

**BEFORE THE  
THREE-MEMBER DUE PROCESS HEARING PANEL  
EMPOWERED PURSUANT TO SECTION 162.961, RSMO**

<b>PARENTS OF A MINOR CHILD,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>vs.</b>	)	<b>02 - DESE -W2</b>
	)	
<b>SPECIAL SCHOOL DISTRICT</b>	)	
<b>OF ST. LOUIS COUNTY,</b>	)	
	)	
<b>Respondent.</b>	)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND DECISION AND ORDER**

**This is the final decision of the hearing panel in an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415(f) (1997), and Missouri law, §162.961.3, RSMo. The hearing panel, upon consideration of evidence and argument presented in this matter, makes the following findings of fact and conclusions of law and issues the following decision and order:**

**SUMMARY OF DECISION**

**At issue, is the validity of an autism diagnosis reached by Respondent in May 2002. The Hearing Panel concludes that while there was some indication that the child-in-question had autism, there was an insufficient basis for the diagnosis reached based on the evidence presented. Respondent, pursuant to the Decision and Order below, is directed to reevaluate the child. Until this new evaluation is concluded, the Hearing Panel orders that the prior diagnosis of “Language Impairment” and “Other Health Impairment” remain in effect, and that no change in SSD’s services or programs, or in the child’s placement be made without**

**Petitioner's consent. Upon the conclusion of the new comprehensive evaluation, the findings and determinations reached there shall control as to the child's diagnosis and needs, and as to SSD's services and obligations.**

### **FINDINGS OF FACT**

#### **The Parties**

**1. The three-member hearing panel was formed on November 25, 2002, upon a request from Petitioner for a due process hearing. The panel consists of attorney Edward Walsh, Chairperson, Vicki Hanson and Rand Hodgson, panel members.**

**2. Petitioner is the parent of a minor child. The minor child (herein "Student") was born , and who resides with Petitioner in the area served by the Webster Groves School District (herein "Webster Groves") and located in St. Louis County, Missouri.**

**3. Petitioner is a single parent who has sole responsibility for raising the Student.**

**4. Respondent is the Special School District of St. Louis County (herein "SSD"). Under Missouri law, SSD is responsible for assuring that children enrolled in public schools within St. Louis County have available to them a free appropriate public education.**

**5. A hearing was convened on January 24 and 25, 2003, at Webster Groves administrative offices in Webster Groves, Missouri. A third day was also convened on February 1, 2003, at SSD's administrative offices in Town & Country, Missouri.**

**6. The Petitioner was represented by Kenneth M. Chackes of the law firm of Van Amburg, Chackes, Carlson & Spritzer in St. Louis, Missouri.**

**7. The Respondent was represented by James Thomeczek, of the Thomeczek Law Firm, LLC, in St. Louis, Missouri.**

### **Procedural History**

8. Petitioner made a request for a due process hearing on November 8, 2002 in order to dispute the diagnosis given to the Student by SSD in its May 2002 reevaluation. J. Ex. at 392.

9. Prior to the 2002 reevaluation, the Student was diagnosed by SSD as “Language Impaired in the areas of semantics, syntax, morphology, and pragmatics” and with an “Other Health Impairment” due to his diagnosis of Attention Deficit Hyperactivity Disorder. J. Ex. 2 at 43-44; J. Ex. 8 at 142.

10. The 2002 reevaluation changed the Student’s diagnosis to Autism. J. Ex. 15 at 261.

11. Petitioner’s request for hearing was received on November 15, 2002, which triggered the “stay put” provision of the IDEA as set forth at 20 U.S.C. § 1415(j).

12. A three-member hearing panel was formed on November 25, 2002. No party objected to any member of the hearing panel prior to or during the hearing.

13. The original decision deadline in this matter was December 30, 2002.

14. On December 19, 2002, at Respondent’s request, the decision deadline was extended to March 10, 2003.

15. On January 29, 2003, at the request of both parties, the decision deadline was again extended to the end of business on Thursday, March 20, 2003.

### **Evidence and Witnesses**

16. Petitioner called the following witnesses to testify: Barbara Lombardo, Anne King, Thomas Vogel, M.D., Mary Lee Dooling, and Petitioner herself.

17. Respondent called the following witnesses to testify: Anne King, Jane McClocklin, and Barbara Lombardo.

18. Petitioner's exhibits P. Ex. 1 through P. Ex. 3 were admitted into the record.

19. Respondent's exhibits R. Ex. A were admitted into the record.

20. Both parties offered joint exhibits J. Ex. 1 through J. Ex. 22, which were admitted into the record.

### Factual Findings

21. The Student is currently an year-old<sup>1</sup> male child attending classes within the Webster Groves School District.

22. Since his birth, the Student has had a number of serious ear infections and two surgeries to implant tubes in his ears. The first surgery was during age two, in 1994. The second surgery was in 1997, along with removal of his tonsils and adenoids.

23. The Student's early language was muffled and difficult to understand, which his mother and grandmother attribute to his ear infections. His mother also states that the Student's hearing until after the insertion of the tubes in 1994. J. Ex. 1 at 13.

24. During his first five years, the Student exhibited behaviors that were very impulsive. When frustrated the Student would often scream. He also showed frustration with his inability to communicate.

25. The Student's impulsiveness, screaming, and angry outbursts caused difficulties in preschool and day care settings.

26. In 1995, the Petitioner had the Student evaluated by John Mantovani, M.D, who

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<sup>1</sup> The student's birth date is.

is a pediatric neurologist. Dr. Mantovani's evaluation lasted for approximately 15 minutes and was apparently cursory.

27. On November 29, 1995, Dr. Mantovani assigned the diagnosis of Pervasive Developmental Disorder ("PDD").

28. In April 1997, the Student was taken to the St. Luke's Center for Learning and Development in Chesterfield, Missouri, where he was examined by Thomas Vogel, Psy. D., a clinical psychologist and Alice Burr-Harris, M.A., a psychological examiner. J. Ex. 1 at 12.

29. The evaluation took place over a two day period and included the administration of the Achenbach Child Behavior Checklist, the Conners' questionnaire, the Vineland Adaptive Behavior Scale, the Wechsler Preschool and Primary Scale of Intelligence (Revised), Children's Behavioral Checklist ("CBCL"), the Conners' Rating Scale and Behavioral Observation. J. Ex. 1 at 12-15.

30. Upon the completion of the Student's evaluation, Dr. Vogel diagnosed the student as having Mixed Receptive - Expressive Language Disorder. In addition, Dr. Vogel found that the Student exhibited the core symptoms of Attention Deficit Hyperactivity Disorder - Combined Form. J. Ex. 1 at 22-23.

31. Dr. Vogel, in his report summary, noted that "[i]t is difficult to determine what [the Student] is capable of doing because of his severe behavior problems and his communication disorder." Dr. Vogel noted that at a minimum the Student suffered delays in the areas of graphic motor control, fine motor control needed for other tasks, receptive and expressive language, the ability to learn by imitation, the ability to form reciprocal social relations and test-taking skills. J. Ex. 1 at 22-23.

**32. Dr. Vogel, in reaching his diagnosis, considered the possibility of autism and acknowledge that some of the Student's problems<sup>2</sup> were consistent with an autism diagnosis. However, Dr. Vogel chose to discount this diagnosis ultimately because the Student did not exhibit in 1997 the classical symptoms of restricted or abnormal play behavior.**

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<sup>2</sup> Communications problems and impaired social interaction problems were found to consistent with Autism. **J. Ex. 1 at 23.**

33. “Autism” is a “developmental disability significantly affecting verbal or nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child’s educational performance. Other characteristics often associated with autism are the engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.”<sup>3</sup>

34. Autism does not apply if a child’s educational performance is adversely affected primarily because the child has a defined emotional disability.<sup>4</sup>

35. In the fall of 1997, the Student started regular kindergarten in Webster Groves at Edgar Road Elementary School.<sup>5</sup>

36. Prior to starting regular kindergarten, Petitioner presented the results of Dr. Vogel’s evaluation to the public school and formally requested an evaluation by SSD. J. Ex. at 29.

37. In September 1997, SSD evaluated the Student at the Petitioner’s request and because of concerns raised through Webster Groves’ screenings in the areas of adaptive behavior, motor, speech, language, cognition, pre-academics, and social emotional behaviors. J. Ex. 2 at 33.

38. On October 2, 1997, a diagnostic conference was held with Petitioner and the

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<sup>3</sup> Missouri State Plan For Special Education, Regulation III – Identifying and Evaluation (Autism), p. 14 (2001).

<sup>4</sup> Id.

<sup>5</sup> The Student previously attended preschool and day care. Since January 1997, the Student had been asked to leave two of these settings since January 1997, due to behavioral and/or language concerns. J. Ex. 2 at 33.

members of the evaluation team<sup>6</sup> their findings and recommendations. J. Ex. 2 at 47.

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<sup>6</sup> The exhibit does not refer to this as a Individual Evaluation Program (IEP). However, throughout the hearing it was referred to as the initial IEP evaluation.

39. All participants agreed with the diagnoses reached by Louise Thomas, school psychologist, Pam Kennedy, educational examiner, Carol Shimizu, language therapist, and Bob Wehmeyer, resource teacher, that the Student was “Language Impaired” (“LI”) in the areas of semantics, syntax, morphology, and pragmatics and “Other Health Impairment” (“OHI”) due to his diagnosis of Attention Deficit Hyperactivity Disorder (“ADHD”).<sup>7</sup> J. Ex. 2 at 43-44, 47.

40. In order for a child to be diagnosed with “Language Impaired ” or “LI” a significant discrepancy must be documented between the child’s cognitive ability and measured language functioning. A discrepancy is considered significant when one or more language areas fall below statistically predetermined criterion level, which for a child grades K-6 is a 1.0 standard deviation.<sup>8</sup>

41. Based on SSD’s evaluation and assessment, the Student qualified for special education services and the formation of an Individualized Education Program (IEP) to address his needs. J. Ex. 2-3.

42. An IEP was implemented on or about October 24, 1997. The 1997 IEP plan called for 1350 minutes per week (“MPW”) of self-contained special education services, 30 MPW of occupational therapy, 90 MPW of resource services, 150 MPW of special education

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<sup>7</sup> A Notice of Intent to Evaluate and Consent Form, dated September 9, 1997, was signed by Petitioner. J. Ex. 2 at 48.

<sup>8</sup> The scoring indicated a 1.0 standard deviation existed here. J. Ex. 2 at 43-44.

itinerant services, 30 MPW of OHI Consultative services, and 150 MPW of general education services. The assigned school continued to be Truman in the Lindbergh School District, where the SSD operated a language classroom.<sup>9</sup> J. Ex. 3 at 52-4.

43. The 1997 IEP plan included a Present Level of Performance statement which noted the Petitioner concerns that the current school placement would not provide the intensive programming the Student needed to succeed. J. Ex. 3 at 55.

44. Over the course of three school years, from November 1997 through the spring of 2000, the Student attended a self-contained (or phase 2) classroom for language impaired students at Truman School in the Lindbergh School District because there was no such classroom in the Webster district. J. Ex. 3 at 59-60; J. Ex. 4 and 5.

45. In October 1998, IEP team convened to review and revise the student's progress, diagnosis and services. J. Ex. 4.

46. On October 8, 1998, a new IEP plan was implemented. The 1998 IEP called for 1400 minutes per week ("MPW") of special education in a language classroom, 60 MPW of occupational therapy, 90 MPW of resource services, and 250 MPW of general education services. J. Ex. 4.

47. The 1998 IEP again assigned the Student to the Truman School in the Lindbergh School District, where the SSD operated a language classroom. J. Ex. 4.

48. On October 7, 1999, the IEP plan was revised. The 1999 IEP called for 1280 minutes per week ("MPW") of language therapy, 60 MPW of occupational therapy, 60 MPW of resource services, and 400 MPW of general education services. J. Ex. 5 at 77.

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<sup>9</sup> The IEP plan is reviewed and revised on a yearly basis.

49. The 1999 IEP also noted that the Student was making progress with goals, objectives and benchmarks.

50. In January and May 2000, the 1999 IEP team reconvened to discuss the Student's behaviors, including his physical aggression toward other students.<sup>10</sup> J. Ex. 6; J. Ex. 7 at 133.

51. The 1999 IEP team found these behaviors to stem from the Student's disability of Language Impairment and Other Health Impairment. J. Ex. 7 at 133.

52. The 1999 IEP team explained the student's behavior as follows: "[d]oes not always understand consequences due to mixed expressive receptive language disorder and OHI." J. Ex. 7 at 133.

53. In the fall of 2000, the Student was transferred to Clark Elementary School, which is in Webster Groves.

54. The Student's teacher at Clark was Anne King.

55. King testified that she specializes in behavior disorders; however, she is not certified in language impairments. She also does hold herself out as an expert in autism. Tr. III, 7-9, 15, 38.

56. At Clark, the Student was assigned to a self-contained classroom for students with a variety of disabilities. Tr. III, 7-8.

57. On September 27, 2000, the IEP team issued an IEP/Reevaluation Results wherein the IEP team agreed to continue the current diagnoses of: "Language Impaired in the areas of semantics, syntax, morphology and pragmatics, OHI-ADHD." Ex. J-8 at 142-44.

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<sup>10</sup> The 1999 IEP plan covered the 1999-2000 school year.

58. The September 27, 2000 IEP/Reevaluation Results was issued without any additional assessment.<sup>11</sup> Tr. I, 26.

59. An IEP meeting was held on March 23, 2001, at which time the IEP team agreed that further assessment were needed for a reevaluation. J. Ex. 10 at 185-87.

60. At that time, King was consulting with Barbara Lombardo, school psychologist, as to when a reevaluation could be performed. Lombardo stated that King told her at that time King was pretty confident that SSD was meeting the Student's needs as best as possible. Tr. I, 28.

61. The reevaluation was completed fourteen months later, on May 22, 2002. J. Ex. 15; Tr. I, 123-14, 126.

62. On March 10, 2002, SSD issued a Notice of Action of its intent to reevaluate the Student and obtained Petitioner's permission to carry out the reevaluation assessment. J. Ex. 15 at 270.

63. Barbara Lombardo, the SSD school psychologist, was the diagnostician for the 2002 reevaluation.

64. Lombardo holds a bachelor's degree in technology, a masters in social work, and is certified as a school psychologist. In addition, Lombardo was accepted into a related

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<sup>11</sup> Under IDEA and IEP an evaluation is valid for three years. Therefore the fall 1997 evaluation expired in the fall of 2000. However, the IEP team, including the Petitioner, agreed to wait until the following spring to conduct further assessments so the staff could get to know the Student better.

doctoral program, but she did not complete her dissertation work to obtain the degree. Tr. I, 15.

65. Lombardo is in her fourteenth year as a school psychologist. She has been involved in evaluating approximately 25 children with autism, including this Student. Of those other instances, 10 evaluations were for children ages 9 to 10.

66. Lombardo was the person primarily responsible for implementing and conducting the 2002 reevaluation. Tr. I, 20.

67. The IEP team, including the parent, had little to no involvement in developing a specific evaluation plan to determine what additional data needed to be collected for the reevaluation.

68. In performing the 2002 reevaluation, Lombardo did not review the Student's medical records. Lombardo testified that she instead relied upon medical records supplied for the 1997 evaluation (almost four years earlier). Tr. I, 20; Tr. III, 224-25.

69. In performing the 2002 reevaluation, Lombardo stated that she observed the Student on a variety of occasions both formally and informally. Tr. I, 20. Several observations were in the classroom when she was observing other students. Observations, in and out of the classroom, ranged from two minutes to 20 minutes. Because Lombardo has been "bless with an excellent memory regarding the observations of children" she does not take notes. Tr. I, 20 -23.

70. Based on the evidence presented, it appears that only one student observation was documented.<sup>12</sup> Tr. III, 239.

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<sup>12</sup> As Lombardo, herself admitted, her failure to document her observations as to the type

71. Unlike the 1997 evaluation which involved several evaluators, the 2002 reevaluation was primarily performed by Lombardo. Tr. I, 20.

72. Lombardo stated and the record showed that she did not use autistic specific testing measures (i.e., ABLIS, ADOS, ASIEP or CARS) even though there was now a suspicion that the Student may be autistic. Tr. III, 241-44; J. Ex 15.

73. Lombardo did have access to Anne King, the Student's teacher, and other educational providers in performing the reevaluation. However, the evidence is unclear as to what role, if any, these individuals played in the actual formation of the diagnostic evaluation.

74. During the 2002 reevaluation, Lombardo had access to daily notes and other records that King kept on the Student's behavior and actions. However, there is no evidence that Lombardo ever took possession of those documents to review. King stated that those records were never turned over to Lombardo's possession for use in planning the evaluation. Tr. III, 70-71.

75. On May 22, 2002, an IEP meeting was held at which time Petitioner was told that the reevaluation warranted a change in diagnosis to Autism. J. Ex. 15.

76. The 2002 reevaluation contains no documentation that the IEP team members agreed or disagreed with the Autism diagnosis. J. Ex. 15 at 269.

### CONCLUSIONS OF LAW

#### Jurisdiction

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of behaviors observed, their frequency or their clinical significance makes it difficult for others to review her finding. Tr. I, 24.

This matter arises under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (“IDEA”) and Missouri law, § 162.670, RSMo., *et seq.* Pursuant to 20 U.S.C. § 1415<sup>13</sup> and § 162.961, RSMo,<sup>14</sup> this Hearing Panel has jurisdiction to hear this dispute.

#### IDEA Requirements

The IDEA requires participating states and their public education agencies to “provide all students with disabilities with free appropriate public education,” which is at times referred to as FAPE. *Breen v. St. Charles R-IV School District*, 2 F. Supp. 2d 1214, 1221 (Mo. E. Dist. 1997). FAPE is defined by federal statute to mean:

special education and related services that –

(A) have been provided at public expense, under public supervision, without charge,

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<sup>13</sup> A parent of a child with a disability has the right to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” 20 U.S.C. § 1415(b)(6). “Whenever a complaint has been received under subsection (b)(6) . . . , the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.” 20 U.S.C. § 1415(f)(1).

<sup>14</sup> Subsection 3 states that a “parent, guardian or the responsible educational agency may request a due process hearing by the state board of education with respect to any matter relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education of the child.

- (B) meet the standards of the State educational agency,
- (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
- (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(a)(18); quoted in, *Breen*, supra.

#### Purpose of an Evaluation Under the IDEA

Under 20 U.S.C. § 1401(3)(A), the term “child with a disability” means “a child . . . (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.”

Although the IDEA contains discrete categories of disabilities, the purpose of an IDEA evaluation is to establish eligibility and identify the student’s educational needs. Under 20 U.S.C. § 1414(a)(1), an initial evaluation “shall consist of procedures . . . (i) to determine whether a child is a child with a disability (as defined in section 1401(3) of this title); and (ii) to determine the educational needs of such child.”<sup>15</sup> Under IDEA regulations, a child must be “assessed in all areas related to the suspected disability, including, if appropriate, health [and] social and emotional status.” 34 C.F.R. § 300.532(g). (emphasis added). A district’s

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<sup>15</sup> See also, 20 U.S.C. § 1415(c)(1) (“whether the child continues to have such a disability”) and 20 U.S.C. § 1415(c)(4) (“to determine whether the child continues to be a child with a disability”).

evaluation is held to a standard provided in the statute of “reasonableness.” *Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley*, 458 U.S. 176, 205-07, 102 S.Ct. 3034, 3050-52 (1982). 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.” Id.; see also, *Wexler v. Westfield Bd. of Educ.*, 784 F.2d 176, 182 (3rd Cir.1986) (upholding a district court IDEA review evaluating “each challenged school board action to determine whether it was reasonable in light of the evidence”).

SSD asserts that as long its proposed diagnosis is reasonable and will permit the Student to receive a free appropriate public education (“FAPE”), this Hearing Panel should uphold the May 2002 determination of autism. While it is true that the IDEA requires a reasonableness standard, the Hearing Panel believes SSD’s assertion here is misapplied. The issue is whether the SSD provided a correct diagnosis for the Student in 2002 in accordance the Missouri State Plan, Regulation III – Identification and Evaluation (Autism), pg. 14 (MoDESE 2001).

There is no dispute that the Student here qualifies as a child with a disability. The dispute here is whether SSD complied sufficiently with the requirements of Regulation III to conclude that the Student had autism. The Hearing Panel would agree with SSD if the assertion raised was that the requirements of Regulation III were not reasonable. However, the Hearing Panel disagrees that it is reasonable for SSD to ignore portions of the requirements of Regulation III.

#### Missouri Criteria For Autism

The Missouri Department of Elementary and Secondary Education has adopted

regulations for implementing Part B of IDEA.<sup>16</sup> Regulation III sets forth definitions and criteria for 13 categories of disabilities including Autism. Regulation III also sets forth procedures for the evaluation and reevaluation of the disability. With respect to autism, Regulation III states the following definition and criteria for identification and evaluation:

**“Autism” means a developmental disability significantly affecting verbal or nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child’s educational performance. Other characteristics often associated with autism are the engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.**

**The term does not apply if a child’s educational performance is adversely affected primarily because the child has an emotional disability as defined in this document.**

**A child who manifests the characteristics of autism after age three could be diagnosed as having autism if the criteria above are satisfied.**

**Criteria for Initial Determination of Eligibility**

**A child displays autism when:**

**A. Through evaluation that includes a review of medical records, observation of the child’s behavior across multiple environments, and an in-depth social history, the following behaviors are documented:**

- 1) Disturbances of speech, language-cognitive, and nonverbal communication: The child displays abnormalities that extend beyond speech to many aspects of the communication process. Communicative language may be absent or, if present, language may lack communicative intent. Characteristics may involve both deviance and delay. There is a deficit in the capacity to use language for social communication, both receptively and expressively.**

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<sup>16</sup> As the Missouri Supreme Court noted in *Fort Zumwalt School District v. State of Missouri*, IDEA offers aid to states that adopt policies and programs to assure ‘all children with disabilities the right to a free appropriate public education.’” 896 S.W.2d 918, 920 (Mo banc 1995).

- 2) **Disturbance of the capacity to relate appropriately to people, events, or objects: The child displays abnormalities in relating to people, objects, and events. There is a deficit in the capacity to form relationships with people. The capacity to use objects in an age appropriate or functional manner may be absent, arrested, or delayed. The child may seek consistency in environmental events to the point of exhibiting rigidity in routines.**

**B. The condition adversely affects the child's educational performance.**

**C. The autism is not a result of an emotional disability as defined in this document.**

**Missouri State Plan, Regulation III — Identification and Evaluation (Autism), p. 14 (MoDESE 2001).**

**Here, SSD's own evaluator, Barbara Lombardo, admitted that she did not review the Student's medical records. Tr. I, 20. SSD's argument that this deficiency was later cured or somehow harmless is not persuasive. Regulation III does not give SSD the discretion to choose what to review or not review. Regulation III imposes a requirement upon SSD, which was not met in this case. This is particularly troubling given Lombardo's testimony that she relied upon medical records supplied for the 1997 evaluation (almost four years earlier), when there were questions raised about what medical records were available at that time as well. Tr. III, 224-25.**

**The Hearing Panel further concludes that other aspects of Lombardo's evaluation and assessment were insufficient to comply with requirements of the Missouri State Plan. Lombardo testified that she observed the Student on a variety of occasions both formally and informally. Tr. I, 20. Several observations were in the classroom when she was observing**

other students.<sup>17</sup> Observations, in and out of the classroom, ranged from two minutes to 20 minutes. Tr. I, 21. Because Lombardo has been “bless with an excellent memory regarding the observations of children” she does not take notes. Tr. I, 23. Based on the evidence presented there was only one documented observation in Lombardo’s report, which we assume, was prepared after the fact. Tr. III, 239.

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<sup>17</sup> The Hearing Panel further notes that the delay in performing the 2002 reevaluation was in part because of Lombardo’s case load in the spring of 2001. Tr. I, 27.

The Hearing Panel did not find her testimony as to observations particularly credible. And as the record denotes, there were times when she was not able to recall events with specificity.<sup>18</sup> As Lombardo, herself admitted, her failure to document her observations as to the type of behaviors observed, their frequency or their clinical significance makes it difficult for others to review her finding. Tr. I, 24.

The validity of the 2002 reevaluation is dependent largely upon her credibility as the diagnostician. Lombardo stated and the record showed that she did not use autistic specific testing measures even though there was now a suspicion that the Student may be autistic. Tr. III, 244. The failure to utilize autistic specific testing measurements means that SSD failed to “ensure” that the standardized tests it utilized in the evaluation “have been validated for the specific purpose for which they [were] used,” and that they were “administered . . . in accordance with any instructions provided by the producer of the tests.” 34 C.F.R. §300.532(c)(1)(i) and (ii). Regulation III – Procedures for Evaluation. For example, SSD attempted to use the Behavior Assessment System for Children to support the Autism diagnosis, although that is not in accordance with the publisher’s instructions. Yet SSD did not consider using autistic specific measurements such as the ABLIS, ADOS, ASIEP or CARS. Tr. III, 241-44.

While Lombardo did have access to Anne King, the Student’s teacher, and other educational providers, the evidence is questionable at best as to what role these individuals played in the formation of the diagnostic evaluation. For instance, King (Student’s teacher) testified that she kept notes and other records on the Student’s behavior and actions. Tr. III,

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<sup>18</sup> Tr. I, 44.

70. While Lombardo had the opportunity to review those reviews, King stated that those records were never turned over to Lombardo's possession for use in planning the evaluation. Tr. III, 71. Further, King's testimony implies that she had little actual involvement in the formation of the evaluation process.

Under the Missouri State Plan, SSD was required to reevaluate the Student in accordance with 34 CFR 300.532 - 300.535. Regulation III — Procedures For Evaluation (Reevaluation), p. 27 (MoDESE 2001). Under IDEA regulations, a "group of qualified professionals and the parent of the child must determine whether the child is a child with a disability, as defined in Sec. 300.7." 34 C.F.R. §300.534(a)(1). SSD did not comply with this requirement here. Although there is a place on the SSD's form for team members to indicate agreement or disagreement with diagnosis, that form was not completed in this case. The evidence is disputed as to whether the team was polled and who agreed or disagreed with the Autism, and only Autism, diagnosis. The student's parent and grandmother and the district's occupational therapist all testified that they had no recollection of any polling of the team participants. J. Ex. 15 at 269; Tr. II, 43, 107-108; Tr. III, 145; J. Ex. 2 at 47. She could not recall if she reviewed King's notes on the Student. Tr. III, 245-46. Lombardo also chose to not observe the Student across multiple educational environments. Tr. III, 237-39.

Because of these failures, the Hearing Panel cannot find that there was sufficient evidence of disturbances of speech, language-cognitive, and nonverbal communication, as well as a disturbance of the capacity to relate appropriately to people, events, or objects. As Lombardo, herself, stated an evaluation or reevaluation measures the "range and nature" of the disturbances to determine if an Autism diagnosis is appropriate. Tr. I, 30. While the

parties dispute the level of disturbance needed for the diagnosis, the failure to review medical records, the failure to test across multiple environments, the failure to autistic specific measurements, and the failure to adequately documents is sufficient to invalidate the 2002 reevaluation. Therefore, there is no need for the Hearing Panel to address this other issue.

SSD bears the burden to demonstrate that the diagnosis reached complied with IDEA as implemented here under the Missouri State Plan. “At the administrative level, the District clearly had the burden of proving that it had complied with the IDEA.” *E.S. v. Independent Sch. Dist. No. 196*, 135 F.3d 566, 569 (8<sup>th</sup> Cir. 1998). The district has the burden of proof in cases in which the parents challenge the evaluation and diagnosis. *Welton v. Liberty 53 Sch. Dist.*, 35 IDELR 63 at 245 (W.D. Mo. 2001). For the reason stated herein, SSD did not meet this burden

The Hearing Panel is also troubled with the assertion made that Student’s special education services will be driven by his educational needs and not by the diagnostic label that is ultimately determined. The Hearing Panel agrees that educational needs determine education services. However, how can those educational needs be properly determined if an inadequate reevaluation took place? As SSD’s school psychologist stated, “its very possible that some programming could be missed down the road because the diagnosis didn’t really directly dictate exactly what [the Student] was all about.” Tr. III, 217-18. At the time of the 2002 reevaluation, Missouri still adhered to the maximization standard set forth in § 162.670, RSMo 2000,<sup>19</sup> and which requires public schools to provide “special educational services sufficient to meet the needs and maximize the capabilities of handicapped and severely

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<sup>19</sup>The Missouri General Assembly removed this standard in August 2002.

handicapped children.” As the Missouri Court of Appeals noted, the Missouri standard for a FAPE is higher than the IDEA standard and is controlling in determining if Missouri public schools are in compliance. *Lagares v. Camdenton R-III School District*, 68 S.W.3d 518, 527-528 (Mo.App. W.D. 2002). If SSD has the responsibility to maximize the Student’s capabilities, the Hearing Panel believes SSD’s 2002 reevaluation failed to meet that responsible. However, if the maximization standard is not applied, SSD still fails to meet its burden for the reasons discussed above.

The Hearing Panel believes there is some indication in the record that the Student may have autism. However, the violations noted above are sufficient to call into question the appropriateness of the evaluation and the diagnosis of autism. The failure to involve the IEP team in the development of the evaluation plan, the failure to utilize a group of qualified professionals to determine the proper diagnosis, the failure to make observations across multiple environments, the failure to ensure that behaviors are documented, together with other deficiencies noted, demonstrates that there is insufficient legal or factual basis for the diagnosis.

### ORDER AND DECISION

A. The Student’s diagnosis of autism given by the SSD at its reevaluation in May 2002 is not appropriate in light of evidence presented.

B. The panel finds that the Student does exhibit characteristics that are consistent and/or indicative of autism both in the classical sense and as defined under the Missouri State Plan, Regulation III, p.14. However, the reevaluation and assessment undertaken by SSD in May 2002 was insufficient to change the Student’s diagnosis from “Language Impaired” and

**“Other Health Impairment.”**

**C. The panel finds that the May 2002 reevaluation did not sufficiently comply with the requirements of the Regulation III in that there was not a thorough review of the medical records, observations of the child’s behavior across multiple environments, and an in-depth social history.**

**D. The panel finds that May 2002 reevaluation was not sufficient in that it failed to properly test for autism with autistic specific testing measures.**

**E. The panel further finds that the May 2002 reevaluation did not adequately document its findings in order to support its diagnosis.**

**F. WHEREFORE, the panel orders SSD to perform a new evaluation and assessment, which is comprehensive in nature, in the next 90 days.**

**G. WHEREFORE, panel orders the new evaluation and assessment shall be administered by a multi-disciplinary, independent third-party team of evaluators with experience in autism evaluation. The team of evaluators, at a minimum, shall include an speech and language therapist, an occupational therapist, and a psychological examiner. All team members must be approved by both parties. In the event the parties cannot mutually agree on the evaluators in the next twenty-one (21) days, SSD will provide on the following business day a list of 15 individuals as possible evaluators, consistent with the above-stated requirements, from which the Petitioner may select no less than three and no more than five evaluators.<sup>20</sup>**

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<sup>20</sup> For informational purposes only, the panel has included a list of evaluators for the parties consideration and use as Attachment A.

**H. WHEREFORE, the panel orders that the new evaluation and assessment shall include the following measurements:**

- i) Autism Diagnostic Observation Schedule (ADOS);**
- ii) Assessment of Basis Language and Learning Skills (ABLBS);**
- iii) Test of Problem Solving (TOPS), unless it is shown that the test was administered in the last 365 days;**
- iv) Autism Screening Instrument For Educational Planning (ASIEP);**
- v) Test of Pragmatic Language (TOPL), unless it is shown that the test was administered in the last 365 days;**
- vi) Oral and Written Language Skills (OWLS), unless it is shown that the test was administered in the last 365 days;**
- vii) Sensory Profile by Winnie Dunn;**
- ix) Test of visual perspective skills;**
- x) Visual Motor Integration (VMI).**

**These testing measurements shall be utilized in addition to any other testing measures the evaluation and assessment teams deems appropriate.**

**I. WHEREFORE, the panel orders the new evaluation and assessment to incorporate into its administration Document G-1 (Compliance Standards and Indicators Checklist) of the State Compliance Standards and Indicators Manual For Eligibility, which assesses eligibility criteria for Autism. (Attached hereto as Attachment B).**

**J. WHEREFORE, the panel orders that upon the completion of the new evaluation and assessment, the Student's IEP team shall meet within 30 days to determine what education services are required consistent with the findings and conclusions of the new evaluation and assessment.**

**K. WHEREFORE, the panel orders that the prior diagnosis of “Language Impaired” and “Other Health Impairment” be reinstated until such time as the new evaluation and assessment is performed. No change in the child’s placement, absent the Petitioner’s consent, shall be permitted during the new evaluation and assessment. The prior diagnosis shall control until the completion of the above-ordered reevaluation and assessment at which time the Student’s IEP team shall convene to write a new IEP plan consistent with the findings and conclusions of the new evaluation and assessment.**

SO ORDERED this \_\_\_\_\_ day of March 2003.

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**Edward F. Walsh**  
**Chairperson**

**Concurring in the Findings of Fact, Conclusions of Law, and Decision and Order entered on March 20, 2003.**

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**Rand Hodgson**

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**Vicki Hanson**

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**NOTICE OF RIGHT TO APPEAL**

**Any party aggrieved by the hearing panel’s decision may bring an appeal to a court of proper jurisdiction. Pursuant to Section 162.962, RSMo, an aggrieved party may file a “Petition for Judicial Review” in state court as prescribed under Chapter 536, RSMo. Section 536.110, provides that such an appeal must be filed within 30 days of the mailing or delivery of the decision. An aggrieved party may also file an appeal in federal court by filing a complaint in a district court of the United States, without regard to the amount in controversy.**

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