

MISSOURI DEPARTMENT OF ELEMENTARY & SECONDARY EDUCATION
THREE-MEMBER HEARING PANEL (§ 162.961 RSMo 2001)

,
A minor student, by his parents,

,
Petitioners,

Vs.

“Due Process” Hearing Request
Of November 8, 2000

SPECIAL SCHOOL DISTRICT OF
ST. LOUIS COUNTY,
Respondent.

DECISION

April 15, 2002

Petitioners

, a minor, age , by his
Parents,

pro se

Respondent

Special School District of St. Louis County
James G. Thomeczek
THOMECZEK LAW FIRM, LLC
1120 Olivette Executive Parkway, Suite 210
St. Louis, MO 63132
(314) 997-7733

Attorney for Respondent

Hearing Panel Members

Ben Franklin
Asst. Director of Special Education
Springfield R-XII School District
940 N. Jefferson
Springfield, MO 65802-3718
(417) 895-2894

Rand Hodgson
10204 S. Outer Belt Road
Oak Grove, MO 64075
(816) 690-5740

Dan Pingelton
Pingelton Law Firm
28 North 8th Street, Suite 402
Columbia, MO 65201-7708
(573) 449-5091
Panel Chairperson

I. Procedural History

Petitioners filed their request for a “due process” hearing on November 8, 2000. Based on their son’s educational diagnosis by Respondent of “early childhood special education, with a medical diagnosis of “pervasive developmental disorder,” Petitioners initially claimed Respondent violated numerous rights under the *Individuals with Disabilities Education Act* (“IDEA”), 20 U.S.C. § 1400 *et. seq.* Petitioners originally claimed the following:

- (a) Respondent failed to implement fully and timely services specified in the student’s Individualized Education Plan (“IEP”): 1920 minutes per week of Applied Behavioral Analysis (“ABA”) in home services; 90 minutes per week of speech therapy; 60 minutes of occupational therapy; and a consultation with a pediatric nutritionist.
- (b) Respondent failed to provided compensatory services, despite acknowledging liability therefor.
- (c) Deficiencies implementing the student’s IEP continue.
- (d) On June 7, 2000, members of the student’s IEP team determined that additional testing was needed in speech, language, cognition, behavior, preacademics, fine and sensory motor skills, and adaptive behavior. But Respondent failed to conduct those tests and failed to make a proper diagnosis of the student.
- (e) Respondent refused the parents’ request to provide an educational that would include an independent ABA expert assessment of the student and his program.
- (f) Respondent’s program of ABA services has not been appropriate. The services provided “may not be beneficial and could be harmful to the student.” Respondent’s therapists were not properly trained and monitored. There has been inadequate supervision by properly trained and certified professionals. Additionally, “too little time has been spent on communication skills, and the student’s safety has been compromised because of the deficiencies described above and in part because of the use of physical restraints.”

Petitioners originally sought the following relief:

- i. An order that Respondent provide a free appropriate public education (“FAPE”) and implement the student’s IEP fully and in a timely manner;
- ii. An order that Respondent provide compensatory services for failure to provide FAPE and to implement the student’s IEP;
- iii. An order that Respondent conduct the additional testing indicated by IEP staff, and make a proper diagnosis;
- iv. An order requiring Respondent provide or pay for an educational evaluation of the student that would include an independent ABA expert to assess the student and his program;

- v. An order that Respondent provide an appropriate ABA program, included “services that are beneficial and not harmful to the student, therapists that are properly trained and monitored, adequate supervision of the program by properly trained and certified professionals, additional time on communication skills, and continuing efforts to minimize or avoid the use of physical restraints”; and
- vi. Reimbursement for Petitioners’ losses and expenses incurred in providing appropriate services for their son.

Following the empowerment of the hearing panel, Respondent requested and Petitioners consented to an extension of the hearing deadline requirements of 34 CFR § 300.511 and Section 162.961.5 RSMo. Pursuant to this agreement, a preliminary scheduling order was entered on December 19, 2000, extending the hearing to February 27, 2001 with the decision to be rendered by March 31, 2001. Thereafter upon request of both parties, a first amended preliminary scheduling order was entered on February 26, 2001, extending the hearing date to June 5, 2001 with the decision to be rendered by July 6, 2001. Thereafter upon request of both parties, a second amended preliminary scheduling order was entered on June 4, 2001, extending the hearing date to September 5, 2001 with the decision to be rendered by October 5, 2001. Thereafter upon the request of both parties, a third amended scheduling order was entered on August 31, 2001, extending the hearing date to October 29, 2001 with the decision to be rendered by December 3, 2001. Thereafter upon request of Petitioners and with the consent of Respondent, a fourth amended scheduling order was entered on October 29, 2001, extending the hearing date to December 18, 2001 with the decision to be rendered by January 18, 2002. On November 21, 2001, Petitioners’ attorney advised the panel chairperson that he no longer represented Petitioners. On November 21, 2001, the chairperson directed Petitioners to confirm their intention to proceed on the hearing date then scheduled for December 18, 2001. On December 3, 2001, Respondent’s counsel informed the chairperson that during a period when this case was being scheduled, an intervening conflict made him unavailable for the December 18, 2001 hearing. Respondent requested a 90-day extension with a hearing date to be set by agreement of the parties. On December 3, 2001, Petitioner sent an e-mail to the chairperson, stating that Petitioners wanted to proceed with the hearing on December 18, 2001. On December 5, 2001, Petitioner sent a letter to the chairperson, protesting Respondent’s request for a 90-day continuance and requesting that the hearing be held no later than January 2002. Thereafter, Petitioners consented to a shorter request for extension by Respondent, and on December 7, 2001 a fifth amended scheduling order (preliminary) was entered upon request by Respondent and with Petitioners’ consent, extending the hearing to February 11, 2002 with the decision to be rendered by March 18, 2002. On January 8, 2002, a telephone conference was held between the chairperson, Petitioner and Respondent’s counsel, for purposes of confirming the hearing dates and other scheduling matters. As a result of that conference, on January 8, 2002 a sixth amended scheduling order was entered upon agreement of both parties, confirming the hearing commencement date of February 11, 2002 with the decision to be rendered by March 18, 2002.

Hearing in this cause commenced on Monday, February 11, 2002, in the boardroom of Respondent’s central administrative offices. The hearing proceeded

through Wednesday, February 13. Due to time constraints and other scheduling issues, by agreement of the parties the hearing was continued at the end of the business day on February 13 and resumed on Monday, February 18, 2002. The hearing concluded on Monday, February 18, and the parties were granted until February 28, 2002 to file proposed findings of fact and conclusions of law. The parties agreed that the panel would render a decision by April 1, 2002. Thereafter, upon request and with the consent of Petitioners, the deadline to render a decision was extended to April 15, 2002.

II. Issues

At the commencement of the hearing, Petitioners reaffirmed their original issues set forth above. Petitioners further claimed the following:

That basically, FAPE has been not been provided to our son ...; that program has not been maximized as it is outlined or as it is defined in the Missouri State Statute 162.670; that the program has not been following the IEP as it was outlined in the October 2000 and the June 2000 IEP; basically, that the therapists providing the services have not been adequately trained and supervised for this particular program, and that has helped to lead to a dangerous situation or dangerous program for our son; that his placement has been violated by the fact that the district has stopped all services as of March 2001 without the benefit of an IEP to determine this change in placement. [Tr. 18-19]

Respondent acknowledged “some gaps in services to [the student] and has offered to provide compensatory educational services.” Respondent stated that there may be a dispute regarding the number of hours of compensatory services owed to Petitioners. Additionally, Respondent claimed it has been “effectively blocked” from providing compensatory services by in-home time constraints imposed by Petitioners. Additionally, Respondent claimed there has been no change in placement for the child’s education in the home to an envisioned setting at school: “There was a change of educational location or site locations, but the actual placement of the child, educational placement of the child, was not to have changed.” Respondent claimed Petitioners refused to send their child to the location where Respondent provided services. Respondent claimed the dispute stems largely from a personality conflict that manifests itself as “a misunderstanding as to the nature of the services that was being requested y the parents and the service provided ... by the district.” Respondent stated that “what the parents were requesting was not really what the parents wanted...” [Tr. 19-20]

III. Findings of Fact

The panel received and gave appropriate weight to the following evidence:

Petitioners' Witnesses: Petitioners¹; Debbie Baebler; Ramsay Salisbury; Margaret Russell; Dave Pentz; and Todd Streff.

Petitioners' Exhibits: P-1 through P-15, and P-17, P-18, and P-19.

Respondent's Witnesses: None. (Respondent conducted comprehensive cross-examination of Petitioners' Witnesses, which included some of the student's special educators.)

Respondent's Exhibits: R-1 through R-54

Exhibits P-1, R-51 and R-54 were videotapes. The panel reviewed only those portions of videotapes that were played at the hearing. Only those portions played, identified by time sequence on the record, were received into evidence and considered by the panel.

After careful considering of the evidence, consisting of numerous educational records and related documents, witnesses and videotape presentations from both parties, the panel hereby finds the following facts:

1. The student is a six-year-old boy, born August 7, 1995, who resides in the Bayless School District with his parents, Petitioners .
2. In December 1997, Dr. Edwin Dodson, a neurologist with St. Louis Children's Hospital, diagnosed the child with a Pervasive Development Disorder ("PDD").
3. When the student was three years old, he was identified for special education services through the Hancock Place School District Early Childhood Special Education Program. He was referred to that district's program by his parents and the "First Steps" program.
4. Hancock's diagnostic summary of June 4, 1998 recited the following: "[The student] is eligible for ECSE [Extended Childhood Special Education] services due to significant delays in intellectual/cognitive skills, fine motor, speech/language, and social/emotional/behavioral skills. He also is delayed in pre-academic skills." [R-3]
5. The June 4 Hancock summary also noted that "when angry, [the student] bangs his head on the wall or floor in temper tantrums. When bored or in isolation, [the student] bangs his head on the side of his crib or against the wall or in his bed during naps or in the middle of the night. On 7/13/97, while visiting relatives, [the student] banged his head on a glass window and broke it. In the past, he has bruised his forehead frequently." The summary also noted that the student exhibits repetitive behaviors. Additionally, the summary noted that the child bites, sometimes severely.
6. Respondent completed the student's initial IEP on June 26, 1998. This IEP specified placement in a "self-contained program in a General Education School" – specifically a "Group ECSE in an Integrated Setting." Occupational Therapy and speech/language services were assigned. [R-4]

¹ MDESE requests that personally identifiable information concerning the student and Petitioners be set forth only on the cover page of the panel's decision. Both the student's parents, as Petitioners, testified in the hearing.

7. Pursuant to the parents' request, in September 1998, the student began receiving special education services at Good Shepherd, a private school in St. Louis County.
8. The student's November 30, 1998 IEP changed the student's placement from "Group ECSE in Integrated Setting" to "[ECSE] Placement in Early Childhood Setting." This IEP envisioned 120 minutes.² Speech/Language therapy was scheduled for 150 minutes; and Occupational Therapy for 150 minutes. (As was described by several witnesses at the hearing, the Speech/Language and Occupational Therapy components were either combined or overlapped as required by the student's circumstances. This was not a contested issue.) [R-7]
9. The November 1998 IEP contained an occupational therapy update report that included the following: "[The student] continues to require intensive sensory integrative therapy in order to effectively learn in the classroom, home and community. ... His inability to modulate his emotions is directly related to sensory processing difficulties which cause adaptive behavior to be seriously delayed. ... When he becomes upset, he will escalate to the point of banging his head severely and biting the therapist." The report described a "soft tunnel" into which the child would go to redirect his behavior.
10. Another IEP was written for the student on June 8, 1999, specifically "[t]o address summer ... eligibility and ABA³ services. This IEP indicated the student was eligible for Extended School Year ("ESY") services. [R-9]
11. Respondent completed a behavior assessment on the student on August 17, 1999. [R-10] This "assessment" recommended that an "intensive behavior treatment program be initiated for at the earliest possible time." The assessment recommended that the program include "all of the current protocols used in Applied Behavior Analysis that have been proven to assist children in ameliorating many of the maladaptive and aberrant behaviors associated with autism." Additionally: "Early in 's program the complete ABLLS should be administered to better guide the Behavior Analysts in making treatment decisions and measuring the effectiveness of treatment protocols."
12. At some time in August 1999, the Petitioners began receiving ABA services for in their home.
13. Another IEP was written for the student on September 27, 1999. This IEP noted that the student was attending school "in-home," and directed 1920 minutes of "Applied Behavior Analysis in-home setting." The IEP directed that for discipline, "physical restraint, time-out and/or extinction will be used as directed by the behavior analyst when may be a danger to himself or others." [R-11]
14. Todd Streff, assistant director of program development for Respondent, wrote a "progress report" on June 6, 2000. The report noted that the student "continues to make gains" in his in-home ABA program, and that "all programs are making progress." The report described various elements of and efforts to address the student's self-injurious behavior ("SIB"). The report noted: "Poor maintenance of

² Reference to the number of "minutes" of service to a student in an IEP usually indicates the number of minutes each week.

³ "Applied Behavior Analysis"

reinforcers and aberrant behaviors are significant concerns with [the student's] programming. The team will need to become more proficient at identifying reinforcers for and ensure that they have the proper stimulus control while working with him." [R-14]

15. Mr. Streff's June 6, 2000 report concluded with the following:

I recommend that the IEP team introduce [the student] to a school setting at the earliest opportunity possible. A school based option would allow for the team to respond to changes in interventions quicker, allow trainers greater opportunity to observe others, provide more consistent training opportunities, and decrease the stress for the family which often is present when a home ABA program is being implemented.

16. The day following Mr. Streff's report, June 7, 2000, an IEP was written for the student. [R-15] This IEP directed 1920 minutes of ABA in-home services; 90 minutes of speech/language services; and 60 minutes of occupational therapy. The IEP continued notations for physical restraints for discipline and SIB problems. The IEP also directed that a pediatric nutritionist consult with the Petitioners, and that a sensory assessment and profile be conducted.

17. At the time Todd Streff wrote his report, and when the June 2000 IEP was prepared, other educators noted concerns for the student's environment. In her June 7, 2000 progress notes, Brenda Deakin wrote the following: "[The student] receives ABA in home, 2 therapists at a time for 3 hrs day Mon-Fri. Rest of time he is in free play. Family has 3 other kids – too busy to supervise him so he watches t.v. in p.m. – can only go out in yard with adult." And: "Mom reviewed his daily schedule for me but both parents said they are 'consistently inconsistent' schedule-wise – every day is different but [the student] is OK with all the changes. I mentioned that to say he is OK is an assumption – fact is, he is having terrible behavior problems." Additionally: "[F]amily seems overwhelmed with the needs of [the student] & demands of 3 other children. [The student] has more unstructured time in day than structured."

18. On September 18, 2000, Petitioners wrote a letter to Todd Streff, voicing several complaints:

- a. The June 7, 2000 IEP continues to be violated because the student was not receiving the minutes specified therein.
- b. A pediatric nutritionist consult has not been completed.
- c. The physical restraints utilized with the ABA program caused the parents concern for their son's safety.
- d. Petitioners also requested Respondent provide an independent educational evaluation, "including an independent ABA expert to assess [the student] and [his] program."
- e. Petitioners complained that "[the student] is now over five [years old] and he does not have an educational diagnosis."
- f. Noting that Mr. Streff and other Respondent staff recommended a school placement, Petitioners wrote the following: "We have stated to you we are

not opposed to school but we must be satisfied the school placement is the appropriate alternative for [the student]. We need to know that [the student] will be safe in the school setting. We need to know how the program will operate and what type of students will be enrolled. We need to know the number of students enrolled. We need to know the number of teachers and teacher's aides that will be in the classroom and the qualifications of these individuals. Will this classroom be a preschool classroom or an ABA classroom or a classroom that does both ABA and preschool? You may have a school environment for [the student] but demonstrate to us why [he] is ready for school. Please provide a response to these concerns in writing. *Until we accept the school setting we ask that you provide enough home therapists to safely and successfully continue [the student's] program as called for in his IEP.* [emphasis added] In addition to the above, please provide to us in writing a plan for reasonable and appropriate compensatory service to replace [the student's] lost services." [P-11]

19. On October 6, 2000, Todd Streff responded to Petitioner's letter, noting the following:
- a. Mr. Streff acknowledged that not all of the 1920 minutes of ABA services were fulfilled. "We have had a number of trained therapists assigned to work with [the student]. For a variety of reasons, including parental preference, we have not been able to assign a set team to work with in the home setting. We continue to recruit and train ABA implementers. However, staff shortages remain. The District does have staff available to work with [the student] on weekends. We have previously suggested that option to you, but you have not agreed to do so. Once again, we ask that you consider permitting the District to work with [the student] on weekends."
 - b. Mr. Streff wrote that he was continuing to inquire as to the status of the pediatric nutritionist.
 - c. "The intensity of [the student's] injurious behavior has, at times, warranted the use of physical restraint in order to avoid injury to [the student] and staff.
 - d. Regarding Petitioners' request for an independent education evaluation, Mr. Streff wrote that "the Missouri Department of Elementary and Secondary Education has advised the District that the IEE procedural safeguard does not extend to assessments pertaining to teaching methods."
 - e. Regarding Respondent's proposed classroom setting, Mr. Streff wrote: "The classroom available to [the student] is the same design as our other ECSE classrooms in the District that have ABA as a component of the day. That model is composed of the traditional ECSE curriculum in the morning and ABA in the afternoon. This design is and can be tailored to meet the needs of each student." [P-12]

20. On October 20, 2000 another IEP was developed for the student. [R-25] This IEP noted that “Parents have requested that programming be provided within an 8:30 – 3:30 time schedule, Monday through Friday, only. This allows for up to 2100 mpw⁴ of programming including lunch times. The IEP directed a total of 1800 total minutes: 1560 for ECSE “to include applied behavior analysis / discrete trial training methodology”; 120 minutes for speech/language therapy; and 120 minutes for Occupational Therapy. (As described above, the Speech/Language and Occupational Therapy components overlapped by agreement.)
21. The October 20, 2000 IEP noted the following for discipline: “Positive reinforcement of successive small steps is beneficial. When [the student’s] behavior becomes self-injurious or unsafe to those around him, use of time-out, or possible physical restraint, may be warranted.
22. The October 20, 2000 IEP noted that the student would be eligible for kindergarten enrollment in the fall of 2001.
23. The pediatric nutrition assessment was completed on October 25, 2000. [R-26]
24. The Missouri Department of Elementary and Secondary Education received petitioners’ request for a due process hearing on November 8, 2001. [R-28]
25. Respondent continued to provide in-home ABA services subsequent to the filing of Petitioners’ due process complaint. On January 2, 2001, Petitioners terminated these services, claiming safety concerns for the student.
26. On February 12, 2001, Petitioners wrote a letter to Todd Streff, stating that the January 2, 2001 termination of services “was temporary not permanent.” Petitioners stated that they “[awaited] a safe, appropriate, and timely renewal of the program.” [R-34]
27. Additionally, in Petitioners’ letter of February 12, 2001, they claim that the October 20, 2000 IEP designation of 1560 minutes for ABA services was not correct: “This is a mistake. In the last 40 minutes of the meeting we agreed the only changes would be to increase the OT and speech. Please see that this is corrected and send a corrected copy.”
28. Although in-home ABA services were terminated by Petitioners on January 2, 2001, the student continued to receive speech and language therapy both at home and at the Witzel Early Childhood Center through March 5, 2001.
29. In February 2001, Petitioners informed Respondent that they declined further speech and language services at the Witzel center. Thereafter, these services were provided in the home.
30. In February, 2001 Respondent determined that no further services would be provided to the student in the home setting. In a February 20, 2001 letter to Petitioners’ attorney, Respondent’s counsel confirmed the following:
 - a. “[T]he District believes that the current situation – the implementation of only speech/language and occupational therapy services – in not in the

⁴ minutes per week

student's interest. The therapists report an increase in inappropriate behaviors, which is having a deleterious effect on the delivery of services."

- b. "Moreover, the District believes that the implementation of the IEP in the home setting is no longer appropriate. The student's current educational placement is individualized early childhood special education, which the District believes is appropriately implemented in a school setting. Among other things, the school setting would allow the implementers to control the outside variables, which interfere with the program."
- c. "The District also notes that an IEP is not intended to be an offering of a 'cafeteria plan' of educational services from which parents may choose. Rejection of some of the services results in the cessation of all services under the plan."
- d. "With the foregoing in mind, *the District is preparing to implement the student's IEP in a school setting – specifically at Witzel Learning Center in the Mehlville School District. The student's educational placement will remain individualized early childhood special education.*" [emphasis added]
- e. Respondent refused to provide any further services unless all services were provided "in the school setting." [R-35]

31. In response to the February 20, 2001 letter from Respondent's counsel, Petitioners' attorney registered the following objections to the Respondent's plan in a letter dated March 4, 2001:

- a. The Petitioners did not agree to "a change in placement from the home to a school setting." Petitioners objected to this unilateral decision by Respondent without holding an IEP meeting.
- b. "Until such time as an IEP meeting can be held to consider a change in placement, the [Petitioners] request that the agreed upon services, the speech/language and occupational therapies, be continued at their home."

32. From March 5, 2001 through the closure of the evidence in this case, the student has received no educational services from Respondent.

33. The last IEP completed for the student was the October 20, 2000 IEP. However, as the due process request was pending, and in light of Respondent's refusal to provide services in the home, Petitioners' previous counsel advised Respondent's counsel that it would be fruitless to complete an IEP. *Other than requesting an IEP before changing placement out of the home* described above in the March 4 letter from Petitioners' previous attorney, Petitioners have not complained of the lack of a current IEP. While the change in placement from in-home service to a school setting is an issue, the general lack of a current IEP is not an issue in this hearing.

IV. Conclusions of Law, Decision and Rationale

1. The student is a child with a “disability” as that term is defined in the *Individuals with Disabilities Education Act* (“IDEA”), 20 U.S.C. § 1400 *et. seq.* 20 U.S.C. § 1401(3)(B); 34 C.F.R. § 300.7(b).
2. The student is entitled to a “free and appropriate public education” (“FAPE”). 20 U.S.C. § 1412.
3. “The term free appropriate public education means special education and related services that: (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided *in conformity with the individualized education program* required under section 1414(d) of this title.” 20 U.S.C. § 1401(8) (emphasis added).
4. The original issues identified by Petitioners were related to Respondent’s failure to implement various elements of the student’s IEP. At the beginning of the hearing, Petitioners identified the following additional issues:

That basically, FAPE has been not been provided to our son ...; that program has not been maximized as it is outlined or as it is defined in the Missouri State Statute 162.670; that the program has not been following the IEP as it was outlined in the October 2000 and the June 2000 IEP; basically, that the therapists providing the services have not been adequately trained and supervised for this particular program, and that has helped to lead to a dangerous situation or dangerous program for our son; that his placement has been violated by the fact that the district has stopped all services as of March 2001 without the benefit of an IEP to determine this change in placement. [Tr. 18-19]

5. **Maximization.** The Missouri Court of Appeals, Western District, recently issued its opinion in *Lagares v. Camdenton R-III School District*, 68 S.W.3d 518 (Mo.App.W.D. 2002).⁵ The court held that special educators in Missouri are held to a higher standard than that envisioned in the IDEA, because Sections 162.670 and 162.675 RSMo require a student’s capabilities be “maximized.” This is a higher standard than the traditional federal requirement outlined by the United States Supreme Court in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 102 S.Ct. 3034, 3049 (1982). *Rowley* was the first Supreme Court case construing the *Education for All Handicapped Children Act*, currently known as the IDEA. *Rowley* held that the federal statutory scheme must provide only a “basic floor of opportunity ... consist[ing] of access to specialized institutions and related services which are individually designed to provide educational benefit to the handicapped child.” *Rowley*, 102 S.Ct. at 3048.⁶

⁵ The Missouri Supreme Court denied an application to transfer on March 19, 2002.

⁶ Numerous cases have discussed the *Rowley* “standard.” See, *e.g.* *Cedar Rapids Community School Dist. v. Garret F.*, 119 S.Ct. 992, 999 (1999) [“The statute may not require public schools to maximize the potential of disabled students commensurate with the opportunities provided to other children ... “]; *Doe v.*

The Supreme Court in *Rowley* reversed the district court's ruling that the Act required "an opportunity to achieve full potential commensurate with the opportunities provided to other children." *Rowley v. Hendrick Hudson District Board of Education*, 483 F.Supp. 526, 534 (S.D.N.Y. 1980). The Court ruled: "Certainly the language of the statute contains no requirement like the one imposed by the lower courts -- that States maximize the potential of handicapped children "commensurate with the opportunity provided to other children.'" *Rowley*, 102 S.Ct. at 3042.

Lagares specifically held that Missouri's statutory "maximization" requirement exceeded the federal floor of *Rowley* and its progeny. Under the authority of *Lagares*, a due process panel is *required* to determine "whether the special education services provided to [the student] were sufficient to meet his needs and maximize his capabilities." *Lagares*, 68 S.W.3d at 528.

On March 27, 2002, the Missouri Department of Elementary and Secondary Education ("DESE") released a statement that "DESE will not require school districts located outside of the Missouri Court of Appeals, Western District to comply with the higher maximization standard. Those districts will be required to comply with the federal free and appropriate public education standard.⁷ However, school districts outside the Western District Court of Appeals geographic area must keep in mind that a court or due process hearing panel would be free to apply the maximizing standard if it chose to do so. ... Additionally, an appeal of any due process hearing panel decision may be filed in Cole County, which is in the Western District Court of Appeals area ..."

While this case originated in St. Louis County, subject to the territorial jurisdiction of the Eastern District Court of Appeals,⁸ the panel believes that *Lagares* is direct, controlling authority, and must be applied in this case.⁹

6. **Maximization for the Student.** Although Petitioners cited a claim for failure to maximize their son's capabilities, the vast majority of evidence involved Respondent's failure to *implement* the student's IEP.¹⁰ Nevertheless, Respondent bears the burden of proving that the student received, or could have received, FAPE. *See Oberti v. Board of Education*, 995 F.2d 1204, 1218-19 (3rd Cir. 1993).

Under the new *Lagares* authority, this panel might first embark upon a lengthy review of the special education program developed for the student to determine if,

Board of Education of Tullahoma City Schools, 9 F.3d 455, 459-60 (6th Cir. 1993) ["The Act requires that the ...schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. ... [w]e hold that the Board is not required to provide a Cadillac."]

⁷ This refers to the traditional, case-by-case analysis used nationally in every IDEA case. This case-by-case analysis remains – the standard under *Lagares* is simply higher than the *Rowley* floor.

⁸ Section 477.050 RSMo.

⁹ The discussion in *Lagares* was comprehensive and the issue met head-on. Especially with the Missouri Supreme Court declining to take the case, and the fact that appeal of an administrative ruling such as this case may proceed through the Western District, to apply any other standard would simply invite if not guarantee error.

¹⁰ Petitioners' due process complaint was filed well before *Lagares*, which was issued a couple months before hearing in this case commenced. Petitioners proceeded to hearing *pro se*, but with the services of a special education advocate.

through the last IEP on October 20, 2000, the program was designed to meet his needs and maximize his capabilities. Yet in this case, Respondent has candidly admitted that the IEP was not implemented as written. The evidence clearly established that the student did not receive significant periods of time of special education and related services, contrary to his IEP. Therefore, Respondent's obligation to provide the student FAPE failed, whether analyzed under the old or the new analysis. Additionally, Petitioners have not advanced any specific complaint regarding the current IEP *as written*. The substance of their complaints has been that that IEP was simply not implemented.

7. **The Requirements of Implementing the IEP.** Respondent failed to provide the student FAPE under either analysis because each analysis requires that the student's IEP be implemented. *See e.g.* 20 U.S.C. § 1414(d)(2)(A),(B); 34 C.F.R. §§ 300.341; 300.342. The student's IEP was not implemented as written. These failures were significant.

At hearing, Respondent contended that Petitioners' in-home time requirements made it difficult, and sometimes impossible, to fulfill the minutes specified in the IEP. The panel is not persuaded by this argument. The October 20, 2000 IEP itself notes that the Petitioners' time restrictions allow only 2100 minutes per week. The IEP envisioned 1820 minutes per week, although it was accepted practice for some services to be provided concurrently, reducing the actual total time. The IEP itself confirmed the possibility of completing these hours, yet they were not done. The evidence at the hearing confirmed that significant portions of missed time were because Respondent simply lacked personnel to implement the IEP, had scheduling problems, or other breakdowns.

Respondent claims that because of the missed IEP minutes, it offered Petitioners compensatory time, but they refused. While that fact may have at one time held some amount of merit, as will be discussed below, Respondent violated the "stay put" provisions when it terminated the student's remaining in-home services and confirmed that *all* services would occur outside of the home or would not occur at all. The panel will not find Petitioners at fault for refusing compensatory services which when offered would have violated the student's current IEP.

8. **Violation of the "Stay Put" Provision.** 20 U.S.C. § 1415(j) directs that during the pendency of this review, the student should have remained "in the then-current educational placement" unless the parties agreed otherwise. This directive is commonly known as the "stay put" provision.

Respondent claims that the child's placement was "Individual Early Childhood Special Education," not homebound. Respondent notes that when Petitioners filed their due process request, the student was receiving service in both the home and at Witzel school. When Petitioners' terminated the student's in-home services, Respondent continued to provide related services of occupational therapy and speech/language therapy. Respondent argues that these related services are provided only to *support* special education services, and that "a child who needs only a related service is not a child with a disability." The panel disagrees. Although Petitioners were free to terminate the in-home services, the Respondent was not free to terminate

anything contrary to the clear terms of the IEP. First, there is no dispute that the student is “a child with a disability,” thereby qualifying for “related services.” 20 U.S.C. § 1401(22). Second, although speech/language is a “related service,” its importance to the student here cannot seriously be questioned. Respondent’s own voluminous records repeatedly document the need for this essential service. The panel is not persuaded by Respondent’s reliance on 34 CFR § 300.7(a)(2)(i). That regulation states, in pertinent part, that “if it is determined, through an appropriate evaluation . . . that a child has [a defined disability] but only needs a related service and not special education, the child is not a child with a disability . . .” It is undisputed, and the IEP confirms, that the student *needs* special education. This regulation is thus inapplicable.

Respondent again argues that even if it violated the “stay put” provision, Petitioners rejected the appropriate remedy of compensatory services. For the same reasons explained above, the panel rejects this defense.

9. **Least Restrictive Environment.** Respondent invites the panel to conclude that since there was “no competent and substantial evidence to the contrary, [the panel should] accept the testimony of those who testified and conclude that [the student] should receive his future education in a school setting.” The panel declines this invitation. To accept it would be the functional equivalent of appointing the panel members as part of the student’s future IEP team. As of the issuance of this decision, the student’s IEP and therefore his current educational placement is primarily in-home.
10. **Petitioners’ Requested Remedies.** Petitioners request this panel find that Respondent has failed to provide the student FAPE, has failed to maximize his capabilities, and has failed to implement his IEP. These things the panel finds in favor of Petitioner, as described herein.¹¹ The panel cannot, however, grant Petitioners any of the remedies they request. Petitioners request the panel order Respondent to retain an independent ABA consultant, acceptable to the Petitioners, to administer the in-home ABA program, and then possibility “transitioning” into the classroom, with services to continue through at least January 2004. Petitioners presented no evidence as to the availability, qualifications, cost, or even identity of such a consultant. Even if the panel were to find this type of relief appropriate, Petitioners’ failure to adduce sufficient evidence addressing the details of these remedies precludes the panel from ordering them. While IDEA remedies from an administrative hearing panel may not always require more precise definition as those necessary in, for example, a court order, the panel cannot order remedies effected by signing a blank check to a stranger.
11. **The Panel’s Responsibility to Implement a Remedy.** Respondent urges that because Petitioners’ requested remedies cannot be ordered by this panel, and because Petitioners have previously rejected compensatory services, that the panel deny Petitioners any relief in this cause. The panel declines Respondent’s invitation. Federal and state law envision this panel ensuring that the various requirements of the IDEA and related law are not only followed by the parties, but *applied* to the child. If they are not, the panel believes it appropriate to award relief in the form of services

¹¹ As explained herein, the failure to maximize the student’s capabilities, and the failure to provide FAPE, occurred because the IEP was not implemented.

that should have been provided to Petitioners under the IEP *still in place* for the student. *See, e.g. Independent School District No. 284 v. A.C.*, 258 F.3d 769 (8th Cir. 2001).

12. **Order:** The panel therefore enters the following orders:

- a. Respondent shall, forthwith, implement the student's October 20, 2000 IEP exactly as written.
- b. The October 20, 2000 IEP shall continue, exactly as written, until such time as a new IEP is properly developed following a re-evaluation of the student.
- c. In implementing the October 20, 2000 IEP, if Respondent is forced to cancel any designated minutes of service to the student, Respondent shall provide Petitioners with a specific date and time schedule for replacement of those minutes.
- d. In implementing the October 20, 2000 IEP, if either Petitioner refuses a specific time for in-home services, Respondent shall immediately thereafter offer equivalent services at the Witzel school. Thereafter, Respondent shall continue to provide in-home services as set forth in the October 20, 2000 IEP, with the offer for equivalent services at Witzel continuing if some specific times for in-home services are rejected by either Petitioner.
- e. Respondent shall develop a new IEP for the student consistent with the IDEA and incorporating the standard announced in *Lagares v. Camdenton R-III School District*, 68 S.W.3d 518 (Mo.App.W.D. 2002). The panel finds this remedy specifically and uniquely required to remedy the IDEA violations in this case, based on the evidence considered as a whole. A re-evaluation shall be conducted pursuant to 34 C.F.R. §§ 300.321 and 300.536 (including §§ 300.532 – 300.535). The panel further orders that the re-evaluation shall include an ABA component recommended by a qualified, independent evaluator who shall materially and meaningfully participate in the IEP process. If the parties cannot agree upon an independent evaluator, Respondent shall provide Petitioners with a list of three such evaluators, *all of whom shall meet the criteria of this order*. From that list, Petitioners shall select one person to complete the evaluation pursuant to this order. Additionally, Respondent shall adhere to the following timelines in compliance with this order: The evaluation procedure shall be initiated within 30 days of the date this order becomes final; thereafter, the evaluation shall be completed within 45 days; thereafter, the new IEP for the student shall be completed within 30 days.
- f. Respondent shall provide Petitioners with compensatory services *in addition* to all time due under the student's current IEP as of April 15, 2002. These compensatory services shall also be in addition to all time due under any future IEPs for the student. Based on the evidence before the panel, Respondent shall provide a total of 1167 hours of compensatory services to be received by Petitioners, at their option as set forth herein, by January 1, 2004. These services shall be made available to Petitioners throughout the

year (including the summer period). Respondent shall provide some or all of this time, as requested by Petitioners, at times designated by Petitioners during regular times when Respondent's personnel are available. This includes weekend time if requested by Petitioners, based on the testimony at the hearing that Respondent had personnel available during these times. Petitioners shall give Respondent reasonable notice in requesting these compensatory services. The compensatory services shall be provided to Petitioners in their home or at some other location proposed by Respondent and agreed to by Petitioners. If agreed between the parties, some services may be provided in-home, and some may be provided at another location. These services shall consist of special education services including applied behavior analysis / discrete trial training methodology; speech/language therapy; and occupational therapy.

- g. The breakdown of the amount of services between special education services and related services shall be at the Petitioners' discretion, except that no more than fifty percent of the total compensatory services shall consist of related services.
- h. Any minutes of compensatory services not utilized by Petitioners by January 1, 2004, shall be deemed waived. The parties may, by joint agreement, convert any minutes of compensatory services awarded hereunder to other services or provisions on behalf of the student in either an equivalent period of time or an agreed-upon value or benefit of another type for the purpose of maximizing the student's capabilities.

* * *

So ordered April 15, 2002. Dan Pingelton, Chairperson, and Rand Hodgson, Member, concurring.

(original signature on file)

(original signature on file)

Dan Pingelton, Panel Chairperson

Rand Hodgson, Panel Member

Ben Franklin, Panel Member, concurs in part, and dissents in part, as follows:

1. I concur with the panel's remedy as ordered in Paragraphs 12(a),(b),(c), and (d).
2. I dissent as to the panel's remedy ordered in Paragraph 12(e), in that I do not believe the student's IEP must be developed pursuant to the standard announced in *Lagares v. Camdenton R-III School District*, 68 S.W.3d 518 (Mo.App.W.D. 2002). I believe the student's IEP should be designed to provide meaningful educational benefit to the student.
3. I dissent as to the panel's remedy as ordered in Paragraph 12(g).

4. I concur with all other remedies ordered by the panel.
5. I dissent as to portions of the panel's conclusions of law and rationale applying the standard announced in *Lagares v. Camdenton R-III School District*, 68 S.W.3d 518 (Mo.App.W.D. 2002). While I agree with the panel's conclusion that FAPE was not provided in this case because the IEP was not implemented, I disagree that the *Lagares* standard should be applied. The *Lagares* standard, just announced, has yet to be applied or even defined on a state-wide basis. I agree with the panel that FAPE was not provided because the IEP was not implemented, whether analyzed under the *Lagares* standard or the more traditional standard applied in *Rowley v. Hendrick Hudson District Board of Education*, 483 F.Supp. 526, 534 (S.D.N.Y. 1980), and numerous cases thereafter.
6. I dissent as to Section 7, *The Requirements of Implementing the IEP*, where the panel states that it was not persuaded by Respondent's contention that "Petitioners' in-home time requirements made it difficult, if not impossible, to fulfill the minutes specified in the IEP." I do not believe it necessary to engage in this fact-finding mission of which party's version was correct. Respondent admitted that the IEP hours were not provided, and while Petitioners shared some responsibility for that failure, I do not find it necessary to make findings beyond the fact that the IEP was not implemented as written and that those failures were significant.
7. I dissent as to Section 8, *Violation of the "Stay Put" Provision*, which implies that special education services are a "menu" from which parents may select individual items. Accordingly, I disagree with the sentence that states: "Although Petitioners were free to terminate the in-home services, the Respondent was not free to terminate *anything* contrary to the clear terms of the IEP." I believe the panel's decision on this issue should have read: "The parents did terminate the in-home program services, however, based on the evidence presented in this case, the Respondent was not free to terminate anything contrary to the clear terms of the IEP."
8. I concur in all other portions of the panel's decision.

(original signature on file)

Ben Franklin, Panel Member

Notice of Right to Appeal

The law provides that any party aggrieved by this decision may appeal to a court of proper jurisdiction. An aggrieved party may file an appeal in state court by utilizing a "Petition for Judicial Review," pursuant to Chapter 536 of the Revised Statutes of Missouri. That petition must be filed in a court of proper venue (the county wherein the aggrieved party resides, or Cole County) within 30 days after mailing or delivery of the decision. (This decision was mailed to the parties on April 15, 2002.) An aggrieved party may also file an appeal in federal court by filing a complaint in a district court of the United States, without regard to the amount in controversy.