the child has a particular category of disability,”

It is not clear why the LEA continued to suspect autism after the parent had provided the March 2000 KU report to the IEP team. The team failed to identify Dr. Reese's report as "additional data".

IEP teams in the past floundered in providing an educational diagnosis for this student as is evident by the change of diagnosis of the student three times in her elementary career, in the absence of any accident/injury.

On her own, the parent acquired input from several professionals in the area of autism, of which may attended an IEP meeting. Testimony included that within such IEP meeting, said professionals shared with the IEP team their belief that the student qualified for "educational" autism. Testimony of teachers who attended the same IEP meeting shared during this IEP meeting that they had observed student with the characteristics mentioned by the professionals as educational autism.

The LEA contracted with an outside autism expert, Lisa Robbins, who, when questioned about the Autism Diagnostic Observation Schedule-Generic (ADOS-G), testified:

"observed it being given several times. I have it. I have not been trained on it. It is fairly expensive and only one place that you can really go, or one group that does the training at this point. It is a test or it is an evaluation tool used to look for certain behaviors that are often present in kids with autism."

The parent acquired report from Dr. Reese at KU, who evaluated the student in March 2000, included the administration of the ADOS-G. Dr. Reese testified:

". . . it could be administered by the school."

He also testified that "anyone trained on it" could have the authority to administer those tests (the ADOS and ADI).

It is not clear why the LEA didn't arrange for evaluation tools other than the CARS to be administered.

Dr. Reese testified:

"The CARS is a diagnostic kind of screening that is used as a part of an autism assessment. The CARS was normed on kids that were younger than (student). In fact, there are cautions of using it on kids over the age of eight or nine, because the norms don't go that high.

The other caution is using the CARS, there is a publication by Messenbaugh in about 1990, indicating that it is not a very good measure for people who are high-functioning in autistic or have Asperger's disorder, because the characteristics aren't that blatant. It is much better measure of the classic autism. Sometimes called cannot type of autism."

It appears the CARS was not appropriate for this student and should not have been the only tool used by the LEA to assess for suspected autism.

This panel member would order that the student be provided an educational diagnosis of autism as the primary disabling condition for purposes of IDEA.

In regard to Findings of Fact 5, parent issue (5) and 58:

The school provided four notices of action dated May 19, 2000, to the parent:

- a. refused increased OT
- b. refused a personal aide
- c. refused diagnosis be changed to autism
- d. refused diagnosis be changed to physically/other health impaired.

IDEA Regulations 34 CFR Part 300 Sec. 300.503(b) Content of notice.

- (1) A description of the action proposed or refused by the agency;
- (2) An explanation of why the agency proposes or refuses to take the action;
- (3) A description of any other options that the agency considered and the reasons why those options were rejected;
- (4) A description of each evaluation, procedure, test record, or report the agency used as a basis for the proposed or refused action.
- (5) A description of any other factors that are relevant to the agency's proposal or refusal;
- (6) A statement that the parents of a child with a disability have protection under the procedural safeguards. .
- (7) Sources for parents to contact to obtain assistance in understanding the provision of this part.

- a. Refused increased OT

This notice does not offer an explanation that is legitimate.  
How the team "feels" about goals is irrelevant.  
No data was provided to justify the decision of refusal.  
"Teacher reports" were not described or provided.  
No options were considered.

- b. Refused a personal aide

This notice does not offer an explanation that is legitimate.  
It mentions a "consensus" which is impossible, since the mother was in attendance at the meeting and was a part of the team when she made the request.  
No options were considered.

- c. Refused diagnosis be changed to autism

This notice does not offer an explanation that is legitimate.

The options considered and why rejected states:

“The LEA considered the request made by the parent to change the diagnosis to Autism. The request is being rejected due to the failure to meet criteria established by the State of Missouri for the diagnosis of Autism.”

The response is a mirror of what the parent is requesting. It is a senseless response.

“Other Factors Relevant to the Action: Parent provided copies of reports to the LEA from University of Kansas Medical Center and Collier Therapy Consultants, Inc., on May 16, 2000.”

This is just telling the parent what she already done; that is, provided the LEA with information related to a suspect disability.

No options were considered.

- d. refused diagnosis be change to physically/other health impaired.

The options considered and why rejected states:

“The LEA considered the request made by the parent to change the diagnosis to Physically/Other Health Impaired. The request is being rejected due to the failure to meet criteria established by the State of Missouri for the diagnosis of Physically/Other Health Impaired.”

This response is a mirror of what the parent is requesting. It is a senseless response.

“Other Factors relevant to the Acton: Parent provided copies of reports to the LEA from University of Kansas Medical Center and Collier Therapy Consultants, Inc. on May 16, 2000.”

This is just telling the parent what she has already done; that is, provided the LEA with information related to a suspect disability.

No options were considered.

These four “notice of action” documents display a failure of the LEA to comply with IDEA and are a serious procedural breach. Such failure contributed to the unnecessary struggle of the parent in trying to acquire what was appropriate for the student. Such failure also contributed to the adversarial tone between the parties.

**In regard to Findings of Fact 31 and 32**

Nowhere in IDEA does a parent have a duty to provide parent acquired evaluation information to the public school.

**In regard to Findings of Fact 3 and 78**

Whether the IEP's team determination that student should be placed in a special education setting for math instruction.

It was not clearly demonstrated the extent to which supplementary aids and services, related services, modifications and adaptations, and accommodations were earnestly and/or legitimately attempted for any significant period of time in the "class within a class" setting for mat in the regular environment.

In the absence of this being a dissenting opinion, this panel member would order the involvement of an "inclusion facilitator" to facilitate attempts of supplementary aids and services, related services, modifications and adaptations, and accommodations. A person that both parties mutually agree to use would be needed. Recognizing that such a title of "inclusion facilitator" is not readily available or recognized in our state, the parties will have to seek out someone without such a title yet has experience in performing the same or similar function.

In regard to the panel decision and rationale:

In addition to my comments above, I disagree with fellow panel members on certain points, including:

The extent to which the parents fully participated in the process is questionable. On at least two occasions, the LEA's legal representative participated in IEP meetings. This parent went above and beyond what is expected of a reasonable person in attempting to acquire what is appropriate for this student. This parent wrote numerous letters to the LEA in order to provide clear communication.

Many goals in the IEP's were not measurable. This panel member would order personnel development (training) on IDEA and specifically, goal writing and objective writing for all team members involved with this student in the future.

Passing grades do not necessarily denote progress for a student.

Marilyn McClure