

**DUE PROCESS HEARING PANEL
MISSOURI STATE BOARD OF EDUCATION
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

,)
by his parents,)
,)
)
Complainants,)
)
vs.)
)
SPECIAL SCHOOL DISTRICT OF)
ST. LOUIS COUNTY)
and)
ROCKWOOD SCHOOL DISTRICT,)
)
Respondents.)

DECISION COVER SHEET

PARTIES

The Student is

His parents are:

The Respondents are:

The Special School District of St. Louis County (“SSD”)

12110 Clayton Rd.

St. Louis, MO 63131

and

Rockwood R-VI School District (“Rockwood”)

111 E North St.

Eureka, MO 63025

ATTORNEYS

Ramon Morganstern
Attorney for Parents
200 South Hanley, Suite 1103
St. Louis, MO 63105

James Thomeczek
Robert Thomeczek
Attorneys for SSD
Thomeczek Law Firm, LLC
1120 Olivette Executive Parkway, Suite 210
St. Louis, MO 63132

John Brink
James Guest
Attorneys for Rockwood
Tueth, Keeney, Cooper, Mohan & Jackstadt, PC
425 South Woods Mill Rd., Suite 210
St. Louis, MO 63017

HEARING OFFICERS

Kenneth M. Chackes	Hearing Chairperson
Fred Davis	Hearing Panel Member selected by parents
Betty Chong	Hearing Panel Member selected by school district

DECISION

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.

ISSUES

Based upon the submissions of the attorney for the parents describing the issues (including Ex. P-84) and the discussion of the issues at a prehearing conference held on April 25, 2002, the hearing chairperson prepared a document that summarized the issues for the hearing panel to decide in this case. Panel Exhibit 1. Both before and after the hearing, the parents' attorney agreed that these were the issues. Tr. I, 10-17; Tr. III, 107-120. The parents claim that the respondent school districts violated the law in the following ways:

1. VIOLATION OF CHILD FIND REQUIREMENTS - ROCKWOOD AND/OR SSD SHOULD HAVE SUSPECTED A DISABILITY AND CONDUCTED AN EVALUATION - AND WOULD HAVE DETERMINED THE STUDENT ELIGIBLE
2. THE ABOVE VIOLATION LED TO DENIAL OF A FREE APPROPRIATE PUBLIC EDUCATION ("FAPE")
3. FAILURE OF SSD TO MONITOR THE STUDENT WHILE IN A PRIVATE PLACEMENT - AND HOLD AN IEP MEETING AND CONDUCT AN EVALUATION
4. FAILURE TO PROVIDE EXTENDED SCHOOL YEAR PROGRAM ("ESYP") - PRIOR TO AND AFTER THE STUDENT'S TRANSFER TO PRIVATE SCHOOL
5. PROCEDURAL VIOLATION - FAILURE TO PROVIDE ROCKWOOD SCHOOL RECORDS UPON REQUEST

At the start of the hearing, the attorneys for the SSD and Rockwood raised the following additional issue. Tr. I, 17-22.

6. OBJECTION TO THE CHAIRPERSON SERVING ON THE PANEL ON THE BASIS OF ALLEGED LACK OF IMPARTIALITY

PROCEDURAL HISTORY AND ISSUES

Relevant Dates and Extensions of Deadlines

- Request for due process hearing: January 10, 2001 (Ex. P-38); received January 12, 2001 (Ex. P-39, P-40)
- Dates of hearing: April 29 and 30, and August 13, 2002
- Date of Decision: October 3, 2002

On February 26, 2001, the attorney for the parents requested, the attorney for the Special School District agreed, and the chairperson ordered, that the hearing would be held in June 2001 and the time line for completion and mailing of the decision would be extended to July 16, 2001. Ex. P-44, P-45. In letters dated April 6 and 26, 2001, however, the attorney for the parents indicated he would be unavailable for the hearing in June and requested a continuance until July or August, 2001. Ex. P-49, P-50.

Throughout the period of April through October 2001, the parties indicated their agreement to a continuance but could not agree upon dates for the hearing. On May 10, 2001, the hearing chairperson granted the parents' request for a continuance and directed the parties to provide, by May 25, 2001, specific dates of their availability for a hearing. Ex. P-51. On June 1, 2001, counsel for SSD proposed that the hearing be conducted in September or October 2001. Ex. P-52. The parents' attorney did not respond at that time, but on July 12, 2001, the parents' attorney provided several dates for hearing in late September, in October, and into early November, 2001. Also on July 12, 2001, the chairperson communicated to the attorney for SSD the dates on which the parents' attorney indicated he was available for a hearing and requested

SSD's response. On July 13, 2001, the attorney for SSD indicated SSD's agreement to a hearing during the week of October 29, 2001. In communications with the other hearing panel members, the chairperson learned and informed the parties that the panel member selected by SSD was not available the week of October 29, 2001. The attorney for SSD then requested that the hearing be held in November 2001, while the attorney for the parents requested it be scheduled in December 2001. On October 16, 2001, the panel member selected by the parents informed the chairperson that, due to a change in employment, she would not be available for a hearing until April 2002. The chairperson informed the parties of that fact and directed them to provide new requests for hearing dates by October 26, 2001. Ex. P-55. The parents then selected a new panel member who was appointed to serve by the Missouri Department of Elementary and Secondary Education ("DESE"). Ex. P-56, P-57, P-58, P-60. By the end of October and in early November 2001, the parties indicated their agreement to hold the hearing in January or February 2002. Ex. P-58, P-59, P-61. On November 14, 2001, the chairperson scheduled the hearing for February 26-28, 2002, and, at the request of the parents, extended the decision deadline to March 30, 2002. Ex. P-61, P-62.

In February 2002, counsel for both the parents and SSD requested, and the chairperson ordered, that the hearing be postponed to April 29-30, 2002, and the decision deadline be extended to May 31, 2002. Ex. P-65, P-66. The chairperson learned and informed the parties, however, that the panel member selected by the parents was not available for a hearing on those dates. Ex. P-67. The parents again selected a new panel member who was appointed to serve by the Missouri Department of Elementary and Secondary Education ("DESE"). Ex. P-82, P-85, P-86.

On April 5 and 10, 2002, the SSD submitted two motions to dismiss, or in the alternative, to clarify issues and for extension of procedural time lines. Ex. P-68, P-80. In those motions SSD sought either dismissal of the case or a statement of the issues with sufficient specificity to allow SSD conduct discovery and prepare for the hearing. On April 12, 2002, the parents' attorney responded to those motions by submitting a letter setting forth a statement of issues and remedies. Ex. P-84. Prior to the start of the hearing, SSD agreed to withdraw those motions, as moot, because the parents provided a statement of issues and SSD had the opportunity to take the parents' depositions. Tr. I, 5-6.

Two days of hearing were conducted on April 29 and 30, 2002. The parties jointly requested one additional day for the hearing be scheduled for June 11, 2002, and the parents' moved for an extension of the deadline for completion of the decision to July 12, 2002. Tr. II, 270-71. The chairperson granted those requests. On June 4, 2002, however, the attorney for the parents moved for a continuance on the ground that he had a different matter scheduled for a court hearing on June 10-12, 2002. The parties agreed to a new hearing date of August 13, 2002, and the parents' attorney requested an extension of the deadline for the decision to September 13, 2002. Those requests were granted. The third and final day of hearing was held on August 13, 2002. The parties agreed to submit proposed findings of fact and post-hearing briefs on August 23 and reply briefs on August 30, 2002. The parties then requested and the chairperson granted additional time to submit their post-hearing briefs and reply briefs. Rockwood requested that the deadline for completion and mailing the decision be extended to September 23, 2002, and the parents requested that it be extended to October 3, 2002,. The chairperson granted the request of the parents and established the decision deadline of October 3, 2002.

Post-Hearing Motions Regarding Briefs

During the post-hearing briefing, the parties raised issues regarding the timeliness and propriety of other parties' submissions. On or about August 29, 2002, the parents submitted, and on or about September 3, 2002, the school districts jointly submitted, proposed findings of fact, conclusions of law and decisions. The school districts' "joint" submission was signed only by an attorney for SSD, James Thomeczek. On September 4, 2002, Rockwood, through its attorney John Brink, filed a motion to extend timelines so the parties could have until September 9, 2002, to file responses to the other parties' initial submissions. On or about the same date, the parents also requested additional time, until September 15, 2002 (which was a Sunday), to file a reply to the brief submitted by the school districts. The chairperson orally informed the parties that they could have until September 15, 2002, to file their replies. On September 6, 2002, Rockwood submitted its own response to the parents' post-hearing submission. On September 13, 2002, the parents submitted their reply to the districts' joint submission and also presented a motion to strike Rockwood's response to the parents' original submission. On September 17, 2002, the SSD submitted its reply, along with a motion to allow the reply to be filed one day late, due to the "family/religious obligations" of its attorney. The day the parties' replies would have been due was the Jewish holiday of Yom Kippur, Monday, September 16, 2002.

The panel denies the parents' motion to strike Rockwood's response to the parents' initial post-hearing submission. The parents also requested oral argument and the opportunity to make a record regarding the motion to strike and sought a subpoena for service on Rockwood's attorney, John Brink, to allow the parents' attorney to interrogate him as a hostile witness. The panel also denies those requests as we have sufficient information with which to rule on the

parents' motion to strike. The panel denies the parents' motion to strike because it has no basis in fact and no legal merit. The motion asserts that "Rockwood failed to file, as ordered, its own Findings of Fact, Conclusions of Law and Decision." The panel did not order Rockwood to file its own post-hearing submission, and recognized that SSD's counsel would be speaking for both school districts. *See* Tr. I, 22; Tr. III, 121. The initial submission on behalf of the school districts was denominated as "Respondents' Joint" proposed findings, etc. Thus, there is no basis for the parents' argument that Rockwood chose to "sit back and wait" for the other parties to file their briefs and then "pick apart" the parents' original brief. The panel has considered the other arguments in the parents' motion to strike and finds they also are without basis and merit. The parents' position in this case is not unfairly prejudiced by Rockwood's response.

The panel grants, for good cause, the request of SSD to file its reply one day late. SSD's reply responds only to the assertions and arguments set forth in the parents' initial submission. The parents are not unfairly prejudiced by SSD's filing its reply one day late.

Finally, both districts complain that much of the language and arguments of parents' attorney, especially those attacking the districts and insulting their teachers and administrators, are inappropriate and unsupported by the evidence. The panel agrees and adds that such inflammatory remarks are a hindrance to the process and not helpful in deciding the issues in the case.

Districts' Objection to Hearing Chairperson's Impartiality

As stated above, at the beginning of the hearing, SSD and Rockwood objected to the participation of the hearing chairperson, Kenneth Chackes, on grounds of lack of impartiality.

Tr. I, 17-22. The Missouri State Plan for Special Education (Missouri's Regulations

Implementing Part B of the IDEA), provides that challenges to impartiality of hearing officers shall be filed with the Missouri Department of Elementary and Secondary Education under the Child Complaint process. State Plan at 52.¹

The districts based their objection on the grounds that Mr. Chackes has due process cases pending against the SSD in which he represents the parents, in at least one of those cases the parents are seeking reimbursement for services provided unilaterally by the parents, and Mr. Chackes represents parents in another case against a school district in St. Charles County in which the parents are seeking reimbursement for the same private school that is involved in this case. Tr. I, 17-22.

The IDEA and Missouri law both require that a hearing officer not have “a personal or professional interest that would conflict with his or her objectivity in the hearing.” 34 C.F.R. §300.508 (1999); §162.961.3 (1999). In some jurisdictions, close affiliation with either school authorities or parents might be seen to create a lack of impartiality. *See e.g. Mayson v. Teague*, 749 F.2d. 652, 658-59 (11th Cir. 1984). In other jurisdictions, however, such affiliations are not disfavored. *Leon v. Michigan Bd. of Educ.*, 807 F. Supp. 1278, 1282-83 (E.D. Mich. 1992); *West Bend Sch. Dist.*, 24 IDELR 1125 (SEA Wis. 1996). Missouri does not follow the rationale of *Mayson v. Teague*, as it allows school officials and attorneys from one district to sit as hearing officers in cases involving other districts. The court in *Leon v. Michigan Bd. of Educ.* considered that the Rules of Professional Conduct state: “Representation of a client . . . does not constitute

¹ Effective October 1, 2001. The previous state plan which was in effect when Mr. Chackes was appointed contained the same provision.

an endorsement of the client's political, economic, social or moral views or activities.” 807 F. Supp. at 1282. Those rules, which also are in effect in Missouri, also recognize that lawyers may simultaneously represent clients “in unrelated matters . . . whose interests are . . . generally adverse,” without even obtaining consent of the clients. Comment to Rule 4-1.7. Missouri lawyers also “may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected.” *Id.* The *Leon* court also recognized the value of having “experienced and knowledgeable hearing officers” which would be compromised if persons affiliated with school districts were disqualified. 807 F. Supp. at 1283 n. 5.

Summarizing the law that has developed nationally on this issue, one law journal article concluded: “In sum, administrative agencies and courts have moved closer to an actual bias than an appearance of impropriety standard for situation-specific cases of alleged hearing officer bias.” Elaine Drager & Perry Zirkel, “Impartiality Under the Individuals with Disabilities Education Act,” 86 *West’s Educ. Law Rep.* 11, 29 (1993). The authors also note that since “special education . . . is a relatively small, specialized field,” there is an inherent “trade-off between a hearing . . . officer’s expertise, or competence, and his/her independence, or impartiality.” *Id.* at 40.

Missouri puts a high value on having experienced and knowledgeable hearing officers, as shown by its statutory requirement that: “All of the panel members shall have some knowledge or training involving children with disabilities.” §162.961.3 (1999). That choice might allow someone to question the impartiality of hearing officers who have been or are affiliated with either school districts or parents. But without evidence of “a personal or professional interest

that would conflict with his or her objectivity,” a hearing officer cannot be said to lack impartiality.

The Missouri Department of Elementary and Secondary Education (DESE) has rejected several challenges regarding the impartiality of hearing officers who also are attorneys who represent parents of children with disabilities or attorneys who also represent school districts. *See* DESE Decisions, April 4, 2002 (challenge to Robert Baine as hearing officer, who also represents school districts); July 18, 2000 (previous challenge by SSD to Mr. Chackes); May 24, 2000 (challenge to Dayna Deck, attorney who represents parents). Each of those decisions is attached hereto. In rejecting those challenges, DESE indicates it follows the position of the majority of states, “to require a showing of actual bias rather than an appearance of impropriety,” to disqualify a hearing officer:

While some may argue that qualifications of hearing officers are analogous to state and federal judges, and that therefore there is a need for hearing officers to avoid the appearance of impropriety in the same way as judge, there does not appear to be any case law in our jurisdiction to support this argument. Nationally, it does appear that the majority position is to require a showing of actual bias rather than an appearance of impropriety. Here, there is no evidence to show actual bias or conflict.

See DESE Decision, July 18, 2000.

Each due process case must be determined based upon its own unique facts and circumstances. Due process decisions have no binding precedential value. According to DESE’s web site: “Due process hearing decisions are only binding on the actual parties involved in that particular case regarding a specific student. These decisions are not binding in any other situation as they are not like court cases.” Thus, even a legal ruling by one hearing panel would not be binding upon another panel in which the same issue arose.

Missouri judicial decisions involving other administrative agencies support DESE’s position that an appearance of impropriety is not enough to disqualify a hearing officer. The courts recognize that, “administrative decisionmakers are expected to have preconceived notions concerning policy issues within the scope of their agency's expertise.” *Wagner v. Jackson County Bd. of Zoning Adjustment*, 857 S.W.2d 285, 289-90 (Mo. App. W.D. 1993). In administrative proceedings, “[f]amiliarity with the adjudicative facts of a particular case, even to the point of having reached a tentative conclusion prior to the hearing, does not necessarily disqualify an administrative decisionmaker, in the absence of a showing that the decisionmaker is not capable of judging a particular controversy fairly on the basis of its own circumstances.” *Id.* There is presumption in Missouri law, “in favor of the honesty and impartiality of administrative decision makers.” *Id.*; *Burgdorf v. Board of Police Comm'rs*, 936 S.W.2d 227, 234 (Mo. App. E.D. 1996). The party challenged impartiality has the burden of overcoming that presumption with clear and convincing evidence. *Burgdorf, supra.*

Mr. Chackes declined to recuse himself at the hearing and the panel finds that the districts did not establish that he was required to do so based on the alleged lack of impartiality.

FINDINGS OF FACT

1. The student in this case is 15 years old (born) and resides with his parents in the area served by the Rockwood School District (“Rockwood”) and the Special School District of St. Louis County (“SSD”).

2. The student’s educational history by Year/Grade/School is as follows:

1990-92	Preschool	Our Savior Lutheran (two years)
1992-93	Kindergarten	Uthoff Valley – Rockwood
1993-94	First Grade	St. Paul School – Fenton

1994-95	First Grade	Sacred Heart School – Valley Park (repeated first grade)
1995-96	Second Grade	Sacred Heart
1996-97	Third Grade	Sacred Heart
1997-98	Fourth Grade	Sacred Heart
1998-99	Fifth Grade	Stanton – Rockwood
1999-2000	Sixth Grade	Rockwood South Middle
2000-01	Seventh Grade	Home Schooling/Metropolitan School
2001-02	Eighth/Ninth Grade	Metropolitan School

4. In May 1992, Rockwood administered the Missouri Kindergarten Inventory of Developmental Skills. All of the student's scores (Number Concepts; Auditory Skills; Paper/Pencil Skills; Language Concepts; Visual Skills; and Gross Motor Skills) were in the average range. Ex. R-1, 005. His kindergarten report card shows satisfactory progress. Ex. P-1.

5. The student did reasonably well in first grade, at St. Paul School (Ex. P-2, R-3), but repeated first grade upon his transfer to Sacred Heart, primarily because of the recommendation of St. Paul. Tr. I, 37-38; Tr. II, 210-214.

6. During his first three years at Sacred Heart, grades one, two and three, the student made satisfactory progress academically, socially and behaviorally. Tr. I, 39, 102-04; Ex. P-3, P-4, P-5.

7. The student had difficulty, however, during his fourth grade year at Sacred Heart. Following the end of first semester, on February 3, 1998, Dr. Sharon Baumgartner, Principal of Sacred Heart, notified the parents that the student was failing six subjects and was in danger of failing fourth grade. Ex. R-5. The letter also offered to provide the student with counseling services at no charge if the parents thought that would be of assistance. *Id.* The letter followed a meeting between Dr. Baumgartner and the student's parents. Tr. II, 219.

8. On February 7, 1998, the parents responded to Dr. Baumgartner's letter. They indicated that the student's mother had communicated with Ms. Czuppon (fourth grade teacher), and that the student was responding positively to the warning from Dr. Baumgartner. The parents stated: "we know that he can be successful if he just applies himself." With respect to the offer of counseling, the parents stated: "At this time, we feel a counselor is not necessary, but would certainly give it serious consideration, if [the student] fails fourth grade." Ex. R-5.

9. On April 3, 1998, Dr. Baumgartner again wrote the parents, stating that the student's grades had not improved in the third quarter but were improving as he began tutoring with a Ms. Lee. In her letter, Dr. Baumgartner stated: "Again, we would be happy to assist you in securing counseling for [the student] if this would help." Ex. R-5. The parents declined the offer of counseling.

10. Dr. Baumgartner testified that she regularly attended child find workshops conducted by the SSD and was aware of the process for referring a student to the SSD for evaluation. Tr. II, 222-23. She also testified that when she met with parents of failing students, as she did with the parents in this case in the spring of 1998, she always informed them that the SSD was available for additional assistance and told them how to contact the district. Tr. II, 222-23, 232-34.

11. The student ended fourth grade failing six courses and was to be retained in fourth grade at Sacred Heart. Ex. R-6. Rather than having the student repeat fourth grade at Sacred Heart, the parents re-enrolled him in the Rockwood School District, where he entered fifth grade at Stanton Elementary School. Ex. R-7.

12. The student had a satisfactory fifth grade year at Stanton Elementary. Ex. P-10; Ex. R-37, 256; Tr. I, 44-45. He got off to a poor start academically, and in the first quarter had a behavior problem with another student, but improved thereafter. *Id.*

13. For sixth grade the student attended Rockwood South Middle School. Students commonly have a difficult time making the transition from elementary to middle school. Tr. III, 13. The student had difficulties both academically and behaviorally from early in his sixth grade year. At the end of the first quarter, he earned three Fs and three Ds on his report card. Ex. P-11. On November 10, 1999, the principal wrote a letter to the parents informing them that the student was having academic problems that could result in his retention in sixth grade. Ex. P-28. In the first semester, the student failed four courses and the principal again wrote to the parents advising them of the student's academic problems. Ex. P-11, P-29. The record of the student's behavioral problems during sixth grade began in October 1999 and continued throughout the year. Ex. P-90. The student and his parents disputed some of the school's allegations regarding the student's behavior. In the spring of 2000, the student's father brought Gene Elkin, a neighbor, with him to a meeting with the principal and other Rockwood staff members. They discussed the student's behavior and academics.

14. Beginning after the first six weeks of sixth grade, Rockwood's counselor, Kathi Risenhoover, used a number of interventions to try to assist the student, including the use of a planner and a homework hotline, and offered to provide tutoring, an organization skills class, and meetings with the counselor before school to review homework. Tr. III, 25, 27, 39, 48. The counselor also provided the student with daily sheets for him to take to his each of his teachers, so they could mark whether he did his homework, and the student could then take them home to

show his parents. Tr. III, 39. Rockwood also placed the student in a remedial reading program at the start of the second semester. Tr. III, 29.

15. When the various interventions were unsuccessful, Rockwood suggested that it administer certain screening instruments to the student. Tr. III, 27. According to the counselor, Ms. Risenhoover, after first semester she suggested to the student's father that the student could be tested for a disability by SSD, but he did not want the student to be evaluated at that time. Tr. III, 29, 44. The mother testified she was not aware of that request. Tr. I, 213-16. The father did not testify about that specific request, but stated generally that he has been opposed to allowing SSD to test his son. Tr. II, 191-92.

16. In February or March 2000, the counselor referred the student to Rockwood's Special Services for testing. Ex. R-18 (the document indicates it was faxed on February 15, 2000, but it indicates a "Referral Date" of March 20, 2000); Tr. III, 27-30. On April 5, 2000, although the student's mother believed it was too late, the father gave Rockwood consent to test. Ex. R-18; Tr. I, 216.

17. On April 26, 2000, Rockwood administered the Kaufman Brief Intelligence Test (K-BIT) and the Kaufman Test of Educational Achievement (K-TEA). Ex. R-18. The student obtained average scores on the K-BIT. *Id.* On the K-TEA he scored below average in math and spelling, well above average in reading, and an average composite score. *Id.* According to Dr. Leigh Berry, parents' expert, the instruments used by Rockwood were "screening" instruments, as opposed to diagnostic instruments. Tr. II, 138-39.

18. As a result of the initial screening, Rockwood completed a referral packet on May 25, 2000, and referred the student to the SSD for an initial evaluation under the IDEA. The

referral packet was signed by Maureen Fiebiger, a school psychologist employed by SSD, and Kathi Risenhoover, from Rockwood. Ex. R-20. At the same time, SSD and Rockwood sent the parents notice that the information included in the referral packet was being sent to the SSD Intake Office to initiate an evaluation for special education services. Ex. R-19. That notice indicates that the procedural safeguards were enclosed and Ms. Fiebiger testified credibly that she followed her usual routine in sending the letter and enclosing the procedural safeguards. *Id.*; Tr. III, 66, 70-71.

19. When Rockwood and SSD completed the student's referral for testing on May 25, 2000, only one or two weeks remained of the school year. Tr. III, 36. The next step in the evaluation process would have been a meeting with the parents to develop an evaluation plan and obtain their consent to conduct the evaluation. Tr. III, 66-69. The evaluation plan usually is completed within 30 days of the referral to SSD and the notification to the parents. Based on its understanding of state requirements, however, SSD does not count the summer months, when schools are not in session, in meeting that 30-day time line. Tr. III, 57-58. In this student's case, the SSD would have sought permission to evaluate and would have developed an evaluation plan at the beginning of the following school year. Tr. III, 71-72.

20. When the parents received the student's final report card at the end of sixth grade, however, and saw that he failed every class, they decided that he would not return to Rockwood South Middle School. Tr. I, 65-66; Ex. P-13. By memo dated August 16, 2000, the father informed Rockwood that the student would not return to Rockwood for the coming year. Ex. P-35. The parents did not inform Rockwood or SSD what they were planning to do for the student's education that fall.

21. After learning of the student's withdrawal, SSD sent a notice to the parents on August 24, 2000, indicating that the evaluation would not go forward, but that the referral information would be retained for 90 days so the evaluation could be completed if the parents wanted it. Ex. P-36; Tr. III, 92. The parents did not contact SSD to request an evaluation after receiving that notice. Tr. I, 217-20. Despite their lawyer's advice to have the student evaluated by SSD, the parents have never consented to an evaluation or contacted SSD to request an evaluation. Tr. II, 191-92. The father explained that they did not want SSD to conduct an evaluation because he was not comfortable with SSD based on past experience and because of the way the student's sixth-grade year went. Tr. II, 191-92, 202-03.

22. The parents contend that the school officials at Rockwood South had labeled the student a trouble maker and targeted him for unwarranted disciplinary actions. Tr. I, 51-56, 60-65, 191-205, 207-213; Ex. R-11, R-15, R-25, R-37. The student was involved in a number of disciplinary incidents during his sixth grade school year, and the parents testified that some of the allegations against him were unfounded. *Id.* Considering the testimony of the parents and their expert witnesses; the testimony of Mr. Elkin, their neighbor who attended a meeting with members of the Rockwood staff; the testimony of the Rockwood counselor, Ms. Risenhoover; and the student's discipline record (Ex. R-11), the panel does not find that this was true. The only witness called by either party who regularly observed the student at school was Rockwood's counselor, Ms. Risenhoover, who provided credible testimony that she did not have a negative attitude toward the student and that she did not pick on him or otherwise treat him badly. Tr. III, 40-41. The parents and Mr. Elkin may honestly believe that the student was treated unfairly, but the evidence before the panel does not support that contention.

23. In the fall of 2000, instead of sending the student to Rockwood South Middle School, the parents began to home school the student.

24. The parents took the student to Dr. Warren Kass, a private psychologist, starting on or about September 16, 2000. Ex. P-100. Dr. Kass met with the student and his parents several times and reviewed the student's educational records. In a report dated October 19, 2000, Dr. Kass diagnosed the student with Attention-Deficit/Hyperactivity Disorder, Combined Type (ADHD) and stated that the ADHD "is primarily responsible for the chronic and pervasive problems in listening, task focus, attention and behavioral self-control that have had the significant negative impact on learning." *Id.* at 4. Dr. Kass recommend an educational evaluation to rule out learning disabilities in mathematics and spelling. Dr. Kass did not assign an educational diagnosis to the student. Ex. P-100.

25. In late September 2000, the parents enrolled the student in Metropolitan School, a private school in the St. Louis area. He completed his seventh grade year at Metropolitan during the 2000-01 school year. The student also attended Metropolitan for the 2001-02 school year, during which he did both eighth and ninth grade work.

26. In January 2001, the parents instituted a due process proceeding against both districts. Ex. P-38.

27. In the summer of 2001, the parents had the student further evaluated by Dr. Leigh Berry, a private psychologist. Ex. P-107. According to Dr. Berry, the purpose of the evaluation was "to document the student's level of functioning and to assist with treatment planning." *Id.*, Report at 1. Dr. Berry found that – under the criteria used in field of psychology in the DSM-IV – the student had average intelligence but lower than expected academic skills in reading

comprehension, mathematics, and written language expression. *Id.* at 3; Tr. II, 156-57. She questioned and suggested reconsideration of Dr. Kass's diagnosis of ADHD, and concluded that additional evaluation was necessary, including an observation of the student at school, before a determination could be made as to whether the student had an educational disability. Tr. II, 118-19, 133-35, 155-57, 164.

27. In the summer of 2001, the SSD offered to evaluate the student. Ex. R-38. In October 2001, the parents provided the SSD with the evaluation reports of Dr. Kass and Dr. Berry, and asserted that because of their evaluations, an SSD evaluation would not be valid. Ex. P-53, P-54. In December 2001, the SSD again offered to evaluate the student, without additional testing, but instead using the testing done by Dr. Berry and obtaining other information, including an observation, that would "round out the evaluation." Ex. P-63, R-53. The parents again declined to allow SSD to perform an evaluation. Ex. P-64. Through the date of the hearing, the parents continue to refuse to permit SSD to evaluate the student. Tr. I, 257-61.

28. With respect to the alleged violation of child find requirements, Rockwood demonstrated that during the student's sixth grade year it was monitoring the student's progress, attempting various interventions and alternative intervention strategies. Rockwood staff, particularly Ms. Risenhoover, and SSD staff working in Rockwood, Ms. Fiebiger, demonstrated adequate knowledge of the screening and referral process. The child find efforts worked in that the student was located and referred for an evaluation.² The parents contend, however, that the process was too slow and that the evaluation should have been completed by the end of the sixth

² In addition, Rockwood and SSD submitted into evidence a number of documents showing their compliance with Missouri's child find provisions. Ex. R-61, R-62, R-63, R-64, R-65, R-66, R-67, R-68, R-69, R-70.

grade year. The panel finds, however, that the speed by which the districts proceeded toward an evaluation during that year was reasonable. The student's performance in fifth grade, when he started poorly and then recovered, coupled with the fact that many students have transitional problems when starting middle school, justified Rockwood's attempts to use alternative intervention strategies before referring the student for a special education evaluation. As will be explained more fully below, even if Rockwood had moved too slowly toward making the referral for an evaluation, which is not this panel's finding, that would not have justified the parents' decision to refuse to allow the SSD to conduct the evaluation. The fact that the parents had the student tested privately also did not justify the parents' continued refusals to allow SSD to perform an evaluation.

29. Without a proper evaluation, the districts had no duty to provide a FAPE, monitor the student, or provide ESYP. The parents' evaluation is insufficient to show the student had an educational disability under the IDEA and the Missouri State Plan. Further, the parents never allowed the SSD to conduct its own evaluation.

30. With respect to the districts' alleged failure to provide Rockwood's records, parents' attorney stated during the hearing and in his post-hearing briefs, that he made an oral request to Rockwood's attorney for the records, but there is no formal evidence to prove that request was made. Parents' counsel did send a request for Rockwood records to SSD's attorney, rather than to Rockwood's attorney, in October 2001. Ex. P-54. That request came after a letter from Rockwood's attorney informing parents' counsel that all communication with Rockwood was to be through Rockwood's attorney. Ex. P-48. In the letter to the SSD attorney requesting Rockwood's records, the parents' attorney indicated that if he did not receive the records he

would subpoena them. *Id.* Parents’ attorney did not follow up on that request or subpoena Rockwood’s records.

31. Nevertheless, Rockwood did provide to the parents’ attorney all of the Rockwood records on April 18, 2002, eleven days prior to start of the hearing and several months before the final day of the hearing on August 13, 2002. Ex. P-87, P-88; Tr. III, 110. Rockwood produced 146 pages of records to the parents’ attorney. Ex. R-72.

CONCLUSIONS OF LAW

This matter arises under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§1400, *et seq.*, and Missouri law, §162.961, RSMo. This Hearing Panel has jurisdiction pursuant to 20 U.S.C. §1415 and §162.961, RSMo.

The burden of proving compliance with the IDEA is on the school districts. According to the United States Court of Appeals for the Eighth Circuit, which governs the federal courts in Missouri: “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 (8th Cir. 1998).

ISSUE 1: ALLEGED VIOLATION OF CHILD FIND REQUIREMENTS - WHETHER ROCKWOOD AND/OR SSD SHOULD HAVE SUSPECTED A DISABILITY AND CONDUCTED AN EVALUATION - AND WOULD HAVE DETERMINED THE STUDENT ELIGIBLE

The United States Supreme Court has described the determination of whether a public entity has complied with the IDEA as requiring a two-part analysis:

First, has the State [or school district] complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Board of Education v. Rowley, 458 U.S. 176, 206-07 (1982) (footnotes omitted).

The primary claim asserted by the parents in this case is a procedural violation, that the school districts failed to act promptly to identify the student as a child with a disability. The IDEA requires that “[a]ll children with disabilities residing in the State . . . who are in need of special education and related services, are identified, located, and evaluated.” 20 U.S.C. §1412(a)(3)(A) (1997); 34 C.F.R. §300.125(a). The courts are in agreement that “procedural inadequacies that result in the loss of educational opportunity,” that seriously infringe the parents’ opportunity to participate in the educational planning process, or that “caused a deprivation of educational benefits,” result in the denial of a free appropriate public education (FAPE). *Amanda J. v. Clark County Schl Dist.*, 267 F.3d 877, 892 (9th Cir. 2001) (citations omitted). The Eighth Circuit has indicated its agreement with those principles. *Independent School District No. 283 v. S.D. by J.D.*, 88 F.3d 556, 562 (8th Cir. 1996). Thus, the violation of the child find and evaluation requirements, where the school districts improperly fail to identify and refer a child for an evaluation, can lead to a finding of a denial of a free appropriate public education and reimbursement for private services. *Special School District of St. Louis County* (Mo. SEA September 19, 2001).³

Reimbursement of Private Tuition

³ Reported on the web site of the Missouri Department of Elementary and Secondary Education, http://www.dese.state.mo.us/divspeced/Compliance/Complaint_System/DPDecisionsFile/DP00014SSD.pdf.

Parents can obtain reimbursement for the cost of enrollment of their child at a private school, if the school district “had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.” 20 U.S.C. §1412(a)(10)(C)(ii); *Florence County School District Four v. Carter*, 510 U.S. 7 (1993); *Burlington v. Department of Educ.*, 471 U.S. 359, 370 (1985). The IDEA provides, however, that such reimbursement “may be reduced or denied,” if, “prior to the removal of the child from the public school,” the parents did not inform the school district “that they were rejecting the placement proposed by the [district] . . . , including stating their concerns and their intent to enroll their child in a private school at public expense.” 20 U.S.C. §1412(a)(10)(C)(iii)(I).⁴ The law is well established that parents must give the school district notice if they want to place their child in a private program and obtain reimbursement. *Evans v. District No. 17*, 841 F.2d 824, 831 (8th Cir. 1988). The parents in this case failed to provide such notice.

The IDEA also permits denial of reimbursement when the parents refuse to allow the school district to conduct an evaluation of the student:

if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in Sec. 1415(b)(7), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation.

20 U.S.C. §1412(a)(10)(C)(iii)(II).

⁴ The failure to provide advance notice does not mandate denial of reimbursement in every case. See *Nein v. Greater Clark County Sch. Corp.*, 95 F. Supp.2d 961, 984 (S.D. Ind. 2000).

This also is a well established principal of law. Unilateral withdrawal of a child from public school, without providing the school an opportunity to evaluate his needs, generally precludes reimbursement for private school tuition. *Schoenfeld v. Parkway School District*, 138 F.3d 379, 382 (8th Cir. 1998). The parents' cooperation in the evaluation process is often critical to their effort to recover reimbursement for private school tuition. As stated in *Costello v. Mitchell Public School District 79*, 266 F.3d 916 (8th Cir. 2001): "In light of their failure to provide information that might well have helped [the school] in its continuing efforts to evaluate [the student's] condition, the plaintiffs will not now be heard to complain of [the school's] failure to comply literally with the terms of the relevant statutes." 266 F.3d at 923. Numerous courts have held that refusal to allow an evaluation, without good cause, precludes relief under the IDEA:

If a student's parents want him to receive special education under IDEA, they must allow the school itself to reevaluate the student and they cannot force the school to rely solely on an independent evaluation. *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1315 (9th Cir.1987) ("If the parents want [the student] to receive special education under the Act, they are obliged to permit such testing."); *Dubois v. Conn. State Bd. of Ed.*, 727 F.2d 44, 48 (2^d Cir.1984) ("The school system may insist on evaluation by qualified professionals who are satisfactory to the school officials."); *Vander Malle v. Ambach*, 673 F.2d 49, 53 (2^d Cir.1983) (School officials are "entitled to have [the student] examined by a qualified psychiatrist of their choosing.")

Andress v. Cleveland Independent School Dist., 64 F.3d 176, 178 (5th Cir. 1995), *cert. denied*, 519 U.S. 812 (1996); *see also Patricia P. v. Board of Educ.*, 203 F.3d 462, 469 (7th Cir. 2000) ("[W]e hold that parents who, because of their failure to cooperate, do not allow a school district a reasonable opportunity to evaluate their disabled child, forfeit their claim for reimbursement for a unilateral private placement.").

The parents' failure to provide notice to the school districts of their intent to enroll the student in a private school and their refusal to allow the SSD to conduct an evaluation of the student, without good reason, prevents their recovery of tuition from the districts.

Child Find and Evaluation Requirements

The Missouri State Plan delineates the specific responsibilities of local school districts in meeting the child find and evaluation requirements. State Plan at 12-17 (1995-98; November 1996).⁵ The State Plan establishes the minimum standards for location of children with disabilities, known as the "child find" requirements, of publishing and posting notices. *Id.* at 13. The required newspaper notices apparently were published by the SSD. More important to the issues in this case, however, are the "screening" requirements. The State Plan provides:

Each local school district shall design and implement a comprehensive, continuous and periodic screening program designed to identify suspected physical, sensory, behavioral/emotional, or other problems which may significantly interfere with a student's capability of achieving educational success.

Id. at 14-15.

The State Plan refers to both periodic screening, which involves formal assessments of performance and development, and continuous screening, which "involves the use of informal observations of an individual student's behaviors to identify possible problems which may interfere with ongoing performance/development as compared to peers." *Id.* at 15. The continuous screening activities are at issue here. Appendix F of the State Plan establishes that

⁵ This was the state plan in effect until October 1, 2001, during all times relevant in this case.

the “development and implementation” of a screening program “is a matter of joint compliance between the special and component districts.” *Id.* at F - 4.

Before a referral is made for a special education evaluation, “alternative intervention strategies” generally “shall” be provided for students experiencing learning difficulties. *Id.* at 15. Progress of students should then “be monitored to determine if learning has improved or has remained unaffected.” *Id.* A referral for evaluation “shall be made when acceptable progress is not evident.” *Id.* Alternative intervention strategies may be waived, however, and the student immediately referred for evaluation, when the “student is suspected of having a significant disability for which special education and related services will be required.” *Id.* at 15-16.

No time limitations exist in either the federal or state special education laws or regulations for child find and screening activities. In this case, Rockwood started to offer and provide extra assistance to the student after the first six weeks of his sixth-grade school year, when he began to have academic difficulties. After the first semester, Rockwood implemented additional strategies. In February or March Rockwood offered to conduct some screening assessments, which it completed in April. Based on those test results and information from the student’s teachers, Rockwood and SSD determined in May that the student should be referred for a special education evaluation. Based upon the student’s history of starting off poorly and then recovering, and the fact that the transition from elementary school to middle school is difficult for many students, the panel concludes that the districts’ actions during the sixth grade year were reasonably expeditious.

Once the districts made the referral for the student’s evaluation, federal regulations required that the student be evaluated “within a reasonable period of time following the agency’s

receipt of parent consent to an initial evaluation of a child.” 34 C.F.R. §300.343(b)(1) (1999). The Missouri State Plan is more specific, and provides that a district “shall develop an evaluation plan and provide the parent with a Notice of Intent to Evaluate as soon as possible, but within thirty (30) calendar days of the date of referral for evaluation when the screening/referral review indicates that an evaluation is necessary.” State Plan at 61. The referral was made on May 25, 2000, however, and the SSD provided evidence that it does not conduct evaluations over the summer. The State Plan specifically allows this practice: “Delays beyond this time [30 calendar days] may be permitted for just cause . . . (school breaks for summer or holidays . . .).” *Id.*

Thus, the panel concludes that the districts complied with the applicable time requirements for completing child find activities and beginning the evaluation process. More importantly, however, the evidence is clear that the evaluation was not conducted, although SSD has been willing to do it since the fall of 2000, because the parents did not want it done.

The panel also must reject the parents’ contention that if SSD had conducted an evaluation it would have found the student eligible. The parents contend the student should have been found eligible as a student with Learning Disabilities and/or Other Health Impaired. The problem, however, is that the parents never allowed the SSD to conduct its own evaluation of the student. Even if the parents’ experts had determined that the student met the criteria for diagnosis of an educational disability, which they did not, the fact that the parents refused to allow SSD to evaluate the student is fatal to this issue.

ISSUE 2: WHETHER THE ABOVE VIOLATION LED TO DENIAL OF A FREE APPROPRIATE PUBLIC EDUCATION (“FAPE”)

Since the hearing panel has not found a violation of the child find and evaluation requirements in Issue 1, we cannot find that the student was denied a free appropriate public education.

ISSUE 3: WHETHER SSD FAILED TO MONITOR THE STUDENT WHILE IN A PRIVATE PLACEMENT - AND HOLD AN IEP MEETING AND CONDUCT AN EVALUATION

ISSUE 4: WHETHER SSD FAILED TO PROVIDE AN EXTENDED SCHOOL YEAR PROGRAM (“ESYP”) - PRIOR TO AND AFTER THE STUDENT’S TRANSFER TO PRIVATE SCHOOL

In order to be entitled to an individualized education program (IEP), or any special education and related services under the IDEA, a child first must be determined to be eligible as a student with an educational disability. *Andress v. Cleveland Independent School Dist., supra*, 64 F.3d at 178. The parents’ claims must fail on each of the above issues because they did not allow the SSD to conduct an evaluation to determine whether the student had a disability under the IDEA.

ISSUE 5: WHETHER THE DISTRICTS VIOLATED THE LAW BY FAILING TO PROVIDE ROCKWOOD SCHOOL RECORDS UPON REQUEST

The panel concludes that there is insufficient evidence to conclude that the districts violated the IDEA in connection with the provision of Rockwood’s records to the parents. Additionally, even if the districts were at fault in not providing the records sooner, the parents were not significantly prejudiced. *Independent School District No. 283 v. S.D. by J.D.*, 88 F.3d 556, 562 (8th Cir. 1996). The parents’ attorney said he would subpoena the student’s records, but he did not do so as was the parents’ right under Missouri law. §536.077, RSMo.

ISSUE 6: OBJECTION TO THE CHAIRPERSON SERVING ON THE PANEL ON THE BASIS OF ALLEGED LACK OF IMPARTIALITY

As discussed above, the panel concludes that there is no basis for the school districts' objection to the chairperson's participation in this case based on alleged lack of impartiality.

DECISION AND APPEAL RIGHTS

In light of the foregoing, the hearing panel finds in favor of the school districts on all issues raised by the parents. If parents desire to have the student receive services from SSD under the IDEA, they must present him to the SSD for an evaluation.

A party who does not agree with the hearing decision may appeal to either federal or state court. This decision will be final unless a party appeals. If an appeal is filed, the court shall receive the records of this proceeding, shall hear additional evidence at the request of a party, and, based on the preponderance of the evidence, grant the relief that the court deems appropriate.

Dated: October 3, 2002

Kenneth M. Chackes
Chairperson

Betty Chong
Hearing Officer

Fred Davis
Hearing Officer

Copies of this Decision will be mailed to the attorneys for the parties on this date, October 3, 2002, by certified mail, return receipt requested.

Kenneth M. Chackes
Chairperson

DUE PROCESS HEARING PANEL
Concern in Decision

by his parents, Complainants,
vs.
SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY
and
ROCKWOOD SCHOOL DISTRICT, Respondents

Based on the facts presented into evidence, I am in agreement with the panel decision in which it “finds in favor of the school districts on all issues raised by the parents. If parents desire to have the student receive services from SSS under the IDEA, they must present him to the SSD for an evaluation.” (Page 26). This agreement applies to Issues one through five (1-5) which are related to child find and free appropriate public education (FAPE).

However, I do have a concern with the decision related to ISSUE 6: OBJECTION TO THE CHAIRPERSON SERVING ON THE PANEL ON THE BASIS OF ALLEGED LACK OF IMPARTIALITY (Page 26). I am not dissenting with the decision but I am uncomfortable in concurring with the issue of permitting chairs who are or have been involved in due process cases with the petitioner or the respondent, especially when the issues are similar or the petitioner is seeking reimbursement. It is also unclear who (the chair or the panel) has the responsibility of ruling on this issue in prehearing and how that responsibility should be determined. In this case, the chair indicated, “So I do not believe that I should recuse myself as chairperson. Any comments about that?” (Transcript Vol. I-19, lines 5-6). Comments were made but no formal vote was taken of the panel.

Although the Missouri Department of Elementary and Secondary Education (DESE) has provided an avenue to challenge impartiality of hearing officers under the Child Complaint process, I understand that child complaint decisions are not binding for due process hearings. Furthermore, DESE’s position “to require a showing of actual bias rather than an appearance of impropriety” is counterproductive in that any demonstration of impartiality or bias does not become evident until the case is actually being heard and has already affected the outcome of the decision. The chair’s impact on the decision then must be litigated through the appeal process. Escalating the costs in time and money in an appeal because the chair was believed to be bias or impartial does not benefit the child in receiving FAPE. It is in the best interest of the child to remove any impression of impartiality before the due process begins so that the decision does not appear to be clouded with prejudice and can be implemented in a timely matter. An appeal should be based on evidence and not be debated on the lack of impartiality of the chair.

In this particular case, I did not observe any impropriety on the part of the chair during the due process hearing. Nevertheless, I believe the DESE should clearly define the guidelines regarding who has and how the responsibility for ruling on the issue of lack of impartiality should be decided. Moreover, in order to avoid any impression of impropriety, I also believe that chairs that are or have been directly involved in due process hearings or other litigation should not be assigned to cases with similar issues or with requests for reimbursement.

Respectfully submitted,

Betty Chong
Hearing Officer
October 3, 2002