

BEFORE THE HEARING PANEL EMPOWERED
BY THE STATE BOARD OF EDUCATION PURSUANT
TO SECTION 162.961 RSMo.

SCHOOL DISTRICT,)	
)	
Petitioner,)	
v.)	April 2, 2003
)	
MOTHER,)	
Parent of STUDENT, a minor,)	
)	
Respondent.)	
and)	
)	
MOTHER,)	
Parent of STUDENT, a minor,)	
)	
Petitioner,)	
v.)	
)	
SCHOOL DISTRICT,)	
)	
Respondent.)	

DECISION

This Decision is the final decision of the hearing panel in an impartial due process hearing pursuant to the IDEA, 20 U.S.C. § 1415(f) (1997), and Missouri Law, § 162.961.3 RSMo.

The Parties

- The Student is
- Student’s Parent (“Mother”) is
- The Petitioner is Raytown C-2 School District
- Student and Student’s Mother were represented by Nancy E. Huerta, Esq., Elizabeth G. McCulley, Esq., Shook, Hardy & Bacon, LLP, One Kansas City Place, 1200 Main Street, Kansas City, MO 64105-2118.
- The School District was represented by Ms. Shellie Guin, Esq., Doster, Mickes, James & Ullom, LLC, 4600 Madison – Suite 711, Kansas City, Missouri 64112.

Hearing Officers

- Richard H. Ulrich Hearing Chairperson
- Connie Sanders Hearing Panel Member designed by School District
- Rand Hodgson Hearing Panel Member designated by Parent

Relevant Dates/Procedural History/Explanation of Deviation from 45 day time line

1. Raytown C-2 School District (“District”) requested due process concerning Student by letter to the Department of Elementary and Secondary Education (“DESE”) dated November 20, 2001 (Exhibit P-52),¹ which was received by DESE on November 28, 2001. (Exhibit P-55) Thus, the deadline for hearing the case and completing and mailing a written decision was January 14, 2002.

2. By order of the Chairperson dated December 12, 2001, the hearing was set for January 10th and 11, 2002, with the decision to be rendered no later than January 14, 2002. (Exhibit P-64)

3. By letter of December 28, 2001, District requested a continuance of the hearing set for January 10th and 11, 2002 due to the unavailability of the District’s witnesses on those dates. (Panel Exhibit 5)

4. By Order of the Chairperson dated January 4, 2002, District’s request for a continuance was granted and the hearing was rescheduled for February 21 and 22, 2002, with the decision to be rendered no later than March 22, 2002. (Exhibit P-108, p. 984)

5. By letter of January 24, 2002, District requested another continuance of he hearing set for February 21 and 22, 2002, due to the unavailability of an indispensable witness. (Exhibit P-109, p. 1086)

¹ References to exhibits are by party and page: Petitioner (District) are denoted by “P”, Respondent (Mother) are denoted by “R” and Panel by “Panel”.

6. By facsimile dated January 25, 2002, from Mother to DESE, Mother requested a due process hearing against the District. (Exhibit P-87) DESE received said request on January 25, 2002. (Exhibit P-88)

7. On February 5, 2002, DESE confirmed assignment of Robert K. Angstead as the Chairperson of the Panel relating to Mother's request and further confirmed Rand Hodgson as Mother's designated Panel Member and Connie Sanders as District's designated Panel Member. (Exhibit P-92)

8. By Order of the Chairperson dated February 7, 2002, District's request for a continuance due to the unavailability of an indispensable witness was granted and the hearing was rescheduled for March 26 and 27, 2002, with the decision to be issued no later than April 30, 2002. (Exhibit P-94)

9. By letter of February 26, 2002, Mother requested that her due process request and the due process request earlier initiated by the District be consolidated into one proceeding. (Panel Exhibit 6)

10. By facsimile of March 6, 2002, District requested a continuance of the due process hearing initiated by Mother to March 26 and 27, 2002, so the matter could be heard simultaneously with the due process hearing originally instituted by the District. (Exhibit P-109, p. 1087)

11. By Order of the Chairperson dated March 6, 2002, Mother's request for consolidation was granted maintaining the previously scheduled hearing dates of March 26 and 27, 2002. (Exhibit P-108, pp. 988-990)

12. By Order of Robert T. Angstead dated March 7, 2002, Chairperson of the Panel empowered pursuant to Mother's request for due process, at Mother's and District's request, the

cause initiated by Mother was consolidated into District's previously filed due process hearing. Further, it was ordered, pursuant to request, that the due process hearing Panel in which he was chairperson was stayed and Mother's due process request would also be heard March 26 and 27, 2002. (Exhibit P-108, p. 991)

13. By letter of March 8, 2002, Mother requested a continuance from the March 26 and 27, 2002, hearing dates to seek representation. (Panel Exhibit 7)

14. By Order of the Chairperson dated March 20, 2002, Mother's request for a continuance was granted and the hearing was continued from March 26 and 27, 2002, and reset for May 6, 7, 8 and 9, 2002, with the decision to be rendered on or before June 3, 2002. (Exhibit P-108, pp. 992-993)

15. By letter of April 22, 2002, Nancy E. Huerta, Esq., and Elizabeth G. McCulley, Esq., of Shook, Hardy & Bacon, L.L.P., entered their appearance on behalf of Mother and requested a continuance from the hearing dates of May 6, 7, 8 and 9, 2002, to review the file and prepare. (Exhibit P-109, p. 1090)

16. By letter of April 24, 2002, District requested a continuance to May 28 and 29 and June 4 and 5, 2002. (Exhibit P-109, p. 1092)

17. By Order of the Chairperson dated May 3, 2002, the appearance of Ms. Huerta and Ms. McCulley was acknowledged, and the requests for a continuance were granted. Pursuant to the requests and by agreement of the parties, the hearing was rescheduled for May 28 and 29, and June 24 and June 25, 2002, with the decision to be rendered on or before August 3, 2002. (Exhibit P-108, pp. 995-996)

18. On or about May 10, 2002, District filed a Motion in Limine (Exhibit 108, pp. 1004-1015), and a Motion to Prohibit Simultaneous Participation by Multiple Attorneys for Respondent. (Exhibit 108, pp. 1017-1019)

19. On or about May 13, 2002, Mother requested a continuance from May 28 and 29, and June 24 and June 25, 2002, for, among other reasons, an IEP team meeting. (Exhibit P-108, pp. 1033-1036)

20. On or about May 14, 2002, Mother filed her response to District's Motion to Designate Lead Counsel, (Exhibit 108, pp. 1037-1040), and District filed its reply to said response on or about May 16, 2002. (Exhibit P-108, pp. 1041-1045)

21. By order of the Chairperson dated May 16, 2002, Mother's request for a continuance was granted, based primarily upon the request for an additional IEP team meeting, and the hearing was rescheduled for June 24, 25, 26, 27 and 28, 2002, with the decision to be rendered on or before August 3, 2002. (Exhibit P-108, pp. 1046-1047)

22. By Order of the Chairperson dated May 22, 2002, concerning District's Motion to Prohibit Simultaneous Participation by Multiple Attorneys for Respondent, it was ordered that Mother did not need to designate lead counsel and that if multiple attorneys were going to be used, the rules of civil procedure would be followed. District's Motion in Limine was denied. (Exhibit P-108, pp. 1049-1050)

23. By letter dated May 24, 2002, District confirmed its issues for Due Process (Exhibit P-109, p. 1157), and requested clarification of Mother's issues on or before May 28, 2002. Said letter was in response to Mother's letter of May 21, 2002. (Exhibit 109, P. 1152)

24. In a telephone conference call of May 28, 2002, with all attorneys participating, Mother requested an emergency protective order to preclude District's deposition of Jennifer

Spills set for May 29, 2002. The Chairperson denied said request during the telephone conference and confirmed the denial of this request by Order dated May 30, 2002. (Exhibit P-108, pp. 1052-1053)

25. On or about June 5, 2002, Mother filed a Motion for Sanctions for District's failure to produce documents. (Exhibit 108, pp. 1054-1061) On or about June 7, 2002, District filed a response to Mother's Motion for Sanctions. (Exhibit 108, pp. 1062-1080)

26. By Order of the Chairperson dated June 11, 2002, Mother's Motion for Sanctions was denied with the Panel reserving the question of the admissibility of one document. (Exhibit 108, pp. 1081-1083)

27. By facsimile of June 6, 2002, Mother's attorney confirmed to District's attorney Mother's issues for Due Process. (Exhibit 108, p. 1083ee) District's attorney responded to this correspondence by facsimile dated June 7, 2002. (Exhibit 108, pp. 1083ff – 1083gg)

28. By facsimile dated June 18, 2002, District requested that Mother be required to provide further clarification of the issues. (Exhibit 108, pp. 1083ll – 1083ddd)

29. By Order of the Chairperson dated June 18, 2002, District's request was sustained and Mother was ordered to provide District and Panel Members with a statement of issues as governed by 34 C.F.R. 300 507(c)(2)(iv). (Exhibit P-108, pp. 1083eee-1083fff)

30. On or about June 20, 2002, District filed a Motion in Limine to limit certain evidence concerning Student's medical reports and pictures. (Exhibit P-108, pp. 1083e-1083q) Mother filed a response thereto on or about June 21, 2002. (Exhibit P-108, pp. 1083r-1083v)

31. By facsimile dated June 21, 2002, Mother provided District and Panel Members with clarification of her issues for Due Process. (Exhibit P-108, pp. 1083jjj-1083kkk)

32. The hearing commenced on June 24, 2002. Prior to receiving evidence, the Chairperson overruled District's Motion in Limine dated June 20, 2002, subject to objections that might be made during the course of the hearing as to relevancy. Thereafter, District filed its Motion to Dismiss, or, in the Alternative, in Limine. (Panel Exhibit 8) The Chairperson overruled District's Motion, with the exception that Mother's request for compensatory education would not be considered as such request had not been presented until three (3) days before the hearing.

33. The hearing was conducted on June 24, 25, 26, 27 and 28, 2002, but was not concluded. Pursuant to motions made by the parties, and by consent, it was ordered the hearing was to reconvene on July 22, 23, 24 and one-half day on July 25, 2002, with the decision to be rendered on or before September 5, 2002. (Panel Exhibit 2)

34. The hearing was reconvened and evidence presented on July 22, 23, 24 and 25 but was not concluded. Pursuant to motions made by the parties, and by consent, it was ordered that the hearing was to reconvene on August 12, 13, 14, 15 and 16, 2002, with the decision to be rendered on or before October 15, 2002. (Panel Exhibit 3)

35. The hearing was reconvened and evidence presented on August 12, 13, 14, 15 and 16, 2002 but was not concluded. Pursuant to motions made by the parties, and by consent, it was ordered that the hearing was to reconvene on August 26, 27, 28, 29 and 30, 2002, with the decision to be rendered on or before November 1, 2002. (Panel Exhibit 4)

36. The hearing was reconvened and evidence presented on August 26, 27 and concluded on August 28, 2002.

37. The Panel, sua sponte, by Order of the Chairperson on September 5, 2002, opened the record for the specific and limited purpose of admitting into evidence Panel Exhibits 5, 6, 7 and 8.

38. Due to the failure of the transcript being completed by September 10, 2002, and on the assurance by the court reporter that the transcript would be completed on or before October 12, 2002, and pursuant to motion made (Panel Exhibit 9) and consented to by the parties, it was ordered on October 15, 2002, that the transcript be completed and delivered on or before October 21, 2002, with the post-hearing proposed findings of fact, conclusions of law and decision (“post-hearing briefs”) being due on or before November 26, 2002, with the Panel’s decision to be rendered on or before December 17, 2002. (Panel Exhibit 10)

39. Due to medical problems experienced by the court reporter and other technical problems in preparing the transcript, the transcript was not completed on October 21, 2002. It was ordered that the transcript be completed and delivered on November 15, 2002, with there to be a telephonic conference on November 19, 2002 wherein the schedule for the submission of post-hearing briefs and the due date of the decision be determined dependent upon receipt of the transcript. (Panel Exhibit 11)

40. The transcript was not completed on November 15, 2002, and it was determined during the telephonic conference that the post-hearing briefing schedule and the due date of the decision would be determined, dependent upon receipt of the transcript.

41. On November 30, 2002, the Panel Chair received, via facsimile, setting forth reasons for the delay in the preparation of the transcript. (Panel Exhibit 12) The completed transcript was delivered to the Panel and both parties on or about December 17, 2002.

42. By Joint Motion for Extension of Time, the parties requested the deadline of February 4, 2003, for the submission of post-hearing briefs. (Panel Exhibit 13)

43. The Joint Motion for Extension of Time was granted by an Order issued on December 19, 2002, with February 4, 2003 being set as the date post-hearing briefs were due with the decision to be rendered on or before March 21, 2003. (Panel Exhibit 14)

44. On or about January 30, 2003, District, by and through its attorneys, requested a continuance to February 18, 2003, to file post-hearing briefs due to counsel's engagement in a jury trial in the United States District Court, Western District. (Panel Exhibit 15) Counsel for Mother did not object to this request.

45. On February 4, 2003, it was ordered that the parties had until February 18, 2003, in which to file their post-hearing briefs and that unless substantial and extraordinary reasons were provided, no additional continuances would be granted. It was further ordered that the decision would be rendered on or before April 4, 2003. (Panel Exhibit 16)

46. The parties submitted their post-hearing briefs on February 18, 2003.

47. The Panel, sua sponte, by Order of the Chairperson on February 26, 2003, opened the record for the specific and limited purpose of admitting into evidence Panel Exhibits 9, 10, 11, 12, 13, 14, and 16. (Panel Exhibit 17)

48. The decision was rendered on April 2, 2003.

ISSUES

1. IS STUDENT ENTITLED TO AN INDEPENDENT EDUCATIONAL EVALUATION AT DISTRICT'S EXPENSE?
2. WAS STUDENT PROVIDED A FREE APPROPRIATE PUBLIC EDUCATION ("FAPE") WHILE ATTENDING NORTHWOOD?
3. WHAT IS STUDENT'S APPROPRIATE PLACEMENT?

FINDINGS OF FACT

1. The Student was born on _____, is a 13 year old boy with Downs Syndrome as diagnosed at birth. At the time of his birth, the doctors told Student's Mother that Student may not survive, and if he did, chances were slim that he would ever walk or talk.
2. Student entered the Sunshine School in May 1991 starting part-time for 9 months and then full-time in December of 1991. The Sunshine Center is a school for disabled children of all ranges and ages. Student remained at the Sunshine Center during his kindergarten year where he started working on academics and received speech therapy, OT and PT.
3. At age 7, Student attended the transition program at Sycamore Hills in the Independence School District for the 1997-1998 school year. Sycamore Hills is a public school where Student was in a special education class. At first, Student was in a one-to-one class and had occupational therapy, physical therapy, speech therapy and a sensory program.
4. While attending the Sunshine School, Mother noticed that Student was beginning to demonstrate self-stemming behaviors where he would stare at lights, the fan, shake his head back and forth, tap his feet and utter what sounded like a repeating birdcall.

5. In February and May of 1998, Student underwent an educational re-evaluation. Pertinent parts of the 1998 re-evaluation conducted by the Independence School District are as follows:

a) On May 5, 1998, the Leiter International Performance Scale was administered wherein Student scored a non-verbal IQ of 36.

b) The Vineland Adaptive Behavior Scales, from May 23, 1995, showed an adaptive behavior composite score of 56. The test results revealed low mild to moderate delays in all areas of development.

c) Under speech and language, Student scored 2 years 10 months on the Peabody Picture Vocabulary Test Revised. The total language score under the Preschool Language Scale was 2 years 4 months.

d) The occupational and physical therapy evaluation was conducted on May 6, 1998. It was recommended that Student receive physical therapy consultation services as needed for the next school year.

e) The conclusion of the 1998 re-evaluation as embodied in the Results and Recommendations diagnosis Student as being severely mentally retarded. The diagnostic summary of the 1998 re-evaluation reads:

Severe Mentally Retarded

CONTINUES TO QUALIFY as Severely Mentally Retarded:

The multidisciplinary team has determined that Student does meet the eligibility criteria for being identified as severely mentally retarded. Student performed more than two standard deviations below the mean on a standardized measure of intelligence, and the adaptive behavior as measured by a standardized test was consistent with the measured intellectual ability. The educational problems Student is experiencing are primarily related to the Student's reduced cognitive ability and adaptive behavior.

The diagnostic summary also concluded that Student's language and articulation were disordered.

6. For the 1998-1999 school year, Student returned to Sycamore Hills, but his classroom from the year before had been disbanded. Student was placed in Learning Center #1 which was a classroom for severe/profound students, without one-on-one assistance. Student increased his incidents of cursing, throwing objects, hitting, spitting and acting out.

7. During the first part of the 1998-1999 school year, Student's behaviors were also reaching an intolerable level at home. Student was throwing drinks, throwing food, spitting, licking, cussing, and hitting. Student also knocked over a stereo and broke a grandfather clock.

8. Mother believed that, at this point, Student's behaviors had deteriorated to the point that she was unable to handle him at home. Student was admitted to Trinity Hospital where he stayed for approximately a week.

9. At Trinity Hospital, Student went under the care of a psychiatrist, Dr. James Batterson and was placed on Risperidone. Student also began seeing Dr. Patricia Purvis, a psychologist who observed that when he was referred to her he was spitting, kicking, hitting, throwing, cursing and was aggressive and out of control. At this point, Mother realized that Student was going to need indefinite psychological and psychiatric care plus medication in order to "get out from what he's in . . . I couldn't leave him like he was. He needed help."

10. The Independence School District submitted Student to Northwood School in the Raytown School District in September, 1998. On December 18, 1998, Northwood denied Student placement stating that due to the amount of one-on-one attention needed by an adult to manage Student's attention to task, and oppositional and aggressive behaviors that Northwood would not be an appropriate placement.

11. Subsequently, Mother went to visit the Rainbow Center for Communicative Disorders (“Rainbow”) to determine if Rainbow would be able to serve Student’s needs. Mother determined the program at Rainbow was appropriate and Student was enrolled at Rainbow on November 30, 1998.

12. An Individualized Educational Program (“IEP”) meeting was held at Rainbow on April 14, 1999. Student’s recommended program for the 1999-2000 school year was maintaining the presence of a one-on-one paraprofessional. 1:1 Teacher/student ratio for all academic activities, daily self-help programming, behavior management, appropriate daily cognitive and readiness programming, adaptive PE 60 minutes per week, 90 minutes of speech/language therapy, 30 minutes of OT and 15 minutes of PT. Student would also receive 2 hours a month in community access gym.

13. Student attended Rainbow’s Extended School Year (“ESY”) program the summer of 1999.

14. On April 12, 2000, an IEP meeting was held at Rainbow. Student’s recommended program was maintaining the presence of a one-on-one paraprofessional, 1:1 teacher/student ratio for all academic activities, daily self-help programming, behavior management, appropriate daily cognitive and readiness programming, adaptive PE 60 minutes per week, 90 minutes of speech/language therapy, 30 minutes of OT and 15 minutes of PT.

15. Student was deemed eligible to attend Rainbow’s ESY program the summer of 2000.

16. On March 29, 2001, a transition IEP meeting was held at Rainbow. Student’s recommended program was maintaining the presence of a one-on-one paraprofessional, 1:1 teacher/student ratio for all academic activities, daily self-help programming, behavior

management, appropriate daily cognitive and readiness programming, adaptive PE 60 minutes per week, 90 minutes of speech/language therapy, 30 minutes of OT and 15 minutes of PT. (Respondent's Exhibit 15)

17. While at Rainbow, Mother believed and Rainbow's IEPs confirm, that Student experienced many positive changes, making progress academically and behaviorally, although in the 2000-2001 progress report, Student was still having incidents of striking others and throwing objects two times a day, and his academic/math skills progress was limited to his distractibility and redirection needs.

18. Mother moved to Raytown, Missouri, which is within District's boundaries, on March 31, 2001 with Student and his siblings.

19. After Mother's relocation within District's boundaries, she embarked to enroll her son. Her efforts to do so, at that time, were not successful. Both parties place blame on the other as to why Student wasn't enrolled in the District during the end of the 2000-2001 school year. The Panel is not convinced that the reason Student was not enrolled at that time is attributable to the District and, accordingly, District's obligation to educate Student did not commence until August, 2001 when Student was enrolled in the District.

20. Student started Northwood School ("Northwood") which is within the District in August, 2001.

21. Northwood is a public separate day facility. The student population of Northwood consists of children who are moderately mentally retarded. Northwood's curriculum is that of functional academic with goals directed toward life skills. The classic student is moderately impaired with an IQ between 42 and 52 and exhibits low adaptive behavior skills. The students of Northwood generally are employable. The purpose of Northwood is to provide a

program for moderately disabled kids who need a functional curriculum. Ten other local school districts contract with the District to send students to Northwood.

22. Because Student's last IEP was completed on March 29, 2001, the District conducted an initial IEP meeting on August 23, 2001, for the purpose of making an interim placement. The IEP team determined that Northwood would be the interim placement for Student to gather preliminary information about Student and to complete a re-evaluation. Student's last re-evaluation of May, 1998, was outdated.

23. At the August 23, 2001, IEP meeting Mother expressed to the team that at Rainbow Student had a one-on-one paraprofessional. However, the IEP team disagreed with that interpretation and concluded that Student only had one-on-one support for educational activities. Mother asked for a one-on-one paraprofessional for all activities at the August 23, 2001, meeting as well as at the September 28, 2001, meeting and expressed her concerns of the lack of a one-on-one paraprofessional given Student's inability to adjust to change, his new environment and the effect on his behaviors in light of the fact that Student previously had one-on-one programming.

24. The team also disagreed that Student was receiving physical therapy. On the IEP, 15 minutes is stated, but the box is not checked. Ms. Paula Makin, principal of Northwood, agrees this could have been a typographical error. Mother testified that she was told that Northwood did not bring PT's in for physical therapy. Instead, PT would be incorporated into his adaptive PE class.

25. Mother discussed with the IEP team that Student still had some behaviors which were of concern.

26. On September 7, 2001, Julie Reineke, Student's classroom teacher, communicated to Mother in Student's daily notebook that due to Student's behaviors, a field trip to the theatre would not be a good place to take Student at this point: "If someone (you or another person more familiar with Student) would be able to go with him on the trip, we could take him and I would be more confident . . ."

27. On September 10, 2001, in the notebook, Mother expressed, "I told you in the very beginning he is used to a one-on-one with a para or jealousy comes out. I did specify this and the team did not agree with this approach."

28. On September 13, 2001, Ms. Makin called Mother to discuss Student's escalating behavior:

Discussed increased aggression – spitting, hitting, kicking, knocking things off, parent suggested a removal from group . . . hit bus driver and spit in face of driver on 9/10/01. Told her we may have to suspend. Asked mom about the testing asked about referral to state school, didn't care for Lakeview Woods, not interested in state school, prefers to go back to Rainbow Center.

29. On September 18, 2001, a notebook entry by Mother informed Ms. Reineke that Ms. Marva Davis, a representative from the Nesting Place, an organization that provided home services for Student, would be accompanying Student on the bowling trip.

30. On September 21, 2001, and again on September 24, 2001, Dr. Batterson increased Student's dosage of Seroquel.

31. After Student had been attending Northwood for about a month, an IEP team meeting was held on September 28, 2001, to discuss Student's evaluation, goals, and objectives. The IEP team defined specific areas of need for Student and drafted methods of addressing those

needs. The IEP team concluded that Student needed a slower paced instruction, a more functional curriculum than the general curriculum, and adapted physical education.

32. On September 28, 2001, Ms. Reineke conducted a Functional Behavior Assessment (“FBA”) on Student.

33. Jennifer Crosby, District’s behavioral consultant, analyzed the FBA during her testimony. In this analysis, Ms. Crosby pointed out that Ms. Reineke did not list Student’s issues with communication as antecedents, and did not discuss Student’s reaction to time out (considered a consequence) or being restrained (also a consequence). The FBA did not analyze that Student’s behaviors were worse in the afternoon which would have supported Student’s reduction to ½ days.

34. When identifying antecedents, Ms. Reineke stated that “When he is sitting and does not want to do the task or if he is waiting for attention. Often there seems to be no precipitating event.” Also, “Behaviors occur when he is not given a snack after too many sad faces. Behavior may occur when he doesn’t want to do a task that he doesn’t like. But often behaviors appear to occur for no specific reason.”

35. During the month of September, Student was in school a total of 17 days. Mother contends that this should have been considered as to whether it was appropriate to conduct an FBA at that time, and that Ms. Reineke might have waited longer in order to give Student a change to “become acclimated.” Due to Student’s behaviors at the time and urgency to address those behaviors, it was appropriate for the FBA to have been done on September 28, 2001.

36. The September 28, 2001, IEP states:

In adapted physical education, Student has demonstrated physically aggressive behavior towards peers and staff. His gross and fine motor skills are markedly below same age peers. He demonstrates low muscle tone and endurance

due to his disability. He performs better with one-on-one instruction and assistance.

37. A behavior intervention plan was put in place which describes interventions such as redirecting Student to other acceptable activities or removing him or others from the situation so no one gets hurt. There was no mention of Student being restrained.

38. The IEP team also decided to reduce Student to ½ day “due to behaviors resulting in injury to others. . .” the team decided on half/time or 900 minutes per week. The September IEP also changes the 15 minutes of physical therapy. PT was discontinued because the needs for physical therapy were being addressed with other services.

39. While Student was enrolled at Northwood, the District performed a re-evaluation of Student from late September through mid October, 2001. The District’s evaluation of Student was multi-dimensional and multi-faceted, and included nine different assessments. The evaluation was conducted by five professionals, three of which were personally acquainted with Student. The evaluators were: (1) Rosalie Potts, (2) Julie Reineke, (3) Sheila Randol, (4) Sandra Lucero, and (5) Diane Gorman.

40. The District’s re-evaluation included several tests and assessments: the Leiter-R, the Vineland, the Callier Azusa, the Goldman Fristoe Articulation, the Expressive One-Word Picture Vocabulary, the Peabody Picture Vocabulary, the Behavior Evaluation Scales School Version, the Classroom Observation Report and the Occupational Therapy Evaluation.

a. The Leiter – R. Rosalie Potts, an educational diagnostician for the District, administered the Leiter-R to Student on October 8, 2001. Ms. Potts received a bachelor’s degree from Southeast Missouri State, a master’s of education degree from University of Missouri at Columbia and an educational specialist degree in reading. She is certified as an elementary education teacher, elementary K-12, a reading specialist, K-12, and elementary

school administration. She has been in special education since 1972 and has been conducting intelligence testing since then. She has administered the Leiter test approximately 80 times and was the administrator for the Leiter test in the District. Ms. Potts credibly testified that the Leiter-R is the most appropriate intelligence test for Student because Student is essentially non-verbal and the Leiter test is specifically designed to measure nonverbal intelligence for students who are non-verbal. Leiter-R results in an intelligence quotient (IQ) for a particular student. The student is not required to talk, write, or read anything and the person giving the test does not give the directions verbally. Directions are given by pantomime, gestures, and facial expressions, with very short verbalizations if the student is minimally verbal. Prior to administering the Leiter-R to Student, Ms. Potts did not have any information as to what Student's IQ should be or had previously been determined. She did not review any records or have contact with any other member of the IEP team and she had little contact with Ms. Makin before administering the test. Ms. Potts completed and administered the test independent of Ms. Reineke's administering and evaluating the Vineland test. Ms. Potts is familiar with the published instructions for the Leiter-R and she followed those instructions when she administered the test to Student. She administered the Leiter-R under standard conditions for Student, although she did offer food reinforcers. The test is not timed, so Ms. Potts gave Student every opportunity to answer and was allowed to encourage the Student, which is normal in cognitive handicapped children. At no point did Ms. Potts feel that she needed to invalidate the results of the testing. Ms. Potts received enough information from Student to score him at an IQ of 32, which is more than four standard deviations below the mean. If Student took this test a number of times with a 90% confidence level, his score would fall somewhere between 25 and 39. Student's previous score on the Leiter-R test was a 36, which is more than 4 standard deviations below the mean. Even though

Student's full IQ had been determined to be 36 based on a previous evaluation, that would not be alarming but actually confirmed Ms. Potts' own evaluation because 36 falls between the range of 25 to 39.

b) The Vineland. Ms. Reineke, Student's classroom teacher at Northwood, and the obvious person to do so, administered the Vineland Adaptive Behavior Scale. Ms. Reineke earned her bachelor's degree in speech pathology, a bachelor's degree in elementary education and a certification in special education. Ms. Reineke has four years experience in special education in the classroom and six years as a speech therapist in a state school. The Vineland does not require the child to be verbal to complete the evaluation and shows where the child is functioning in the domain of communication, daily living and socialization. Ms. Reineke has administered the test for four years while at Northwood and was trained to do so. At the time the Vineland was completed on September 26, 2001, Ms. Reineke had been with Student for a month with daily contact. Student's Vineland score was a 31. This score was over a 30-point drop from his previous Vineland result of 56 at Independence. This apparent significant drop in score did not concern Ms. Reineke because she compared the age equivalence and the age of the student. The Independence School District Vineland given to Student was in 1995 when he was much younger. When a student gets older, the gap between age and assessment results widens for mentally retarded children. It is not unusual for Student to score lower as he ages. The Vineland was representative of Ms. Reineke's prior experiences with Student while he was in the classroom. The Vineland was the appropriate test to accurately measure Student's adaptive behaviors, and Ms. Reineke had enough information from the Vineland to develop educational programming for Student.

c) Ms. Reineke also conducted the classroom observation portion of Student's evaluation. Ms. Reineke selected a random day and observed Student's behavior in the classroom, and noted his work, behavior, etc. Ms. Reineke accurately reflected her observations of Student in her report. Ms. Reineke received enough information to assist in developing the education programming for Student.

d) Behavior Evaluation Scale. Ms. Reineke also participated in the behavior evaluation scale. This scale, which is a checklist, is used when there are concerns in the area of behavior. Three evaluators who had personal knowledge of Student including Ms. Reineke, participated in this assessment, which was completed on September 26, 2001. Each evaluator scored Student through a checklist to rate his behavior.

e) Callier Azusa. Sheila Randol, a District's educational diagnostician, performed the Callier Azusa on Student on October 4, 2001. Ms. Randol has a bachelor of science degree in elementary education and master's in special education. She has worked for the District for over thirty years. From 1969 to 1975, Ms. Randol was an elementary education teacher. In 1975, she began as a learning disabilities teacher and diagnostician. From 1993, she added to her duties the role as a placement coordinator for the severely handicapped. From 1995, she was a part-time coordinator at the elementary school and middle school and starting in 1996, she was the process coordinator and placement coordinator for the severely handicapped for Raytown South Middle School. In addition, Ms. Randol is certified to teach kindergarten through eighth grade and is certified to teach students with learning disabilities from K-12. She has administered the Callier Azusa over thirty times. Callier Azusa is an assessment of classroom behaviors that are in a student's repertoire of behaviors, rather than behaviors that have to be taught or practiced. The Callier Azusa measures performance at a particular stage and

not the student's potential. The Callier Azusa is routinely performed if a particular student's skill development is not up to some of the other measures that would be appropriate for his/her age. The Callier Azusa was conducted by examiner Ms. Randol in conjunction with Ms. Reineke. The classroom teacher was chosen because the directions require the informant to be someone who has observed the child for at least two weeks which Ms. Reineke had done. Ms. Reineke and Ms. Randol went through each item to evaluate Student's functioning in the classroom. Ms. Reineke had participated in administering the Callier Azusa between 5-10 times. The results were representative and accurate of Student's ability. Ms. Randol never had any discussions about Student's level functioning or what the results should be, nor, had any contact with Student's IEP team before completing the Callier Azusa. Student was four or more standard deviations from the mean in all areas.

f) Sandra Lucero is the District's occupational therapist serving students K-12. Ms. Lucero first met Student when he began school at Northwood and immediately began providing occupational therapy services. Ms. Lucero evaluated Student's fine motor skills through the Occupation Therapy Component. Ms. Lucero has a degree in occupational therapy from the University of Kansas. In addition, Ms. Lucero has participated in clinical work around the country. Ms. Lucero has also been involved in conducting evaluations for 21 years. Ms. Lucero selected an assessment test that was appropriate for Student's chronological age level as well as his cognitive ability, and administered the occupational therapy assessment to Student on October 2, 2001. At that time, Ms. Lucero was familiar with Student because she had been seeing him during her daily occupational therapy sessions. Based on her experience, children do not regress on fine motor skills if they are out of school for a period of time because fine motor is such a part of daily life, such as putting on and off a coat. Based on Rainbow's IEP and the

progress report, Student was not capable of doing more with respect to his fine motor skills at Rainbow Center than he was doing for her at Northwood. Ms. Lucero did a functional evaluation, which she believed was appropriate for Student, and she selected the developmental measure from the repertoire of tests that were available. Ms. Lucero assessed a range of developmental skills in order to know basically what age range within which Student was performing. She selected the developmental assessment created by the CRU, the Children's Rehabilitative Unit. The purpose of this assessment tool is to assist therapists in determining functional and developmental level with respect to fine motor skills. The CRU assessment allows the child multiple attempts at doing what the evaluator requests, compared to other tests which allows the child only one chance to do what is requested of him/her within a certain time limit. This was an appropriate assessment because of Student's cognitive ability and his minimal verbal skills. When Ms. Lucero evaluated Student, she used the checklist for the CRU, which she has used for at least 10 years. Ms. Lucero learned after going through various levels that Student demonstrates skills ranging from the 18-month level with a scattering of skill up to the 3-year level. Based on her evaluation of Student, the results were consistent with what Ms. Lucero knew working with Student at that time. Her evaluation was accurate and appropriately measured Student's fine motor skills, and she obtained enough information to develop appropriate goals and objectives for Student.

g) Dianne Gorman is a speech/language pathologist at Northwood. Ms. Gorman graduated with an Associates of Arts degree with honors from the community college at Coffeyville, Kansas and graduated with a Bachelor of Science in Education with highest distinctions from the University of Kansas. She also received her Master's degree from the School of Allied Science at the University of Kansas Medical Center. From 1980 to 1990, Ms.

Gorman worked in Kansas City, Kansas, in the public school district as a speech pathologist and in the fall of 1990 she began with the District as a speech/language pathologist, specifically at Northwood. Ms. Gorman serves on the intervention team if there is a student who needs behavior interventions. Over the past 21 years, Ms. Gorman has been involved in 500 or more evaluations. Since Student's interim IEP required speech services, Ms. Gorman began seeing him for individual therapy and group language activities. She was able to observe his skill level with respect to speech and language. During her therapy with Student, Ms. Gorman conducted her own probes to find where he was functioning at that time in the setting in which he was currently placed. In addition, Ms. Gorman would ask Student to follow simple directions to determine at what levels he performed those skills. Ms. Gorman conducted the Peabody Picture Vocabulary test, the expressive one word picture vocabulary test, the Goldman Fristoe test of articulation and the speech and language sample. The articulation test provides a sample of all phonics, sounds and all positions of words. Because of the limited output of Student, she wanted to be able to assess both expressive skills and receptive skills on a one word level where he was currently functioning. It is common practice to have an articulation test and vocabulary test for cognitively impaired students. Ms. Gorman administered this test which is designed to measure speech or production of speech sounds approximately 1,000 times. The purpose of assessing speech sounds is to determine at what level of development the student was and the normal speech development in the normal pattern. Ms. Gorman has supervised clinical practicums where she has administered and scored tests and Ms. Gorman has been administering the Goldman Fristoe for 25 years. The Goldman Fristoe was an appropriate test of articulation for Student because it is presented with picture plates that are 8x10 inches and are large, colorful drawings or representations of objects. Students are given a verbal cue to elicit a response and

74 sounds were tested. Student did not exhibit any aggressive behavior during the testing. After administering and scoring the Goldman Fristoe, Ms. Gorman concluded that Student's raw score placed him below the first percentile for his chronological age. Results of the Goldman Fristoe accurately reflected Student's articulation skills.

h) Ms. Gorman also administered the Expressive One Word Picture Vocabulary Test on September 27, 2001. She had administered the Expressive Language Picture Vocabulary Test hundreds of times. This test is designed for students ranging in age from three through thirteen and was appropriate for Student because his expressive language was at a one word level. After scoring the test, Student's age equivalent was two years, five months. Ms. Gorman testified with 100% accuracy that Student was able to understand the items on this test. The expressive vocabulary test accurately reflects Student's expressive vocabulary. Ms. Gorman is not aware of any expressive vocabulary test that would have been more appropriate to administer to Student.

i) Ms. Gorman also administered a receptive vocabulary test for Student, the Peabody Picture Vocabulary Test-Revised Form L. This test is designed to measure the student's understanding of a single word vocabulary recognition of items by name or object. The student does not have to say the word. The purpose of conducting a receptive vocabulary test is to measure the student's level of comprehension. Ms. Gorman has administered the receptive vocabulary test hundreds of times. This test was appropriate for Student. Under this test, Student's age equivalent was two years, six months, which is consistent with the results of the expressive vocabulary. Ms. Gorman is not aware of any receptive vocabulary tests that would have been more appropriate to administer to Student. The results of the receptive vocabulary test

accurately reflects Student's receptive vocabulary at the time. She obtained enough information from the test to develop speech and language goals and objectives for Student.

41. A meeting was held on October 18, 2001 to review the re-evaluation results. The meeting was attended by Mother, Ms. Reineke, Ms. Makin and Ms. Tracy Banks from The Nesting Place. As Ms. Reineke was reading the test results, Mother informed the attendees that she did not agree with the test results, as she felt that her son could do more. It was Mother's belief that Student's behaviors were out of control.

42. With regard to the re-evaluation of October 1998, at the hearing, Dr. Patricia Purvis (Student's psychologist) and R. Batterson (Student's pediatrician), expressed concerns over the results produced by the District's evaluation.

43. In Dr. Purvis' opinion, Student functions at a level between moderate to severe and would place Student's cognitive ability somewhere between 38 and 42 using a scale of 1 to 100, and Student's communication skills are that of a two to three year old and that Student is not capable of expressing himself on a regular basis using more than one word. Dr. Purvis conducted tests on Student. Those test results were not shared with the District.

44. Both Dr. Purvis and Dr. Batterson testified that they observed Student performing functions that exceeded those depicted by the District's evaluation. Neither Dr. Batterson nor Dr. Purvis observed Student in the school setting. Both testified that an appropriate placement for Student was Rainbow.

45. Dr. Purvis further testified that the 1998 re-evaluation performed by the Independence School District and the 2001 re-evaluation performed by the District were pretty close in consistency and compatibility in terms of their cognitive findings and stated that the District's re-evaluation appeared to be comprehensive.

46. On October 24, 2001, the District's representative, Barbara Welsh, wrote a letter to the Missouri Department of Elementary and Secondary Education ("DESE") requesting consideration for funding to serve severely handicapped children and enclosed copies of the IEP, current evaluation and evaluation plan. Ms. Welsh wrote a second letter also on October 24, 2001, stating that District is considering a State School placement and enclosed the Justification for Placement, IEPs and progress notes, the Evaluation Plan, and the current Evaluation Report.

47. Student was suspended for four days starting on October 25, 2001 until October 31, 2001 for kicking the teaching assistant in the stomach and pushing the bus driver. On the Consolidated Bus Report, the bus driver stated that "Student is a threat to my kids and myself on the bus."

48. On October 30, 2001, Ms. Welsh received two letters from Robert Guth of DESE, stating that Student is eligible to attend the State Schools for Severely Handicapped.

49. On November 6, 2001, Mother, Ms. Makin, Ms. Welsh and Ms. Davis went on a tour of Lakeview Woods. After the tour, Barbara Welsh presented papers for Mother to sign which would have changed Student's placement to Lakeview Woods.

50. This proposal was made subsequent to the September 28, 2001 IEP team meeting wherein placement was at Northwood, and prior to the November IEP meeting, but the building team members were in hopes of Mother agreeing to the placement.

51. On November 6, 2001, Mother received an IEP notice stating that the purpose of the meeting was to review/revise the IEP.

52. On November 8, 2001, there was another bus incident where Student hit the driver in the face and knocked the lens out of his glasses. Student was changed to parent

transportation in the morning only with the District paying \$.75 a mile to cover transportation costs.

53. Prior to the November 13, 2001 IEP meeting, District personnel met to discuss roles and concerns about placement. They, without Mother's presence, discussed options and the chances of Mother accepting those options. They discussed placement at Lakeview Woods and their preference for that placement. They were hopeful that placement was going to change at that meeting. As Ms. Makin stated, "no one disagreed, it was basically unanimous." Ms. Makin did not express Mother's reservations about Lakeview Woods to the team. The consensus was that Lakeview Woods would be the appropriate placement because it was the least restrictive environment after Northwood.

54. An IEP meeting was held on November 13, 2001 and it was attended by Mother and advocates.

55. Mother brought advocates to the IEP meeting after she found out that there would be no referrals to either NOVA or to Rainbow. She contacted Ms. Welsh who told her that she had no choice in viewing Rainbow Center or NOVA and at that time she "knew that I was in trouble as far as I was concerned, because of the way he was already being put right into the state school".

56. At the November 13, 2001 IEP meeting, a review of Student's present level of performance showed that Student was making no progress in the areas of his behavior, his fine motor and self-help skills, and his gross motor skills. He was showing minimal progress in the areas of functional academics and functional language.

57. Mother, at the IEP meeting:

“expressed concern over behavior which she feels has escalated in the past few days at school. She believes that

Student needs a full day program and wants him placed at the Rainbow Center. In addition, Mother has requested a personal assistant at school and on the bus. She has also requested an independent evaluation but was not specific as to her concerns about the current evaluation completed in October 2001.”

58. Mother requested that the District provide Student with a one-on-one bus assistant for Student while he is being transported to and from school. In the Notice of Action, Student was assigned to a bus with a bus assistant who will assist/supervise all the students riding that particular bus.

59. The IEP team determined that Student should be provided the opportunity to attend a full-day school program with additional modifications made to his behavior intervention plan and with additional supports provided in his school setting in order to determine if his educational needs can be met in his placement at Northwood.

60. Mother requested an independent evaluation at public expense for Student. In the Notice of Action, District indicated that it will initiate a due process hearing to defend its evaluation.

61. Mother requested a one-on-one paraprofessional (personal assistant) full time for Student. In the Notice of Action, the District agreed to increase the staff in the classroom to which Student is assigned. However, there was still a rotation schedule for the third person to be in the classroom as late as December.

62. The final Notice of Action refused Mother’s request that Student be returned to the Rainbow Center. Mother rejected placement at Lakeview Woods. The team determined:

that sufficient time is needed to collection data in order to determine if Student’s educational needs can be met in his current setting (full-day educational program at Northwood School) with the implementation of revisions developed by the IEP team on 11/13/01. These revisions include

modifications to his current behavior plan, an aide on the bus to assist/supervise all students assigned to that particular bus, and additional staff support (three staff members which includes a special education teacher and two paraprofessionals in a class that currently has six students including Student).

63. Thus, despite the initial thought to change Student's placement, the team ended up maintaining Student's placement at Northwood. The only revisions made to the previous IEP were "1:1 support when Student's learning or the learning of others is impeded by his behavior" additions to the behavior plan, and restoration to a full time day. During the discussion about returning Student to a full day, the District requested that Ms. Marva come to school and stay with him a part of the school day to make it more successful for him.

64. On November 20, 2001, Raytown School District filed a request for due process on five grounds, three of which were addressed in the Notices of Action described above. The five issues included: the validity of the evaluation conducted by the District, the assistant added to the classroom, the reassignment to the bus with an aide, that Lakeview Woods is the appropriate placement for Student and that the IEP was revised to provide a full day program.

65. At the request of Dr. Allee, District's Executive Director of Special Services, Jennifer Crosby, behavior consultant, was brought in to observe Student starting on Monday, December 3, 2001 and continuing through Wednesday, December 19, 2001. When questioned about the timing, Ms. Makin responded by saying that "District was going forward with the due process and stay put would be at Northwood full-time."

66. Additional consultation by Ms. Crosby occurred in the spring of 2002 from the beginning of May until the end of the school year.

67. Ms. Makin stated that the reasons that Ms. Crosby had not been called in sooner was "We thought this was a temporary placement and we were trying to work with the resources

in the building.” At the same time, Ms. Makin could not recall that they had ever had a student with the behaviors of the frequency and consistency of Student’s. Penny Russell was listed as one of the teachers at Northwood who would have such experience, but Ms. Makin can’t recall if Ms. Russell observed Student. Also, Ms. Makin could not recall either Ms. Russell or Pat White (also on the staff at Northwood) recommended documenting antecedents or using a functional behavior analysis form. These forms were not used with any other child at Northwood.

68. Throughout the fall, Student demonstrated substantial amounts of inappropriate behaviors. There is no charted frequency of behaviors prior to December 17, 2001, but starting on that date with the aid of golf clickers, it was recorded that Student was demonstrating actions in the upper 100’s such as kicking, hitting and biting 137 times.

69. At the time of the consultation on December 3, 2001, Ms. Crosby had seen neither Student’s IEP nor the behavior intervention plan that was currently in place. Ms. Crosby requested information on whether functional data was being collected and developed on ABC as well as an ABDC chart.

70. Ms. Crosby documents on December 3 that “Student began banging on the door of the time out room. As the paper covered the window, I was unable to see what part of his body he was using to bang on the door.”

71. Ms. Crosby also noted that there was a trampoline in the proximity where Student was being escorted to time out. She encouraged Northwood personnel to remove this to separate Student’s association of a reinforcer (trampoline) and consequence (time out). Ms. Crosby was also concerned that Student could climb onto the trampoline when he was unattended. There also was a radiator in the time out room that Student would climb on, kick and touch.

72. Ms. Crosby noted that Dee, the paraprofessional did not know sign, as well as Ms. Crosby also couldn't use sign; "Student communicated with me with signs. I felt quite helpless at the time."

73. Ms. Crosby developed a visual schedule for Student to use during lunch, because that seemed to be a time that he had particular issues. She did not recall seeing the Barney chart mentioned in the IEP being used in the classroom. Ms. Crosby stated that using visual cues for a child with limited communication helps prevent a certain degree of frustration.

74. Ms. Makin informed Mother that Student would have to stay at school if someone from The Nesting Place could not go with him on a field trip.

75. On December 5, 2001, Ms. Banks called Northwood to say that the Nesting Place was unable to come to school to help with field trips. Ms. Makin told her that Student cannot go unless someone from the outside goes with him.

76. On December 7, 2001, Ms. Makin told Mother that she and Dr. Allee, the District's Executive Director of Special Services, had discussed that Student will not be going on field trips due to escalating behavior and the fact that the Nesting Place cannot attend.

77. On December 21, 2001, Dr. Batterson increased Student's Seroquel to the dosage of 200 milligrams, three times a day. In his opinion, the medication has been administered in the maximum. Medication had resolved the problems as much as it could for Student.

78. On January 4, 2002, Mr. Makin sent Mother records pertaining to Student. This was the first time that Mother knew that Student was being restrained.

79. The individual restraining Student was certified in JKM restraint. Ms. Crosby did not know about its reputation in the community or the appropriateness of the restraints for children with disabilities.

80. Mother had concerns over Student's safety at Northwood. Her concerns culminated on January 11, 2002, due to a problem with Student's eye. Mother testified that keeping Student in school at Northwood up until this point was a difficult decision and when she saw his eye and had her doubts, she decided that Student would not be going to Northwood. Student was not returned to Northwood until late April, 2002.

81. The District did not participate in Mother's decision to take Student out of school from January through late April, 2002. On a daily basis, the District called Mother to inquire into the whereabouts of Student. Ms. Makin stopped making the daily telephone calls to Mother upon receipt of Mother's January 28, 2002 letter expressing safety concerns for her son. Ms. Makin advised Mother that Student could return at any time.

82. Principal Makin called the Division of Family Services (DFS) to report educational neglect due to Student's absences from the District. Prior to making the referral to DFS, Ms. Makin wrote a letter to Mother stating if Ms. Makin did not hear from Mother, she would contact DFS. The District received no response from Mother.

83. On February 4, 2002, Dr. Batterson wrote a letter supporting Mother's decision to keep Student out of school as at his last visit, Student appeared anxious about returning to school.

84. Homebound services were not offered to Mother from January 11 to April 30, 2002.

85. Student returned to Northwood in April of 2002 and on April 23, 2002, an IEP meeting was held, at which time Student's placement was discussed.

86. This IEP states that there was no progress in Student's behavior goals. However, there was slow progress in his functional academics, fine motor and self-help skills, gross motor skills and in speech.

87. Mother requested that placement be considered at Rainbow Center or NOVA, and that there be continued services at Northwood School or Homebound. The team decided (with Mother dissenting) that the IEP cannot be implemented at Northwood School due to Student's significant delays in cognition, academic achievement, behavior, social/emotional functioning, motor skills, and communication. The team determined (again with Mother's dissent), that Lakeview Woods School was appropriate for Student's placement. The team used as a basis for the proposed action the current IEP and the 2001 re-evaluation report which included results of the tests administered as previously described at length in this decision.

88. The April IEP also reflected that Student was being restrained, "If restraint is needed, will follow Northwood established procedures at this time." Northwood had no written policies or procedures pertaining to inspection or restraint.

89. The Notices of Action taken stated that due process will be initiated to defend the current evaluation, the number of staff assigned to Student's room will increase, and placement at Rainbow Center is not appropriate.

90. On April 26, 2002, Ms. Makin offered Mother the option of placing Student at Lakeview Wood temporarily. Mother declined and countered with a request for homebound, which was declined.

91. On May 29, 2002, Student's IEP team met to conduct another IEP meeting.

92. Mother presented information by Marilu Herrick, Director of the Rainbow Center, Georgette Elder from NOVA as well as letters from Drs. Batterson and Purvis dated May 28,

2002, and May 27, 2002, respectively, who again expressed their preference for placement at Rainbow.

93. Marilu Herrick stated at the May IEP that Student had a one-on-one paraprofessional, not a one-on-one teacher while at Rainbow.

94. The inappropriateness of Lakeview Woods as a placement for Student was not discussed at the May IEP. The IEP team considered all information presented at the meeting and the IEP team's decision to leave placement at Lakeview Woods was based, in part, on the fact that Lakeview Woods was the least restrictive environment on the continuum.

95. As indicated above in this decision, Mother requested a due process hearing against the District on January 25, 2002. This request was subsequently consolidated with the request initially filed by the District in November of 2001, giving this Panel jurisdiction of all the issues between the parties.

96. On June 21, 2002, Mother provided District with final re-clarification of her issues at which time Mother identified the following items for hearing: "Our issues for due process are: (1) the Raytown C-2 School District denied Student a free appropriate public education by: (a) failing to comply with the procedures under 20 U.S.C. § 1400, *et. seq.*; and Mo. Rev. Stat. § 162; thus the IEP is not reasonably calculated to enable Student to receive an educational benefit; and (b) failing to place Student in an appropriate program during the 2001-2002 school year which would have provided the services and support needed to allow him to benefit from his instructional program; (2) Lakeview Woods State School for the Severely Handicapped is not an appropriate placement in the least restrictive environment; (3) Student is entitled to an independent evaluation. Our proposed remedies include: (1) Placement in an appropriate facility including, but not limited to, The Rainbow Center or Northwood School. (2)

Compensatory education and/or any other damages the hearing Panel finds just to remedy Raytown C-2 School District's denial of FAPE to Student during the 2001-2002 school year.”

97. The lengthy hearing commenced on June 24, 2002 and intermittently continued through August 28, 2002. Prior to the commencement of the hearing, the Panel ruled that compensatory education would not be considered as a remedy given that this relief was requested three days before the hearing commenced.

CONCLUSIONS OF LAW

1. IS STUDENT ENTITLED TO AN INDEPENDENT EDUCATIONAL EVALUATION OF STUDENT AT DISTRICT'S EXPENSE?

Although the re-evaluation performed by the District was not optimal, the record demonstrates that the District completed a comprehensive re-evaluation of Student in October of 2001, which fully complied with the Individuals with Disabilities In Education Act (“IDEA”) evaluation procedures and was multidisciplinary, multifaceted and conducted by qualified examiners.

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. §§ 300.320(a) and 300.531; *see also* the Missouri State Plan's Regulations for Implementing Part B of the IDEA (“the Missouri Plan or State Plan” or “Missouri State Plan”) [III] at p. 22. In addition, a school district must reevaluate each child with a disability “if conditions warrant a re-evaluation or if the child's parent or teacher requests a re-evaluation, but at least once every three years.” 20 U.S.C.A. § 1414(a)(2). *See also* 34 C.F.R. 300.536. Both the IDEA and the Missouri State Plan contain extensive provisions

describing how the evaluation and re-evaluation process should be conducted. *See* 34 C.F.R. § 300.531—300.536; Mo. S.P. [III] at p. 23.

Included among the IDEA’s extensive procedural safeguards is a provision that allows the parents of a disabled child to request an independent educational evaluation (“IEE”) at public expense if the parent disagrees with an evaluation obtained by a school district. *See* 20 U.S.C. § 1415(b)(1); *see also* 34 C.F.R. § 300.502. When a school district is presented with a parent’s 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. §300.502(b)(2). If a school district initiates a due process proceeding and prevails, the parent may obtain an independent evaluation, but not at public expense. *See* 34 C.F.R. §300.502(b)(3).

In determining whether a parent has a right to an independent educational evaluation, the Panel is required to focus on the District’s evaluation for purposes of determining whether it reasonably complied with the evaluation procedures specified in the IDEA and under the State Plan.

In keeping with the guidelines set forth by the IDEA and its implementing regulations, courts and administrative panels that have addressed the sufficiency of district evaluations consistently focus on whether the evaluation in question satisfied the procedural requirements outlined in 34 C.F.R. § 300.532. “The IDEA does not prescribe substantive goals for an evaluation, but provides only that it be ‘reasonably calculated to enable the child to receive educational benefits.’” *J.S. v. Shoreline School Dist.*, 220 F.Supp.2d 1175, 1185 (W.D. Wash. 2002), (*citing*) *Board of Educ. of Hendrick Hudson Central School Dis., Westchester County v. Rowley*, 458 U.S. 176, S.Ct. 3034. Thus, when assessing the adequacy of the District’s evaluation, primary scrutiny should determine whether that evaluation meets the criteria and

procedures set forth in the IDEA and the Missouri State Plan for implementing Part B of the IDEA.

In *Shoreline School Dist.*, the federal district court held that a school district fully met its obligation to evaluate a student where the evidence indicated that staff members who were knowledgeable about the areas of suspected disability evaluated the student in all areas of his suspected disability. *See Id.* at 1186-1187. Similarly, in *Fallbrook Union Elementary School Dist.*, 28 IDELR 678 (Hearing Officer California 1998), the hearing officer found that the district's psycho-educational assessment was appropriate since the tests were administered by a licensed school psychologist according to the criteria and evaluation procedures set forth in the State of California's Education Code, which mirrors the evaluation procedures set forth at 20 U.S.C. §1414(b) and 34 C.F.R. § 300.532. *See also Grapevine-Colleyville Indep. School Dist.*, 28 IDELR 914 (Hearing Officer Texas 1998) (finding that a district's evaluation of a ten-year old student was appropriate because the assessments were "conducted by trained personnel, assessed all suspected areas of disability, and were appropriately administered.")

The instances in which courts have deemed a district's evaluation to be insufficient uniformly involve situations where the district's evaluation substantially fails to satisfy the guidelines set forth by the IDEA. For example, in *Seattle School Dist. No. 1 v. B.S.*, 82 F.3d 1493 (9th Cir. 1996), the court held that a school district's evaluation of a child with multiple disabilities was insufficient because it "failed to include anyone ... with knowledge in the disorders known to be the cause of [the child's] problems." *Id.* at 1499. The Ninth Circuit held that this failure "was contrary to the School District's duty to 'ensure...[that the] evaluation [of the student] is made by a multidisciplinary team... including at least one teacher or other specialist with knowledge in the area of suspected disability.'" *Id.* (citing) *Union School Dist. v.*

Smith, 15 F.3d 1519, 1523 (9th Cir. 1994). Similarly, the court in *Warren G. v. Cumberland County School Dist.*, 190 F.3d 80 (3d Cir. 1999), deemed a school district's evaluation of two learning disabled brothers inadequate because the district's evaluations failed to employ tests and other evaluation materials which were tailored "to uncover specific areas of their learning disabilities." *Id.* at 87.

There is credible and sufficient evidence in the record to support a finding that the District's October 2001 re-evaluation of Student complied with the evaluation procedures outlined in the IDEA and the Missouri State Plan.

The IDEA requires evaluations and re-evaluations to comply with the following procedures:

(1) the testing and evaluation materials used to assess a child must be selected and administered so as not to be discriminatory on a racial or cultural basis, and should be provided and administered in the student's native language or other mode of communication;

(2) the evaluator must use a variety of assessment tools and strategies to gather relevant functional and developmental information that may assist in determining whether the child is a child with a disability and the content of the child's IEP;

(3) any standardized tests given to the child must be validated for the specific purpose for which they are used and administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of such tests;

(4) tests and other evaluation materials must include those that are tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient;

(5) 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;

(6) 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;

(7) the child must be assessed in all areas related to the suspected disability;

(8) the evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs;

(9) 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;

(10) 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 20 U.S.C. §1414(b) and 34 C.F.R. § 300.532. The State Plan essentially mirrors these evaluation procedures. *See* State Plan (III) at pp. 23-24.

1. The testing and evaluation materials used by the District to assess Student were selected and administered so as not to be discriminatory on a racial or cultural basis, and they were provided and administered in the English language, which is Student's native language.

No evidence was adduced by Mother to support any finding that the testing materials were either discriminatory or given in a language other than Student's native language. The District's testing, assessment and evaluation materials were nondiscriminatory.

2. Student's re-evaluation utilized a variety of assessment tools and strategies to gather relevant functional and developmental information that assisted the IEP team in determining the content of Student's IEP.

There is substantial credible evidence in the record that the District used a variety of assessment tools and strategies to gather relevant information about Student's functional and developmental level. The District's October 2001 re-evaluation was conducted by five qualified professionals, and employed a total of nine (9) different assessment tools. The evaluation tests and materials employed by the District to reevaluate Student in October 2001 were designed to assess specific areas of Student's functioning. Student was assessed in the areas of cognitive level, adaptive behavior, speech and language, social and emotional development, and gross and fine motor development.

For example, Student's classroom teacher (Julie Reineke) administered the Vineland Adaptive Behavior Scale ("Vineland Assessment"), which is designed to show where a child is functioning in the areas of communication, daily living and socialization. The Vineland Assessment is based upon Ms. Reineke's observations of Student in the classroom. Based upon the Vineland Assessment that she administered to Student, Student's adaptive behavior was commensurate with his cognitive ability.

Ms. Reineke also assisted Ms. Randol with the administration of the Callier Azusa by serving as the informant. Ms. Randol, as one of the District's educational diagnosticians, assists with giving assessments to students suspected of being disabled in grades kindergarten through grade twelve. Ms. Randol testified that she administered the Callier Azusa over thirty (30) times before she had administered it for Student. The purpose of the Callier Azusa was to measure Student's developmental positions as of the date of the test (October 4, 2001), and Ms. Randol partially relied upon Student's classroom teacher's observations of him in the classroom over a period of time for reaching certain conclusions. The Callier Azusa measures a child in several areas including: motor development, perceptual development, daily living skills, cognitive, communication, language and social development. The Callier Azusa is administered to a specific population of students, i.e. those who are in the severe to the profound mental retardation range as well as the deaf and blind, and is used when the evaluator is concerned that a particular student's skill development is not appropriate for his age. The Callier Azusa also assesses behaviors that are a part of a child's repertoire of behaviors as opposed to behaviors that he is learning or practicing or could learn.

Sandra Lucero, an occupational therapist serving students in kindergarten through grade twelve, evaluated students in the area of occupational therapy for over twenty-one years and

began providing occupational therapy services to Student when he enrolled at Northwood. Ms. Lucero conducted the occupational therapy component to Student's re-evaluation and in doing so, she selected a functional evaluation which was appropriate in light of Student's level of cognitive functioning. She selected a developmental measure known as the Children's Rehabilitative Unit (CRU) assessment. The purpose of the CRU is to assist therapists in determining functional developmental level with respect to fine motor skills. Ms. Lucero had used the CRU for at least ten (10) years and it seemed to "correlate well with other testing." Ms. Lucero selected the CRU from a repertoire of available tests because Student was a non-verbal and low cognitive-functioning child; therefore, the CRU was especially appropriate for him because it allowed him to make multiple attempts to perform whatever he was requested to perform, and he was not required to perform any certain motor task within a certain time limit. In contrast, other available tests and evaluation tools "were heavily language reliant" or prescribed time limitations or allowed directions to only be given once to a student. Ms. Lucero administered the assessment in the therapy room because Student was familiar with that room and had food reinforcers present during the CRU testing. She administered the CRU testing under standard conditions. As Student's occupational therapist, Ms. Lucero specifically did not believe retesting or independent testing or an independent functional assessment of Student would render better or more accurate information about his fine motor skills.

Rosalie Potts, an educational diagnostician for the District, administered the Leiter-R test to Student because it is essentially a non-verbal test, which required very little, if any, verbal skills in order to complete.

Diane Gorman, Student's speech pathologist at Northwood, testified about the tests she selected to assess Student in the area of speech and language. Specifically, Ms. Gorman

employed the Peabody Picture Vocabulary Test, the Expressive One Word Picture Vocabulary Test and the Goldman Fristoe Test of Articulation to assess Student, and she further testified about what each test is designed to measure. The Goldman Fristoe Test is designed to measure the production of speech sounds, was designed for certain age levels and was an appropriate test to administer to Student. Ms. Gorman obtained enough information from all of the tests that she administered to Student in order to develop speech and language goals and objectives for Student.

3. The standardized tests administered to Student were validated and properly administered by trained and knowledgeable personnel in the field.

There was credible testimony that the tests administered to Student as part of the District's October 2001 re-evaluation were validated to test the areas of function indicated. Several of the evaluators testified in detail about the manner in which they administered the tests to Student and discussed the instructions and procedures that they followed in doing so. Furthermore, there was no credible evidence adduced to indicate that any of the District's evaluators were not qualified or trained to give the particular tests and assessments that were administered for Student. Mother testified that she is not challenging the qualifications of the District's evaluators.

Mother maintains that one reason the District re-evaluation does not comply with Missouri law is that an educational diagnostician, who administers educational evaluations and assists in determining eligibility for special education must have a Master's Degree, and Ms. Reineke did not. Undermining this contention is the fact that Rosalie Potts, an educational diagnostician for the District, who administered the Leiter-R test holds a master's degree. So does Sheila Randol, also an educational diagnostician for the District, who administered the

Callier Azusa, and Dianne Gorman, a speech/language pathologist at Northwood who administered the Peabody Picture Vocabulary Test, the Expressive One Word Picture Vocabulary Test sample, the Goldman Fristoe Test of Articulation, and the speech and language.

The experience, training and credentials of the District's participants who administered the tests that served as the foundation for Student's October 1998 re-evaluation were excellent.

4. The tests and evaluation instruments used to assess Student's abilities and disabilities included those that are tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

The Leiter-R test, which is an intelligence test, is only one of the nine assessments administered as part of Student's October 2001 re-evaluation. The District's evaluators specifically selected other tests and evaluation materials, which were tailored to assess specific areas of Student's needs in the areas of speech and language, fine and gross motor development, perceptual development, daily living skills, cognitive level, adaptive behavior, and communication.

5. The District's evaluators selected and administered tests so as to ensure that the results would accurately reflect Student's aptitude or achievement level in the areas of impaired sensory, manual, and speaking skills.

The District's evaluators specifically selected tests and assessments that were appropriate for Student, who is essentially non-verbal and/or has significant language problems. For example, Ms. Lucero, the occupational therapist, specifically chose the CRU as an assessment tool for evaluating Student's developmental fine motor functional level because, unlike other available assessments, the CRU was not "heavily language reliant," and it was not subject to

time restrictions or other restrictions against repeating instructions or making gestures. Similarly, Ms. Potts specifically selected the Leiter-R test to assess Student because it is essentially a non-verbal test, which required very little, if any, verbal skills in order to complete, and the test was specifically designed for non-verbal students like Student who have significant language problems. Consideration was given by the evaluators of other tests and some were not used because they required more verbal skills to complete than Student possesses.

6. The District did not merely employ a single procedure as the sole criterion for determining Student's disabilities or his IEP; rather, it employed nine (9) different types of evaluations and assessments and cross-referenced these assessments with observations of Student in the classroom.

As noted several times, the District administered a total of nine tests and assessments as part of its re-evaluation and the testimony of the evaluators underscored their conscious efforts to consider the tests in relationship to one another so that no one test or procedure would be the sole criterion for determining Student's eligibility and for developing his IEP. For example, the CRU test was used because, in part, correlated well with other testing. The District's IEP for Student reflects goals and objectives for Student in the different areas in which he was assessed, further demonstrating that no one test was given sole consideration for development of Student's IEP.

7. The District's evaluators assessed Student in all areas related to his suspected disability.

The District's October 2001 re-evaluation properly assessed Student in all areas related to his disability. The District's evaluators tested Student in the areas of gross and fine motor development, perceptual development, daily living skills, cognitive development, functional

development, cognitive communication, speech and language. Thus, the District's re-evaluation sufficiently meets this criterion.

Mother also maintains that the District's re-evaluation was defective because it did not test for autism even though the emergency information she filed with the District stated that Student had "autistic behaviors, self stems and exhibited behaviors consistent with autism". However, neither Dr. Batterson nor Dr. Purvis in their communications to the District mentioned autism. In addition, while several witnesses testified as to some similarities between Student's behaviors and autistic behavior, no evidence specifically ascribing autism to the Student was produced. To prevail in an attack on the District's re-evaluation it is incumbent upon a parent to identify particular omissions in a district's re-evaluation and then show how these omissions prevented the District from developing an adequate program. See *Judith S. v. Board of Education of Community Unit School Dist. No. 200*, 28 IDELR 728 (N.D. Ill. 1998), 1998 WL409416. Herein, even if autism testing should have been a component of the testing, and we are not ruling that it should have been, it was not shown how its omission prevented the District from developing an adequate program.

8. The District's re-evaluation was sufficiently comprehensive to identify all of Student's special education and related services needs.

There is substantial, credible evidence in the record that indicates that the District's October 2001 re-evaluation was comprehensive. Several of Mother's witnesses testified that they believed the re-evaluation was comprehensive. Specifically, Student's treating psychologist, Dr. Purvis, who was called to testify on behalf of Mother, testified that the District's re-evaluation appeared to be comprehensive insofar as it contained an IQ measure, an

adaptive behavior information assessment, a speech language component, and an occupational therapy component. In addition, Georgette Elder, the principal of Nova Center, who was called by Mother to testify at the hearing, testified that she had reviewed the District's October 2001 re-evaluation and found nothing in her review to suggest that the District's re-evaluation was inadequate or inappropriate.

The entire IEP team agreed to assess Student in the areas of vision, hearing, health and motor, cognitive/adaptive, academic, speech and social/emotional and the entire IEP team believed that the evaluation plan was sufficiently comprehensive to assess Student's educational needs.

In addition, the District's re-evaluation was sufficiently comprehensive to identify all of Student's related services needs. For example, Ms. Gorman, the District's speech pathologist, did not believe any kind of testing or retesting would reveal any better or more accurate information about Student in the areas of articulation, phonology and receptive vocabulary skills. Similarly, Ms. Lucero, the District's speech pathologist, testified that she did not believe retesting or independent testing or an independent functional assessment would render any better or more accurate information about Student's fine motor skills.

Student's re-evaluation, which consists of assessments in several areas of functioning, fully enabled the IEP team to identify Student's special education and related services needs and to develop an IEP to address those needs.

9. The District's evaluators used technically sound instruments that could assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

The District's evaluators, as described above, appropriately selected testing instruments designed to specifically address Student's cognitive, behavior and developmental functioning. Mother did not adduce any evidence to contradict the District evaluators' testimony that they employed technically sound instruments in conducting their respective evaluations. Dr. Allee reviewed the District's evaluation, and believed the instruments used were technically sound, and believed Student's scores were consistent with prior evaluative information.

10. The District's evaluators used assessment tools and strategies that provided relevant information that directly assisted them in determining Student's educational needs.

As stated above, the assessment tools used by the District evaluators provided them with relevant information that directly assisted them in determining Student's educational needs. For example, Ms. Reineke obtained enough information from the Vineland and the Callier Azusa to develop educational programming for Student. Ms. Lucero (occupational therapist) testified that the evaluations gave her sufficient information in which to develop educational programming for Student. Ms. Gorman (speech pathologist) obtained enough information from the evaluation materials to develop speech and language goals for Student.

Mother's evidence failed to rebut the District's evidence in this regard. Mother herself testified that she did not have any concerns about the qualifications of the examiners or about the propriety of the tests that they administered to Student.

Marilu Herrick, Director of Rainbow, and Mother's witness, testified that she did not find fault with the District's re-evaluation.

DESE's approval of the District's October 2001 re-evaluation is additional evidence that the District complied with the procedures prescribed by the IDEA and the Missouri State Plan

for re-evaluations. Although of marginal value, since the District cannot delegate its responsibility to any other agency, DESE indirectly validated the District's re-evaluation. The District's October 2001 re-evaluation of Student was submitted to the Missouri Department of Elementary and Secondary Education ("DESE") so that DESE could determine whether Student was eligible for a state school for the severely handicapped. As part of its determination, DESE reviews the sufficiency of the re-evaluation of the student, and should return any evaluation that it deems to not meet federal or state law. DESE did not return the District's October 2001 re-evaluation to the District or indicate to the District in any way that the re-evaluation failed to comply with state or federal legal requirements. Instead, DESE ultimately determined that Student was eligible for the state school for the severely handicapped.

The results of the tests administered by the District are compatible and consistent with Student's prior re-evaluation. Significantly, the results of the tests administered by the District are consistent with the re-evaluation performed by the Independence School District in 1998. An important example is the Leiter-R administered by Independence indicated an IQ of 36 while the District's test indicated an IQ of 32. The District's score on the Vineland was 31 as compared to 56 which was the Independence score that was administered when Student was five. The District's Vineland was administered when the Student was eleven. The drop in this score did not concern the evaluator as the gap between age and assessment results widens with age for mentally retarded children. Finally, the Peabody Picture Vocabulary test administered by Independence and the District scored Student at age equivalents two years, ten months and two years, five months respectively. Dr. Purvis, Mother's witness, testified that the Independence re-evaluation and the District's evaluation were "pretty close" in terms of being consistent and compatible.

Accordingly, for the above stated reasons, District's re-evaluation of October 2001 was comprehensive, complied with the IDEA's procedures, was multidisciplinary, multifaceted and conducted by qualified examiners. As such, Student is not entitled to an independent educational evaluation at District's expense.

2. WAS STUDENT PROVIDED A FREE APPROPRIATE PUBLIC EDUCATION ("FAPE") WHILE ATTENDING NORTHWOOD?

Under IDEA, all children with disabilities are entitled to a free and appropriate public education ("FAPE") designed to meet their unique needs. 20 U.S.C. § 1412. "A free appropriate public education is defined as special education and related services that: (1) have been provided at public expense, under the public supervision and direction, without charge, (2) meet the standards of the educational agency, (3) include an appropriate preschool, elementary, or secondary school education in the State involved, and (4) are provided in conformity with the IEP." *Carl D. v. Special School District of St. Louis County, Missouri*, 21 F.Supp.2d 1042, 1053 (E.D. Mo. 1998).

Student is a child with a disability for the purposes of IDEA, 20 U.S.C. § 1401(a)(1) (1990). His identification as a student with Downs Syndrome resulting in mental retardation as embodied in Missouri law renders him eligible to receive special education services and all of the rights and privileges afforded by the IDEA. Mo. Rev. Stat. § 162.675.

The IDEA does not prescribe any substantive standard regarding the level of education to be accorded to disabled children, and it does not require "strict equality of opportunity or services." *Board of Education of Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034. Nor does IDEA require an educational program to provide each and every service and accommodation that could conceivably be of some

educational benefit. *Rowley*, 458 U.S. at 199. Instead, the United States Supreme Court has held that an appropriate educational program under the IDEA is one that is “reasonably calculated to enable the child to receive educational benefits.” *Id.* at 207.

In reliance upon *Rowley*, the Eighth Circuit has held that “[t]he standard to judge whether an IEP is appropriate under IDEA is whether it offers instruction and supportive services reasonably calculated to provide some educational benefit to the student for whom it is designed.” *Gill v. Columbia 93 School District*, 217 F.3d 1027, 1035 (8th Cir. 2000). “While the benefit must be more than trivial, the statute does not require the state to maximize the potential of each disabled child.” *Carl D.*, 21 F.Supp.2d at 1053. “Rather, IDEA’s goal is ‘more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.’” *Id.*, (citing) *Rowley*, 458 U.S. at 192. Thus, “[a]chievement of passing marks and advancement from grade to grade are important—but not dispositive—factors in assessing educational benefit.” *Carl D.*, 21 F.Supp.2d at 1053.

In *Gill*, the Eighth Circuit (in 2000) addressed the issue of whether Missouri enacted a higher standard for the education of disabled children that requires a program designed to maximize capabilities. The *Gill* court rejected the higher standard. In relying upon its prior decision in *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 612-13 (8th Cir. 1997), *cert. denied*, 523 U.S. 1137, 118 S.Ct. 1840 (1998), the Eighth Circuit held that Missouri “has not expressed an intent to override the federal standard” and that “the state regulations governing special education [in Missouri] do not recognize a greater obligation than that found in the federal statute.” *Gill*, 217 F.3d at 1036. Accordingly, *Gill* holds that the test for determining whether a particular educational program is appropriate is whether it is sufficient to provide a child with some educational benefit. *Id.*

Subsequently, the Missouri Court of Appeals for the Western District rejected *Gill* by holding that Missouri's standard for special education services was higher than the federal standard imposed under the IDEA. *Lagares v. Camdenton R-III School District*, 68 S.W.3d 518, 528 (Mo. App. W.D. 2001).

The holding and rationale of *Lagares* was quickly superseded by statute as observed in *Reese v. Board of Educ. of Bismarck R-V School Dist.*, 225 F.Supp.2d 1149, 171 Ed. Law Rep. 231 (E.D. Mo. 2002). On May 28, 2002, less than two (2) months after the date the Missouri Supreme Court denied transfer of the *Lagares* decision, the Missouri legislature amended RSMo. §§162.670 and 162.675 to delete any and all reference to special education services sufficient to "maximize [handicapped children's] capabilities." See 2002 Mo. House Bill No. 2023, enacted May 28, 2002. See also RSMo. §§162.670 and 162.675 (2002). Furthermore, the Missouri legislature specifically replaced the deleted language with language that mandated "a free appropriate education consistent with the provisions set forth in state and federal regulations implementing the ...IDEA." See 2002 Mo. House Bill No. 2023, enacted May 28, 2002; See also RSMo. §§162.670 and 162.675 (2002).

Subsequently, in light of the Missouri legislature's swift amendment of RSMo. §§ 162.670 and 162.675 to delete any reference to maximization, the United States District Court for the Eastern District of Missouri held on September 30, 2002, that it would adhere to the Eighth Circuit's prior holdings of *Gill* and *Clynes*, notwithstanding *Lagares*, as to the applicable standard in evaluating educational services that were provided between March 1998 and August 1999. See *Reese, Id.* at 1155.

Given the recent history of the appropriate educational standard in Missouri, the *Lagares* maximization standard was in effect from the date of the decision, December 18, 2001, until the

statutory amendment on May 28, 2002. Given that Student was not in school from early January 2002 to the end of April 2002, *Lagares* was in effect for approximately two months during Student's attendance at Northwood.

Whether this Panel is guided by the *Rowley*, *Gill* and *Clynes* standard of the necessity of providing a disabled child with educational benefit or the *Lagares* standard of maximizing a student's capabilities, it does not matter. Under either standard, Student was not provided FAPE.

District has the burden of proving that it complied with IDEA. *E.S. v. Independent School District, No. 196*, 135 F.3d 566 (8th Cir. 1988). In so doing, school districts must provide a free appropriate public education in the least restrictive environment ("LRE") appropriate to the child's unique needs. See 20 U.S.C. § 1412(a)(5); *Rowley, id.*, at 176.

FAPE is defined in the IDEA as special education and related services that: (1) are provided under public supervision and at public expense without cost to parents; (2) meet the standards of the state education agency; (3) include an appropriate preschool, elementary, or secondary school education; and (4) are provided in conformity with the individualized education program required by § 1414(a)(5) of the Act. 20 U.S.C. § 1401(a)(18); *Lagares, id.* at 523². 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).

Under *Rowley*, and the progeny of cases thereunder, whether the requirements of the IDEA have been met is often a two part inquiry:

- (1) Has the state complied with the procedures in the Act?

² While the panel recognizes that the *Lagares* standard of maximizing a student's capabilities has been superseded by statute, its definition of what is entailed in providing a special education is consistent with *Rowley*.

(2) Is the student's IEP reasonably calculated to enable the child to receive an educational benefit and was such benefit received?

In considering the first prong of the *Rowley* test, Mother contends that one example of the District's violation of Student's procedural safeguards is the meeting held by District personnel prior to the November 13, 2001, without any notice to Mother wherein Student's placement was discussed and Lakeview Woods was deemed to be an appropriate placement. It is impermissible for a district to have an IEP completed before the IEP meeting begins. Comments to question 32 p. 12478, Fed. Reg. Vol. 64, No. 48, 3/12/99. Parents help to formulate their child's IEP and are entitled to notice of proposed changes in the educational program. *Yankton School Dist. v. Schamm*, 93 F.3rd, 1373 (8th Cir. 1996) (Citing 20 U.S.C. § 1415(b)(1)(c)). The problem with this position is that whatever took place prior to the November IEP, the IEP did not change Student's placement. So whatever the District's personnel thought was a proper placement prior to the meeting did not materialize.

Of some concern to the Panel is the District's request for a due process hearing on November 20, 2001, wherein the District was requesting placement at Lakeview Woods. At the time this request was made, the IEP in existence, which was seven days old, depicted Northwood as the appropriate placement, and the IEP is the catalyst for placement. Whether this premature request for placement at Lakeview Woods, as well as other procedural defects, constitute procedural violations in excess of a minimal harmless procedural violation and therefore, in themselves, violate prong one of the *Rowley* requirements does not have to be determined specifically for the purpose of this decision. The procedural violations contributed to the denial of FAPE.

It is primarily the second prong of the *Rowley* requirements that was not met and which denied Student of FAPE.

1. The District did not implement Student's Rainbow IEP.

When a child, who has a prior IEP, moves to a new district, the district can accept the current IEP or conduct a new one. Until a new IEP is formulated or an interim IEP and placement is agreed to, the receiving district must implement the current IEP, as is, as written, without deviation. The new district is responsible for "ensuring the child, has available special education and related services in conformity with an IEP". *See comments to question 17*, 12476 Fed. Reg. Vol. 64, No. 48, 3/12/99. District accepted Student's Rainbow Center IEP, which was developed at his previous school. "If the parents and the new public agency are unable to agree on an interim IEP and placement, the new public agency must implement the old IEP" to the extent possible until a new IEP is implemented. *Comment to Question 17*, Fed. Reg. Vol. 64 No. 48, p. 12476, 3/12/00. Student's IEP in effect upon his enrollment at Northwood was developed at Rainbow by the IEP team and Rainbow was implementing the IEP.

The Rainbow IEP contained the related service of a one-on-one paraprofessional, which was a significant provision of the Rainbow IEP. Mother told the Northwood principal and teacher that Student had a one-on-one paraprofessional at Rainbow in August 2001. The District did not afford Student with a one-on-one paraprofessional. The District did not contact Rainbow for an interpretation of this provision, and did not have discretion to selectively implement only portions of an IEP which conform with its policy, nor can it disregard providing the related service of a one-on-one paraprofessional because it is against their district policy. Even if it did not agree with Mother that Student needed a one-on-one paraprofessional, District was required to implement the Rainbow IEP until a new IEP was developed and implemented. *See Comment*

to *Q17*, Fed. Reg. Vol. 64, No. 48, p. 12476, 3/12/99. For these reasons, and the additional reasons set forth below, the District did not implement Student's Rainbow IEP.

2. The District restrained Student without documentation.

The District restrained Student without documentation. Restraint was not written in Student's IEP. Mother did not know the District was restraining him for months after the fact.³

3. The District's "time out" room for Student was inappropriate.

Student was transported to "time out", a room with a radiator which he liked to climb on and there was a trampoline in the vicinity of the time out room. At times, the window to the time out room was covered. Thus, because Student was frequently placed in time out, he was, on some occasions, out of sight during time out.

4. The District failed to provide appropriate related services.

The amount of related services must be stated in the IEP, so that the level of the agency's commitment of resources will be clear to parents and other IEP team members. 300.347(a)(6). The time allotted to each related service must be appropriate and clearly slated. The time allotment can only be slated as a range of time if it is "necessary to meet the unique needs of the child" and not because of personnel shortages or uncertainty with respect to the availability of staff. *Comment to Q 34*, Fed. Reg. Vol.64, No. 48 p. 12479, 3/12/99.

The list of related services, based on a child's unique needs, may include other developmental, corrective, or supportive services if they are required to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.24.

Related services include transportation, developmental, corrective and other supportive service. 20 U.S.C. § 1402 (22). Speech-language pathology, psychological services, physical

³ Although this issue might better be categorized as a procedural defect, whichever prong of the *Rowley* test it is fitted under, it was inappropriate and contributed to the Student not receiving FAPE.

and occupational therapy, recreation – including therapeutic reaction, social work services, counseling services, rehabilitation counseling, or services as may be required to assist a child with a disability to benefit from special education. *Id.* “The district ... shall provide necessary transportation for all handicapped children residing within the district.” Mo. Rev. Stat. § 162.710.

Special education and related services are services that will be provided for a child as follows:

1. To advance appropriately toward attaining the annual goal;
2. To be involved in progress in the general curriculum;
3. To be educated and participate with other children with disabilities and

nondisabled children in the general curriculum. 34 C.F.R. § 300.347.

Initially, while at Northwood, Student was transported by bus. Without reconvening the IEP team, Student’s transportation was changed to Mother providing transportation. The IEP team should have been reconvened to change Student’s transportation.⁴

Specific related services, such as physical therapy and occupational therapy, should specify the amount of related services as precisely as possible, stating the “anticipated frequency, location and duration” of services. 34 C.F.R. § 300.347(a)(6). Student’s Rainbow IEP, required to be implemented by District until the September IEP, called for 90 minutes per week of Speech/Language Therapy; District gave Student 60 minutes. The Rainbow IEP also called for 60 minutes per week of Occupational Therapy, and District gave Student 40 minutes. Additionally, the Rainbow IEP contained physical therapy as a related service of 15 minutes per

⁴ Although this issue might better be categorized as a procedural defect, whichever prong of the *Rowley* test it is fitted under, it was inappropriate to contribute to the Student not receiving FAPE.

week. District did not provide physical therapy to Student claiming that it was incorporated into its adaptive PE.

District's Exhibit P-9 includes a "face page" to the August 23, 2001, interim IEP, that indicates the appropriate speech/language therapy was 60 minutes per week and Occupational Therapy was 40 minutes per week. These times conflict with the times allocated in the Rainbow IEP which was attached. Also on the face page, physical therapy is not listed, and bus transportation and a one-on-one paraprofessional were not referenced. Neither the occupational therapist nor the speech/language teacher attended the August IEP. This IEP was held within days of Student's enrollment and there was no evidence that Student had been observed to provide a basis for reduction of these related services. Accordingly, it is concluded that the Rainbow IEP was the operative IEP until the September IEP at Northwood.

Related services cannot be based on availability of district personnel. District failed to provide adequate services for, and denied Student the opportunity, for fieldtrips. For Student to attend fieldtrips, District sometimes required Mother (or designee) to attend fieldtrips with Student.

5. Student did not receive an educational benefit.

As stated above, in reliance upon *Rowley*, the Eight Circuit has held that "(t)he standard to judge whether an IEP is appropriate under the IDEA is whether it offers instruction and supportive services reasonably calculated to provide some educational benefit to the student for which it was designed. *Gill, id.* at 1035. However, the educational benefit must be more than trivial. *Carl D., id.* at 1053.

Although many of the District's witnesses professed that Student was progressing, the evidence suggests otherwise. Diane Gorman, the Speech and Language Pathologist at

Northwood testified that Student progressed, but conceded that according to Student's IEPs during the 2001-2002 school year, Student made no progress. Ms. Reineke, Student's special education teacher, testified that all of Student's IEPs throughout his 2001-2001 school year at Northwood had no data showing progress. In addition, Ms. Reineke felt she did not have enough support with Student. Sandra Lucero, Occupational Therapist, stated that Student was making progress, yet the IEPs from November 2001 to May 2002 are nearly identical.

Frequently throughout the 2001-2002 school year, Student's behavior reached the crisis level. Although sincere efforts were made to control the behaviors, the essence of the school year was one of crisis control and the educational benefits provided were trivial.

An indication that Student did not receive FAPE at Northwood is the District's position that Lakeview Woods would be an appropriate placement for Student. If, in fact, Student received FAPE at Northwood, Northwood would be the appropriate placement. District's position that Lakeview Woods is a more appropriate placement is not relevant. Just as the District rightfully advocates that if the District's proposed placement is appropriate, consideration of Mother's choice is not required and comparison of other appropriate placements and Mother's preferred placement should not be made.

"The issue is whether [the District's] placement [i]s appropriate, not whether another placement would be more appropriate, or even better for that matter." *Heather S. v. State of Wisconsin*, 125 F.3rd 1045, 1057 (7th Cir. 1997). It was noted in the case of *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, at 1314 (9th Cir. 1987) that even if the alternative placement preferred by the parents is better than the proposed placement by the school district, "that would not necessarily mean that the district's placement was inappropriate."

Although the *Heather S.* and *Gregory K.* cases involved situations where the analyses related to districts defending their placements against placements preferred by parents, the legal principle is the same. If Northwood afforded Student FAPE, it is the appropriate placement for Student, especially since it is the least restrictive environment of the placements considered.

Within a month of Student's enrollment at Northwood, each of his teachers and therapists completed a questionnaire as to the appropriateness of Student's placement at Northwood. Every teacher/therapist that completed the questionnaire stated that Northwood was not the appropriate placement for Student, with the exception of one teacher who was uncertain. Prior to the November 13, 2001, IEP, Student's personnel met and concluded that Lakeview Woods was an appropriate placement. District representatives toured Lakeview Woods with Mother and encouraged her to agree to this placement. As early as November 20, 2001, the District filed its due process request which included the request for Lakeview Woods to be determined as an appropriate placement for Student. These factors suggest that the District had concerns, from a very early time, that Student was not receiving an appropriate education at Northwood.

The Panel is not concluding that a district's proposal of a new placement in a more restrictive setting is an automatic admission of failure to provide FAPE. The Panel is concluding that under the facts of this case, the District, from a very early point in time, was not convinced that Northwood was an appropriate placement.

Simply stated, Northwood did not provide FAPE to Student because it could not. Northwood is a public separate day facility with a student population of children who are moderately retarded. Northwood's curriculum is that of functional academic with goals directed toward life skills. The classic student is moderately impaired with an IQ between 42 and 52 and exhibits low adaptive behavior skills. The students at Northwood generally are employable and

the purpose of Northwood is to provide a program for moderately disabled kids who need a functional curriculum. Student's IQ of 32 as recorded on his Leiter-R test score, testimony that he is not employable, his teacher did not have adequate support, and personnel at Northwood never saw such behavior at Northwood, all display that Northwood's resources are not geared to educate this Student.

To the District's credit, good faith efforts and resources were used in the attempt to educate Student with the hope that Student would have a chance to find an educational benefit at Northwood. He did not. Also of importance is the District's efforts were impaired by the fact that Student was in attendance for approximately one-half of the school year. From January to April of 2002, Mother made the decision to remove Student from Northwood. Mother's decision was based upon concerns she had for her son's safety and while the decision from her perspective was somewhat understandable, Northwood was deprived of the opportunity to try and make Northwood a suitable place for him to go to school. Given this fact, even if compensatory educational services were considered by the Panel, they would be de-minimis.

3. WHAT IS STUDENT'S APPROPRIATE PLACEMENT?

The threshold issue of determining Student's placement is whether he is severely mentally retarded and therefore severely handicapped. The Panel concludes that he is. Two re-evaluations were presented. First, the re-evaluation of the Independence School District conducted in 1998, wherein the diagnostic summary states that Student is severe mentally retarded and continues to qualify as severely mentally retarded, indicating that yet a third prior evaluation concluded the same. The second re-evaluation presented was the October 2001 evaluation conducted by the District. As stated above, this evaluation is deemed to be appropriate, and concludes that Student is severely mentally retarded. Between the two re-

evaluations similar tests were performed, and the results are compatible. The results become self-validating.

A child must fall within the definition of “severely handicapped,” to be determined eligible for a State School for the Severely Handicapped, which “requires a determination (1) that the child’s performance on standardized instrument measuring intelligence and other facets of development is at a level ‘less than one-half of normal students of equivalent age and ethnic-cultural background,’ State Plan, App. B, at B-1, and (2) that the child is ‘unable to benefit from or meaningfully participate in’ local public school programs because of the extent of a “handicapping condition or conditions.” *Hunt v. Bartman*, 873 F.229, 232 (W.D. Mo. 1994); *citing* Mo. Rev. State. § 162.675(3).

Student’s Leiter-R tests were 36 and 32. Both are more than 4 standard deviations below the mean. Student was 4 or more standard deviations from the mean in all areas in the Callier Azusa test conducted by the District on October 4, 2001. The District’s tests administered as part of the Occupational Therapy component of the October 2001 re-evaluation revealed that Student (age 11) demonstrated skills ranging from the 18 month level with a scattering of skill up to the three year level. The Goldman Fristoe Test administered by the District placed Student below the first percentile for his chronological age, and the Expressive One Word Picture Vocabulary Test on September 27, 2001, resulted in Student’s age equivalent of two years, five months. The results of the District’s re-evaluation placed Student’s cognitive, adaptive, developmental/achievement, speech language, and motor development four or more standard deviations below expectancy. Ms. Herrick, Mother’s witness, agreed with the diagnosis of severely mentally retarded.

Accordingly, Student falls within the case law definitional components of being severely handicapped.

For the reasons stated above in this decision, Student is a severely handicapped child as defined in RSMo. § 162.675(3):

“(3) “Severely handicapped children”, handicapped children under the age of twenty-one years who, because of the extent of the handicapping condition or conditions, as determined by competent professional evaluation, are unable to benefit from or meaningfully participate in programs in the public schools for handicapped children. The term “severely handicapped” is not confined to a separate and specific category but pertains to the degree of disability which permeates a variety of handicapping conditions and education programs;”

Missouri law requires the State to provide educational services for severely handicapped students who cannot benefit from programs in the public schools by assigning them to state-operated schools or contracting with other public or private agencies for their education. RSMo. § 162.725 is applicable:

“The state board of education shall provide special educational services for all severely handicapped children residing in school districts which are not included in special districts provided that such school districts are unable to provide appropriate programs of special instruction for severely handicapped children . . .”

Much evidence was presented, pro and con, as to whether Rainbow, Nova or Lakeview Woods is the appropriate placement. It is not necessary to evaluate those contenders. While the Panel feels that Lakeview Woods is an appropriate placement, reasons for support are not being provided, because once the diagnosis of severely handicapped is made, the placement belongs to DESE.

DECISION

1. The Panel finds and concludes that the District's October 2001 re-evaluation of Student was appropriate, and therefore, Student is not entitled to an independent evaluation at District's expense.

2. The Panel finds and concludes that Student was not provided with FAPE while attending Northwood.

3. The Panel finds and concludes that based upon Student being severely handicapped, the Student's placement lies with DESE. The Panel reaffirms the declaration by DESE of Student's eligibility for state schools. The parties shall, forthwith, submit all appropriate documentation to DESE in order for an IEP meeting to be held within the applicable guidelines.

4. The Panel finds and concludes that Student is not entitled to compensatory education for the 2001-2002 school year.

APPEAL PROCEDURE

PLEASE TAKE NOTICE that this Decision constitutes the final decision of the Department of Elementary and Secondary Education in this matter.

PLEASE TAKE NOTICE that you have a right to request a review of this Decision pursuant to the IDEA and/or the Missouri Administrative Procedures Act, Section 536.010 *et seq.* RSMo. Specifically, Section 536.110 RSMo. provides in pertinent part as follows:

“1. Proceedings for review may be instituted by filing a petition in the circuit court of the county of proper venue within *thirty days* after the mailing or delivery of the notice of the agency's final decision. . .

3. The venue of such cases shall, at the option of the plaintiff, be in the circuit court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence. . .”

PLEASE TAKE NOTICE that you also have a right to file a civil action in Federal or State Court pursuant to the IDEA. See 34 C.F.R. § 300.512.

Dated: _____

Richard H. Ulrich, Hearing Officer

All Panel members concur.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 2nd day of April, 2003, a copy of the foregoing was served upon the following parties to this action by depositing same in Federal Express at St. Louis, Missouri, postage prepaid, duly addressed to:

Parents

Nancy E. Huerta, Esq.
Elizabeth G. McCulley, Esq.
Shook, Hardy & Bacon, LLP
One Kansas City Place
1200 Main Street
Kansas City, MO 64105-2118

Ms. Shellie Guin, Esq.
1 Main Plaza
4600 Madison – Suite 711
Kansas City, MO 64112

Pam Williams, Director
Special Education Compliance
Department of Elementary & Secondary Education
205 Jefferson Street
Jefferson City, Missouri 65101

and further a copy of the foregoing was served upon the following parties by depositing same in the U.S. Mail, postage prepaid this 2nd day of April, 2003, addressed to:

Mr. Rand Hodgson
10204 S. Outer Belt Rd
Oak Grove, MO 64075

Ms. Connie Sanders
10202 NW 73rd Terrace
Weatherby Lake, MO 64152

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