

BEFORE THE MISSOURI DEPARTMENT OF ELEMENTARY
AND SECONDARY EDUCATION

IN THE MATTER OF XX)	
)	
XX and XX, the PARENTS OF XX, a Minor Child,)	
)	
Petitioners,)	Case No. 2004-DESE-RSS/01
)	
vs.)	
)	
MISSOURI DEPARTMENT OF ELEMENTARY & SECONDARY EDUCATION,)	
)	
Respondent.)	

HEARING DECISION COVERSHEET

Petitioners:

Child:
DOB:

Parents:
Parents' Legal Counsel:

Mr. Daniel D. Whitworth
Mr. Bradley R. Barton
Whitworth, McPherson & Longnecker, L.L.C.
626 Byers
Joplin, Missouri 64801

Respondent:

Lead Agency:
Lead Agency's Representative:

Missouri Dept. of Elementary & Secondary Education
Ms. Margaret Strecker, Assistant Director
Missouri Dept. of Elementary & Secondary Education
P.O. Box 480

Lead Agency's Legal Counsel:

Jefferson City, Missouri 65102
Ms. Victorine R. Mahon
Ms. Nikki Loethen
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102

SPOE Provider:

Cerebral Palsy of Tri County

Hearing Officer:

Process Request:
Date of Hearing:
Extension Date:

Hearing Officer: Ryan S. Shaughnessy
October 1, 2004
November 5, 2004
November 30, 2004

Decision:

Date of Decision:

For Petitioner – Compensatory Services Awarded.
November 30, 2004

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)	
Respondent.)	

FINAL ADMINISTRATIVE DECISION AND ORDER

Petitioners XX and XX, the parents and legal guardians of XX, a minor child, (hereinafter collectively referred to as "Petitioners"), filed a Request for Due Process Hearing relating to the implementation of an Individualized Family Service Plan by Respondent Missouri Department of Elementary and Secondary Education (hereinafter referred to as "Respondent"), pursuant to and in accordance with Part C of the Individuals with Disabilities Education Act, 20 U.S.C. 1400, et seq.

PARTIES

- 1. Petitioners.** Petitioners XX and XX are the parents and legal guardian of XX, a minor child.

- 2. Appearance for Petitioners.** Petitioners XX and XX appeared in person and by legal counsel. Petitioners are and were represented by Dan Whitworth and Brad Barton, licensed attorneys at law, whose address is: 625 Buyers, Joplin, Missouri 64801.

- 3. Respondent.** Respondent is the Missouri Department of Elementary and Secondary Education. The Missouri Department of Elementary and Secondary Education is the lead agency responsible for ensuring the provision of early intervention services to eligible infants and toddlers with disabilities and their families under Part C of Individuals with Disabilities Education Act. The Missouri Department of Elementary and Secondary Education is the administrator of the First Steps Infants and Toddler Program.

4. Appearance for Respondent. Respondent Missouri Department of Elementary and Secondary Education appeared by its corporate representative and by its legal counsel. Respondent Missouri Department of Elementary and Secondary Education is and was represented by Victorine R. Mahon and Nikki Loethen, Assistant Attorney Generals, whose address is: P.O. Box 899, Jefferson City, Missouri 65102.

5. System Point of Entry. Cerebral Palsy of Tri County is the system point of entry service provider charged with the implementation and delivery of individual development therapy services under the Individualized Family Service Plan developed for XX and his family.

DUE PROCESS HEARING REQUEST

1. Request for Due Process Hearing. On October 1, 2004, Petitioners XX, the parents and legal guardian of XX, filed a request for a due process hearing under the First Steps Infants and Toddler Program. The Request for Due Process Hearing states as follows:

Description or Nature of Problem: Fraudulent billing for developmental therapy not provided to student.

Summary of Complaint Allegations: [XX] to receive individual and group developmental therapy at Cerebral Palsy of Tri County. Therapy was billed and paid by the State; however, the student did not receive the prescribed therapy. The investigation by DESE indicates all teachers and ABA therapists involved verify [XX] did not receive the prescribed therapy. DESE found "insufficient evidence" to say that individual therapy was not conducted regardless of the teachers' statements.

2. Issue Presented. The issue presented for the determination of the Hearing Officer is whether Cerebral Palsy of Tri County, as the system point of entry service provider under the First Steps Infants and Toddlers Program administered by the Missouri Department of Elementary and Secondary Education, provided individual developmental therapy to XX in accordance with the requirements of the Individualized Family Service Plan adopted and approved for XX and his family for the period October, 2002, through August, 2003.

3. Relief Requested. Although not clearly stated in the Request for Due Process Hearing, Petitioners XX and XX seek an Order from this Hearing Officer awarding Petitioners XX and XX, as the parents and legal guardians of XX, compensatory services for care and treatment of XX

4. Due Process Hearing. The due process hearing was held on Friday, November 5, 2004, at the College View State School, located at 1101

Goetz Blvd. Joplin, Missouri 64801. Petitioners and Respondent did not file or otherwise raise any objections to the time, date or place for due process hearing and announced ready for the hearing. The due process hearing commenced at 9:30 a.m. and concluded at 3:30 p.m. with a 15 minute break for lunch.

5. Administrative Record. The administrative record of the due process hearing consists of a legal file, transcript, and exhibits as follows:

a. Legal File. The legal file consists of the following documents, to wit: (1) Request for Due Process Hearing, (2) Motion to Dismiss or, in the alternative, Motion for More Definite Statement with supporting Legal Memorandum, (3) Reply to Motion to Dismiss, (4) Scheduling Order, (5) Consent and (6) Proposed Findings of Fact and Conclusions of Law.

b. Transcript. The legal transcript was taken down, recorded or otherwise prepared by Karen S. Rogers, a certified court reporter, whose address is: Midwest Litigation Services, 711 N. 11th Street, Saint Louis, Missouri 63101. The transcript included the testimony of the following witnesses, to wit:

Witness No. 1:

Name: Catherine Cross
Executive Director of Cerebral Palsy of Tri-County
Offered by: Respondent

Witness No. 2:

Name: Marcia Lyn Murdock
Speech Pathologist/Former Employee of Cerebral Palsy of Tri-County
Offered by: Respondent

Witness No. 3:

Name: Trisha Montez
Parent with minor child enrolled at Cerebral Palsy of Tri-County
Offered by: Respondent

Witness No. 4:

Name: Melissa Wehmeyer
ABA Implementer
Offered by: Respondent

Witness No. 5:

Name: Martha Waugh
Tenant of Cerebral Palsy of Tri-County
Offered by: Respondent

Witness No. 6:

Name: XX
Parent of XX
Offered by: Petitioners

Witness No. 7:

Name: Sara Graue
Teacher/Current Employee of Cerebral Palsy of Tri County
Offered by: Petitioners

Witness No. 8:

Name: Janie Harrison
Teacher's Aide/Current Employee of Cerebral Palsy of Tri County
Offered by: Petitioners

Witness No. 9:

Name: XX
Parent of XX
Offered by: Petitioners

c. Exhibits. The exhibits offered and/or admitted into evidence at the due process hearing were as follows:

Exhibit A Description: DESE Child Complaint Files
Offered by: Respondent
Status: Received without Objection.

Exhibit B Description: DESE Child Complaint Decision
Offered by: Respondent
Status: Received without Objection.

6. Consent to Extension of Decisional Time Deadlines. Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education, acting by and through their respective legal counsel, orally stipulated to the extension of the decisional time deadlines through November 30, 2004, at the pre-trial hearing. Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education, acting by and through their respective legal counsel, further executed a Consent confirming the extension of the decisional time deadlines through November 30, 2004, and waiving the time deadlines for the issuance of decisions in due process hearings set forth in 34 CFR 303.423 (2004).

7. Date of Entry of Administrative Order. This Final Administrative Decision and Order was entered on November 25, 2004, within the time deadlines set forth in the above-referenced Consent.

PRELIMINARY MATTERS

1. Rulings on Pre-Hearing Motions. On or about October 21, 2004, Respondent Missouri Department of Elementary and Secondary Education filed its Motion to Dismiss or, in the alternative, Motion for More Definite Statement.

a. Ruling on Motion to Dismiss. The Motion to Dismiss alleges that the Petitioner's Request for Due Process Hearing should be dismissed on the following grounds, to wit: (1) The Request for Due Process Hearing contains only conclusory, vague and general allegations; and (2) the Petitioners XX and XX lack the standing to seek reimbursement for "fraudulent billing." The Hearing Officer, having taken judicial notice of the Motion to Dismiss and the Reply thereto, having heard the arguments of legal counsel, and being otherwise fully advised, does hereby grant the Motion to Dismiss insofar as the Request for Due Process relates to "fraudulent billing" and does hereby deny the Motion to Dismiss as it relates to the implementation of the Individualized Family Service Plan for XX or the delivery of services under the Individualized Family Service Plan for XX. The Hearing Officer expressly finds that the failure to implement the Individualized Family Service Plan or the failure to deliver services under the Individualized Family Service Plan is a cognizable claim under 34 CFR 303.403(a) (2004).

b. Ruling on Motion for More Definite Statement. The Motion for More Definite Statement alleges that the allegations of Petitioner's Request for Due Process Hearing is too general insofar as the allegations failed to specify how or to what degree the services provided deviated from the Individualized Family Service Plan. The Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education stipulated that the dispute relating to group developmental therapy was withdrawn because the Petitioners XX and XX had or, in the alternative, were receiving compensatory services for group developmental therapy not provided in accordance with the Individualized Family Service Plan for XX. The Hearing Officers, having taken judicial notice of Motion for More Definite State and the Reply thereto, having heard the arguments of legal counsel, and being otherwise fully advised, does hereby deny the Motion for More Definite Statement on the following grounds, to wit: (1) the Request for Due Process Hearing fairly presents or otherwise sets forth the claimed error, illegality or wrong and otherwise complies with the requirements of the Missouri Part C State Plan (2004), (2) the Request for Due Process clearly alleges that no individual developmental therapy was provided to XX under the Individualized Family Service Plan, and (3) the amendment of the Request for Due Process Hearing would not serve any useful purpose such as clarification of the issues for the hearing. See, e.g., St. Louis County v. State Tax Commission, 515 S.W.2d 446, 452 (Mo. 1974).

2. Other Preliminary Matters. Prior to the commencement of the due process hearing, the following preliminary matters were addressed, to wit:

a. Conflict of Interest. Legal counsel for Petitioners XX and XX voluntarily disclosed a potential conflict of interest arising from a consultation between another member of the law firm and Marcia Lyn Murdock seeking legal advice regarding this matter. Legal counsel for Petitioners XX and XX further represented that there had been no communication of any information, privileged or otherwise, between legal counsel for Petitioners and the other member of the law firm. Petitioners XX and XX, individually, and Respondent Missouri Department of Elementary and Secondary Education, by its legal counsel, consented on the record to the continued representation of Petitioners XX and XX by their legal counsel and waived any potential conflict of interest on the record. Legal counsel for Petitioner further requested orally that Marcia Lyn Murdock be requested to consent to the continued representation of Petitioners XX and XX by their legal counsel. The Hearing Officer, having considered the request, does hereby deny the request.

b. Presentation of Evidence. Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education, acting by and through their respective legal counsel, stipulated and agreed on the record that the order of the calling of witnesses and presentation of evidence would be reversed to permit the orderly calling and inquiry of witnesses by Respondent Missouri Department of Elementary and Secondary Education.

c. Other Stipulations.

1. Transcript References. Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education, acting by and through their respective legal counsel, stipulated and agreed on the record that the minor child would be designated on the transcript as "XX" even if the actual name of "XX" was used by Petitioners XX and XX, Respondent Missouri Department of Elementary and Secondary Education, their respective legal counsel, Hearing Officer or witnesses.

2. Withdrawal of Exhibits. Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education, acting by and through their respective legal counsel, stipulated and agreed on the record that the exhibits introduced into evidence at the hearing would be withdrawn at the conclusion of the hearing and would be preserved and maintained by the legal counsel for the Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education.

3. Submission of Post-Hearing Memorandum. Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education, acting by and through their respective legal counsel, stipulated and agreed on the record that Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education would submit

proposed Findings of Fact and Conclusion of Law to the Hearing Officer by no later than 4:00 p.m. on November 24, 2004.

FINDINGS OF FACT

The Hearing Officer, having heard and considered the evidence adduced at the due process hearing, having taken judicial notice of the file, and having heard the arguments of counsel, does hereby make the following findings of fact, to wit:

A. Program Eligibility and Referral.

1. XX is a minor child born on May 11, 2000. (Exhibit A)
2. XX and XX are the parents and legal guardian of XX (Exhibit A)
3. At all times relevant hereto, XX is and was a resident of the State of Missouri. (Exhibit A)
4. Dr. Flasterstein, a neurologist, diagnosed XX as suffering from autism and/or pervasive developmental disorder and Brenda Gordon, a speech pathologist, diagnosed XX as suffering from a significant speech and language delay. (Exhibit A; Transcript, pp. 163 & 249)
5. On or about August 19, 2002, XX was referred to the Missouri First Steps Infants and Toddlers Program for early intervention services. (Exhibit A)
6. Subsequent to August 19, 2002, XX was certified as being eligible to receive early intervention services under the First Steps Infants and Toddlers Program. (Exhibit A)

B. Individualized Family Service Plan.

7. On or about September 23, 2002, Petitioners XX and XX participated in the development of an Individualized Family Service Plan for the delivery of services to XX under the First Steps Infants and Toddlers Program administered by Respondent Missouri Department of Elementary and Secondary Education. (Exhibit A; Transcript, pp. 49-50)
8. Subsequent to September 23, 2002, Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education adopted and approved an Individualized Family Service Plan for the provision by Cerebral Palsy of Tri County and/or Marcia Lyn Murdock of individual developmental therapy services to XX as follows: Individual Developmental Therapy – 300 minutes (or 20 units) per month. (Exhibit A; Transcript, pp. 54, 92, & 175)

9. From October, 2002, through August, 2003, XX was eligible or otherwise entitled under the Individualized Family Service Plan adopted and approved by Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education to receive a total of 3,300 minutes (or 220 units) of individual developmental therapy per month from Cerebral Palsy of Tri County and/or Marcia Lynn Murdock. (Exhibit A; Transcript, pp. 54, 92, & 175)

C. Implementation of Individualized Family Service Plan and Delivery of Services.

10. At all times relevant hereto, Cerebral Palsy of Tri County and/or Marcia Lyn Murdock are and were the service providers for individual developmental therapy services to XX under the terms of the Individualized Family Service Plan adopted and approved by Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education. (Transcript, pp. 22-23)

11. At all times relevant hereto, Cerebral Palsy of Tri County employed the following persons to implement the Individualized Family Service Plan and to deliver individual developmental therapy to XX, to wit: Marcia Lynn Murdoch – speech pathologist/developmental therapist. (Transcript, pp. 22-23)

12. In support of its position that all individual developmental therapy was provided by Cerebral Palsy of Tri County and/or Marcia Lyn Murdock to XX in accordance with the Individualized Family Service Plan, Respondent Missouri Department of Elementary and Secondary Education offered the testimony of the following witnesses, to wit: (a) Catherine Ann Cross, Executive Director of Cerebral Palsy of Tri-County, (b) Marcia Lyn Murdock, Speech Pathologist/Former Employee of Cerebral Palsy of Tri-County, (c) Trisha Montez, Parent with minor child enrolled at Cerebral Palsy of Tri-County, (d) Melissa Wehmeyer, ABA Implementer, and (e) Martha Waugh, Tenant of Cerebral Palsy of Tri-County. (Transcript)

13. Catherine Ann Cross testified, in pertinent part, as follows:

Q. And in that plan were you required to -- was your facility to provide to him individual developmental therapy?

A. Yes.

Q. And who was in -- who was the person to provide those services?

A. Marcia Lyn Murdock -- we all call her Lyn -- was the person employed to do that.

Q. Did you personally observe Lyn Murdock providing individual developmental therapy?

A. Yes, I did.

Q. And specifically did you see her providing that therapy to XX?

A. Yes, I did.

Q. In your job, I understand it's primarily administrative --

A. That's correct.

Q. -- but did you ever visit the classrooms to see what was going on?

A. Yes. My job is primarily administrative. But there's not a day go by that I'm not through the classrooms in that building. You know, if I'm at work. I'm passing through those classrooms, in contact with the teachers. I try to keep communication with the family, but essentially that program is overseen by my assistant. But that doesn't mean that I'm not in and out of those classrooms.

Q. And who is your --

A. I generally start the day there at the center -- if you can't touch a child and work with a child at some point during the day, that's what makes it all worth it. The paperwork, you know, that's part of it. But being with the kids is a big part of it to me too. And you know, I haven't been able to spend that much time, but that's not to say that I don't spend time in those classrooms. I don't spend an extended length of time. I can't sit down and spend 20 minutes or a half hour. But I can stand there, observe, walk on through, know what's going on.

Q. With respect to Lyn Murdock, you said that you had seen her actually working with XX?

A. Yes.

Q. Okay. Did you ever receive any complaints regarding Lyn Murdock and, if so, from whom?

A. Yes, I did. I think the two people that complained to me were Jane Harrison and Sara Graue were people that came to me. They went to Carrie Cavitt, who was my assistant at that time, to voice their concerns. And Carrie and those people were asked to come into my office, express their concerns to me. I asked Lyn to come in the office. We sat down and discussed all their concerns at this time. Things would die down, I wouldn't hear anything. I heard twice I believe from these people that there were problems. And then once before I went into my -- into the hospital, that was right shortly before, someone came to me and I honestly cannot tell you who it was. I do not remember. But it was handled in the same manner.

I told Lyn she had to come talk to these people, hear what they had to say. Lyn would try to explain to them what developmental therapy was, that there was a push-in type where you provided that therapy right in the classroom with a group of other children or a pull-out where you provided that therapy in maybe a separate location.

Q. Okay.

A. And that always seemed to resolve it.

Q. Okay.

A. I think honestly that my staff did not understand what it was -- what the expectations for these things were.

Q. Did you do the billing of services for your facility?

A. Yes.

Q. In your opinion or to your knowledge are the services that were billed to the Department of Elementary and Secondary Education compatible or correct with respect to Lyn Murdock's individual developmental therapy?

A. I wouldn't bill them if I didn't think they were.

Q. With respect to the IFSP, do you believe that the individual developmental therapy services that were provided by Lyn Murdock comported with what was in the plan?

A. Yes, I do.

Q. If the center was closed, it's possible that hours or units may not have been provided when the center was closed?

A. That's correct.

Q. And if the child was absent, it's possible that some units may not have been provided if they weren't there?

A. That's correct.

Q. But in other respects, to your knowledge services were provided?

A. Yes, ma'am.

Q. Okay. And who was XX's teacher during this time?

A. I believe he was in Sara Graue's case and that Jane Harrison was her -- another aide in that classroom.

Q. Okay. And you would agree with me that those individuals were with XX pretty much the entire day?

A. They were there except during naptime. Everybody eats lunch in

shifts, so there could be other staff in there during that time of the day. But for the most part, those would be the people who would be in that classroom.

Q. Okay. And you would agree with me that they were certainly in the room a lot more than you were?

A. Yes.

Q. Okay. Are you familiar with where Sara Graue's classroom was in proximity to your office?

A. Yes.

Q. And could you please tell us where your office is located from the front door of the complex?

A. When you come in the front door of the center, there's a foyer area. You turn to the left and my office is the second door on the left. It's -- it's kind of -- you can't really say it's the middle of the building, but as close to the middle as you're --

Q. And in relation to your office, where was XX's classroom?

A. Down the hallway and then right there by that hallway.

Q. Okay. You couldn't physically see into the classroom from your office, is that correct?

A. No, I can't see into any of the classrooms from my office.

Q. As executive director, you have a myriad responsibilities. Is that fair to say?

A. That's fair to say.

Q. And one of those you mentioned was billing?

A. Yes.

Q. Okay. And you actually relied upon the documents provided by the various therapies to submit that billing to -- whether it's DESE or whomever pays that bill?

A. Yes.

Q. Okay.

A. But I also had to check those billings too to make sure they were accurate. We have a formula that we use for how many hours a day that child is in the center, how many hours that child might be seen by a therapist, and that's taken away from what we consider our day with that child.

Q. With that formula, though, there's only so many children that can be

- billed for therapy in one day, is that correct?
- A. That's what had always been our understanding. Now from what I've determined here lately, that seems to be a rule that nobody else knew about, nobody at DESE knew about.
- Q. That's not my question. But right now you only bill for eight children a day?
- A. That's right.
- Q. So when you say you're checking the billing, you're making sure that you comport with that formula?
- A. Right.
- Q. It's not so much that you're making sure that there's services provided that were billed for, because you don't know that because you're not in the classroom the entire time?
- A. I'm in and out of those classrooms often enough that I see the developmental therapists, whoever that might be, working with the children or being with a group of children in a classroom. But no, I can't verify every single unit.
- Q. Okay. So again, you're relying upon --
- A. But I do think I'm credible, you know, that I wouldn't --
- Q. Pardon?
- A. I do think I'm pretty credible. You know, my life has been given to this organization. I truly believe in the services we provide and I believe in the families and the kids we serve. And I -- I feel like very strong that we have to be credible.
- Q. You would also agree that the teachers that work beneath you are also credible individuals in the jobs that they're performing on a day-to-day basis?
- A. I would hope so.
- Q. All right. So let's talk about at least the complaints with Sara Graue and Jane Harrison.
- A. Mm-hmm.
- Q. What specifically did they tell you?
- A. They just felt that Lyn was not spending enough time in the classroom.
- Q. Did they come together or was it separate times?
- A. They came together, I think.

- Q. Okay. How many occasions did they come to your office?
A. Twice that those two for sure.
- Q. Okay.
A. And they were spread out at different times.
- Q. All right. Let's talk about the first time that they came in. What was your subsequent conduct with respect to Lyn Murdock on the first occasion that you heard these complaints that XX is not receiving the therapy?
A. I don't think I heard the complaint that XX wasn't receiving the therapy, sir. I believe I heard the complaint that she wasn't spending enough time in the classroom.
- Q. Okay. And what was your reaction to --
A. At that point I called Lyn in. And she sat down, we discussed the whole thing. Seemed to be satisfactory with the girls. They would go away and I wouldn't hear anything more.
- Q. Okay. Well, you did hear something a little bit later, did you not?
A. Yes.
- Q. Okay. And what was your reaction --
A. And I can't tell you how much later that was. It was quite a while.
- Q. Sure. Okay. What was your reaction then the second time they came around?
A. I guess I reacted in the same fashion. I called Lyn into the office and I said, you know, "What's going on here? You girls -- what is your -- you tell Lyn what your complaint is. Let's discuss this whole thing." And we would kind of go through the whole thing. I would try to be very observant after that point to see where Lyn was at in the building, what she was doing in the building. And I found her to be doing what she was supposed to be doing, which was working with the children.
- Q. And you found that to be because you reviewed her individual notes?
A. No, and I also monitored where she was in the building and what was going on. And yes, of course I looked at her paperwork.
- Q. Okay. What was Lyn's explanation?
A. She was explaining to them the difference between push-in and pull-out therapy, how she was seeing the children, and that always seemed to be satisfactory.

- Q. So she actually explained to them what push-in and pull-out therapy was that day that she met with them?
- A. Yes.
- Q. So if they testify today, then they'll be able to decipher if that was actually performed subsequent to that conversation?
- A. I would think they would be able to, but when we had our -- we were requested by DESE to provide an in-service for our staff about what individual therapy was, what group therapy was, in what manners this could be provided. Those girls -- and this was done in August or -- no, I believe it was in September of this year. They still didn't know.
- Q. All right. You're right. When she provides you with a form that says how many units per child she administered, that's what you bill, is that correct?
- A. Yes.
- Q. Okay.
- A. But I have to bill it according to whatever the authorization sheet.
- Q. Okay. If the child did not receive the amount of units prescribed in the IFSP, whose responsibility is it to inform the parent that that is not being provided?
- A. I didn't know there was a responsibility to inform the parent.
- Q. So is it your testimony today that if a child is not receiving the prescribed units in the IFSP, you just don't care about it, you're not mandated by the IFSP?
- A. It would depend on the reason the child didn't receive the services. Was it because the center was closed? Was it because the child was ill? If the developmental therapist was sick, we were supposed to make up those units, and we always tried to make up those units. But never were units billed that were not provided.
- Q. And that's -- that's not my question. My question is, if the units were not provided as prescribed by the IFSP, you did not inform the parents that, one, they were not provided as required or, two, that you didn't inform them that compensatory time would be made up?
- A. I guess that just didn't happen that often.
- Q. Is it your testimony that in no respects did you ever double bill?
- A. I would never double bill.
- Q. And if units were not prescribed -- or if units were not provided because the center was closed, the parents would know that,

- correct?
- A. Yes.
- Q. If units were not provided because the child was absent, the parent would know that, correct?
- A. Right.
- Q. And if a unit was not provided because of some other reason, for instance the provider was ill, you would make that up, correct?
- A. We would do our very best to make it up, yes.
- Q. And so is it your testimony that it either never happened or it's extremely rare that a unit would not be provided according to the IFSP that the parents wouldn't know about it?
- A. I would say it would be extremely rare.
- Q. Is it your testimony today that the services that Lyn Murdock in her documentation that she provided to you was accurate?
- A. Yes, sir.
- Q. Okay. And you're also aware that DESE had a prior investigation and found that the group therapy was actually deficient and those services were not provided?
- A. The services were provided, but not in the manner --
- Q. Yes or no, are you aware that DESE had an investigation and that they found the group therapy services provided to XX were deficient?
- A. The services were not -- they were not provided in the manner specified on the IFSP. Services were provided.

(Transcript, pp. 19-47)

14. The Hearing Officer finds that the testimony of Catherine Ann Cross is not credible, persuasive or responsive to the issue of whether Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan for the period October, 2002, through August, 2003, for the following reasons, to wit:

a. Catherine Ann Cross lacks sufficient personal knowledge to determine whether Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan for the period October, 2002, through August, 2003.

i. Catherine Ann Cross is the Executive of Director of Cerebral Palsy of Tri County charged with the administrative oversight of the facility, including billing. (Transcript, pp. 19, 22-23 & 33)

ii. Catherine Ann Cross testified that the oversight of individual developmental therapy and group developmental therapy services provided under the First Steps Infants and Toddlers Program was overseen by her assistant. (Transcript, pp. 23)

iii. Catherine Ann Cross testified that she could not view the classroom of XX from her office. (Transcript, pp. 33)

iv. Catherine Ann Cross admitted that she does not spend a substantial or extended length of time in the classrooms, that she visited each of her classrooms on a regular basis, and that she oversaw a facility providing services to 69 children. (Transcript, pp. 23 & 32)

v. Based on the record, the Hearing Officer expressly finds that Catherine Ann Cross lacks sufficient personal knowledge to support the conclusions expressed by Catherine Ann Cross that Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided all units of individual development therapy services to XX in accordance with the Individualized Family Service Plan.

b. Catherine Ann Cross lacks sufficient education, training or other qualifications to determine whether Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan for the period October, 2002, through August, 2003.

i. Catherine Ann Cross admitted that she had no formal training in the provision of individual or group developmental therapy services. (Transcript, p. 31)

ii. Catherine Ann Cross further admitted that group developmental therapy services provided to XX were incorrectly provided under the supervision of Marcia Lyn Harrison as opposed to the provision of group developmental therapy services directly by Marcia Lyn Harrison as required by the Individualized Family Service Plan. (Transcript, p. 46)

iii. Catherine Ann Cross testified that, when confronted with complaints from Sara Graue and Janie Harrison, she relied on Marcia Lyn Murdock to explain the "push-in" and "pull-out" models for the provision of individual developmental therapy services. (Transcript, p. 27)

iv. Catherine Ann Cross further testified that it was her understanding that Cerebral Palsy of Tri County was permitted only to bill

individual developmental therapy services to Respondent Missouri Department of Elementary and Secondary Education for a maximum of 8 children per day that it was permissible to bill Respondent Missouri Department of Elementary and Secondary Education for dates, other than the dates the services were actually provided. (Transcript, p. 34)

v. Based on the record, the Hearing Officer expressly finds that Catherine Ann Cross lacks sufficient education, training or other qualifications to support the conclusions expressed by Catherine Ann Cross that Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided all units of individual development therapy services to XX in accordance with the Individualized Family Service Plan where it is clear from the record that Catherine Ann Cross lacks a sufficient or adequate understanding of the nature, method of delivery, and billing of individual and group developmental therapy services under the requirements of the First Steps Infants and Toddlers Program.

c. Catherine Ann Cross's testimony on the issue whether Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan for the period October, 2002, through August, 2003, is speculative.

i. Catherine Ann Cross admitted that she does not spend a substantial or extended length of time in the classrooms where Marcia Lyn Harrison allegedly provided the individual developmental therapy services to XX (Transcript, p. 23)

ii. Catherine Ann Cross testified that she observed Marcia Lynn Murdock providing individual developmental therapy services to XX (Transcript, pp. 22 & 25) However, Catherine Ann Cross failed to testify how when or where the individual developmental therapy services were provided to XX

iii. Catherine Ann Cross admitted that she could not verify that "every single unit" of individual developmental therapy was provided to XX (Transcript, p. 35)

d. Catherine Ann Cross's testimony on the issue whether Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan for the period October, 2002, through August, 2003, is not credible.

i. Catherine Ann Cross testified that she observed Marcia Lynn Murdock providing individual developmental therapy services to XX (Transcript, pp. 22 & 25)

ii. Catherine Ann Cross admitted that she could not verify that "every single unit" of individual developmental therapy was provided to XX (Transcript, p. 35)

iii. Catherine Ann Cross failed to testify how when or where the individual developmental therapy services were provided to XX, and whether the individual developmental therapy services were provided to XX under the "push-in" (ie. group setting) or "pull out" (ie. individual setting) models of therapy.

iv. In testifying that the individual development therapy services were provided to XX in accordance with the Individualized Family Service Plan, Catherine Ann Cross admitted that she relied on the credibility and/or integrity of Marcia Lyn Murdock and not on actual verification by observation or otherwise of the provision of all of the units of the individual developmental services by Marcia Lyn Harrison to XX (Transcript, p. 33)

v. In testifying that the individual development therapy services were provided to XX in accordance with the Individualized Family Service Plan, Catherine Ann Cross admitted that she relied on the accuracy of the monthly attendance reports and notes submitted by Marcia Lyn Murdock and not on actual verification by observation or otherwise of the provision of all of the units of the individual developmental services by Marcia Lyn Harrison to XX (Transcript, pp. 35 & 46)

vi. Catherine Ann Cross further admitted that the primary service providers charged with the care and custody of XX were Sara Graue and Janie Harrison. (Transcript, p. 31)

vii. The testimony of Catherine Ann Cross directly conflicts with the testimony offered by Sara Graue and Janie Harrison, who had the primary care and custody of XX, on the issue of whether Marcia Lyn Murdock provided individual developmental therapy services to XX (Transcript, pp. 193, 233 & 234)

viii. Based on the record, the Hearing Officer expressly finds that the testimony of Catherine Ann Cross is not credible.

15. Marcia Lyn Murdock testified, in pertinent part, as follows:

Q. Okay. And could you look at that for us, Lyn, and tell us how much individual therapy was required to be --

A. 20 units.

Q. -- to be provided to XX?

A. 20 units.

Q. 20 units?

A. Mm-hmm.

Q. Okay. Did you always provide XX that amount of individual therapy?

A. Yes, I did.

Q. Would there have been occasions where XX was either absent or ill or the center was closed when therapy obviously could not be provided?

A. Yes. I recall XX's attendance was good, but yes, whenever there's a child absent or if the center is closed, yes, it would be difficult to see them.

Q. Did you keep records that would show the therapy that you provided to XX and also would show his attendance --

A. Yes.

Q. -- on a given day?

A. Yes.

Q. Why don't you go ahead and read the first couple of sentences, please.

A. "XX was absent quite a bit this month due to illness, but he seemed happy to be back the last week of the month. He appears to really enjoy being in his classroom but still has days where he seems a bit insecure and unsettled." More? Is that enough?

Q. Now Lyn, would you have written this report if you hadn't seen XX at all?

A. No, I couldn't write a report like that.

Q. Unless you were lying of course, right?

A. Well, right, I could make it up.

Q. But you didn't do that?

A. No, I did not make these up. And I wrote them on every child.

Q. One more thing as to this page. If you hadn't provided this therapy, I guess you would have had to sit down and make up for each day that --

A. Yes. Yes.

- Q. That would have been a lot of --
A. I would have had to make up months and months and months of these little things.
- Q. That would have been a lot of work, wouldn't it?
A. Yes, it would have.
- Q. Lyn, did you get paid -- let's say on these attendance records that showed how much therapy you provided, did you get paid more if you put down that you provided 20 units than if you put down you only provided 18?
A. No, I did not.
- Q. So there was no financial incentive for you to doctor these records, was there?
A. No, ma'am.
- Q. And in the direct examination when you went through on the attendance records on a monthly basis, you were asked about absences of the children. And I'm looking at them too, and you've got it in front of you. XX's absences from the school were not necessarily unique for one of the children, was it?
A. No. Many -- that's -- many of our children were absent.
- Q. Right.
A. Fragile, high risk, ill.
- Q. Sure.
A. Doctors' appointments.
- Q. Okay. In the IFSP, does it talk about the issue of absenteeism or the school closing in relationship to the units of therapy provided?
A. I don't know if it's in that -- within the IFSP. If it's written in the IFSP a specific amount of units, then yes, that is what is to be provided.
- Q. Okay. But I think your testimony is the IFSP -- do you know if the IFSP with regard to XX addresses that issue of absenteeism or --
A. I don't think the IFSPs address that in that form that we have in here. It just has the units written up that they are to receive and, granted, when they didn't get them, they weren't billed, so.
- Q. Okay. Was there -- did you ever remember talking to the XXs about -- specifically about XX not receiving some of the units of individual developmental therapy --
A. No.

Q. -- in a given month?

A. I don't.

Q. And how do you keep track of the unit time per child?

A. Well, I had to keep track of it in my office on a piece of paper.

Q. And those were -- you brought some records yesterday that you didn't bring today that were your --

Q. What documents that are not here today did you use in your day-to-day activity that would help establish what the unit -- what the unit time was for?

Q. Okay. What -- what records did you keep to determine the unit time per child for the --

A. Besides the ones that are embedded in this document --

Q. Yes, ma'am.

A. -- right here, nothing but a sheet that had little times on it. Like if it says XX, circle, then if I spent the entire circle time with him, I would write it down on my little attendance sheet.

Q. What I'm trying to get at is, did you determine the units based upon watching a clock to figure out that you were with that child for 15 minutes, or was it an estimate based upon the activity that you were involved with the child at that time?

A. When I would sit on the floor with a child and do an activity and then move through the room to another activity, yes, I tried to watch the clock. Sometimes I went over. Sometimes it might be short a couple of minutes. If the activity ended and the child was going to lay down for a nap, that was it. I might help try to transition the child into a nap period. Whatever was needed. That is what developmental therapy was, was immersion into the structure of their daily lives to try to achieve these outcomes from these family-driven meetings and these family-driven IFSPs. And yes, the answer is I tried at all times to keep my units 15 minutes. Sometimes they were a couple more. Sometimes they were a couple less. That's just kind of how life with children is.

Q. I haven't seen any documents that are a timekeeper sheet, and you didn't do that. You just tried to do it in your head?

A. No. I had a document that I -- I'm telling you it was attached to this on the attendance sheet.

Q. That has the time?

A. I would put one or two units, yes.

Q. I'm asking physically about --

A. Oh, no, no. I did not write from 11:00 -- no.

Q. That's what I'm asking about.

A. I did not do that on every child, no.

Q. Okay.

A. I probably would have tried, but it would have been a little -- this was overwhelming as it was. It was a huge struggle to keep this paperwork up day to day.

Q. Okay.

A. Huge struggle.

Q. -- were there any other documents which memorialized the individual therapy given to a child on a specific day?

A. Besides the transferring of the attendance sheet to turn in to Cathy and the monthly reports, that was my daily. Now there was daily kept in the classroom also that was done by the teachers or their aides or me on occasion. If they -- which also -- that was an IEP. That was not an IFSP. We also wrote IEPs. That was extra. We didn't have to do that. They were therapy-driven. For instance, if a child received OT or speech, we would also create a document to work on in the classroom that would address some of those therapy-driven goals within the course of the day.

Q. Well, what I'm trying to get at is, did they keep some sort of a daily log that referenced therapy provided or anything like that?

A. No. It was more like these -- this thing -- this document we had put into place for the classroom to help the teachers gear what they were doing through the day towards -- like if this child could stack blocks up to ten, which was on the brigrance for developmentally age appropriate, then they didn't do that with that child. We tried to create -- I tried to create for each teacher for each child developmental areas to be addressed in the course of the day in the classroom, and they had those for themselves for documentation. And they were -- that was overseen by me. That was in addition to all of this, and that had nothing to do with -- that was just an extra thing that we did kind of to back up our -- our therapies.

Q. So in actuality, the attendance record may not accurately reflect --

A. Correct.

Q. -- the units provided on that day?

A. Correct. They were provided -- they could have been provided on other days, but they're not on here like that. I had to come up with eight children to bill per day. So sometimes I had to clump the units together. I might see a kid for one unit on the 4th and one unit on the 5th and two units on the 6th and put it into one day because I could only bill eight.

Q. How could we -- how could someone come in and determine if XX got four units of individualized therapy on the 3rd?

A. By those other two sheets. The -- the section V sheet with the daily and the sheet that was attached to it.

Q. But we don't have either of those for March of '03, do we?

Q. Is that true?

A. I'm sorry. Is what true?

Q. The documents that --

A. Yes.

Q. -- to support this aren't here?

A. Yes.

Q. And your own testimony is that those documents may not support the fact that there were four units given to XX on the 3rd?

A. No. They will support that there were units given on other days that were not billed.

Q. And the reason you did that was --

A. I was told that we could only bill eight children a day. That's how it's been for years. I don't know why. You have to ask Cathy Cross that question.

Q. Okay. So it really didn't have anything to do with the child. It had to do with your billing?

A. It had -- yes. Eight children a day was the total amount that we could bill, even if we saw 15.

Q. Were those your personal documents?

A. Yes, they were.

Q. Personal notes?

A. Yes. They were not on any type of a form. That was just my way to keep track.

- Q. And did you use those then to create the attendance records and other things that are contained in Exhibit A?
- A. Yes.
- Q. Did you provide those documents to someone, however?
- A. Yes, I did.
- Q. Who did you provide them to?
- A. I gave -- upon request when this was brought up, I gave them -- immediately went to my room and gave them everything that I had, gave it to Shelly Keeling. That was when Cathy Cross was direly ill in the hospital, so I'm not sure Shelly -- I don't know what happened after that. I mean I knew she copied and copied and copied lots of things. But when she handed them back to me, I put them back in my office.
- Q. Okay. Does that -- does that -- if I understood your testimony, that - - those services may be rendered over several days?
- A. Yes.
- Q. Okay.
- A. Yes, it was -- it was difficult to create the attendance record at the end of the month, because I would have to tally up the units and then plunk them on certain days.
- Q. Then I guess my other question was, this was prepared at the end of the month --
- A. Yes.
- Q. -- not daily?
- A. Oh, it was at the very -- the last day, the last hour of school. Usually at home in the evening.
- Q. Lyn, with respect to this document though, if it says at the end of the month that you provided 20 units of instruction, that's not a made-up number?
- A. No, that's not a made-up number.
- Q. And the only reason that you may have shifted some numbers from one day to another is because you were on -- under the impression that you could only bill for --
- A. Yes, absolutely.
- Q. -- eight children a day?
- A. Drove me crazy. I had to bill eight a day. No more, no less.

- Q. And if the attendance record shows A, the child was absent, is that correct?
- A. Yes. Absences are correct.

(Transcript, p. 47-128)

16. The Hearing Officer finds that the testimony of Marcia Lyn Murdock is not credible, persuasive or responsive to the issue of whether Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan for the period October, 2002, through August, 2003, for the following reasons, to wit:

a. Marcia Lyn Murdock testified that she was providing individual developmental therapy services to XX under the "push in" model of therapy whereby the individual development therapy services were provided to XX in a classroom or group setting. However, Marcia Lyn Murdock was unable to testify or, in the alternative, did not testify regarding the dates of service, the intensity of the service, or the method of delivery of individual developmental therapy services to XX (Transcript, p. 52)

b. Marcia Lyn Murdock testified in a general and conclusory manner that she had provided individual developmental therapy services to XX in accordance with the Individualized Service Plan for the period October, 2002, through August, 2003. (Transcript, p. 52) Marcia Lyn Murdock relied, in part, on the monthly attendance reports prepared by Marcia Lyn Murdock to determine whether individual developmental therapy services were provided to XX (Transcript, p. 104) Marcia Lyn Murdock further stated that the monthly attendance reports were prepared at the end of each month based on her handwritten notes. (Transcript, p. 126) Marcia Lyn Murdock failed to produce the supporting handwritten notes and failed to explain why the supporting handwritten notes were not produced or otherwise offered into evidence at the hearing. (Transcript, pp. 115-116)

c. Marcia Lyn Murdock's testimony conflicted with the testimony of Sara Graue and Janie Harrison who testified that Marcia Lyn Murdock was not present in the classroom (except to take attendance and to inquire into the progress of the children) and that Marcia Lyn Murdock did not provide individual developmental therapy to XX in the classroom. Marcia Lyn Murdock acknowledged that her testimony conflicted or, in the alternative, was likely to conflict with the testimony proffered by Sara Graue and Janie Harrison. Marcia Lyn Murdock further challenged the understanding of Sara Graue and Janie Harrison of the "push in" model of therapy. Notwithstanding these assertions, Marcia Lyn Murdoch's testimony directly contradicts the testimony of Sara Graue and Janie Harrison and is not credible.

17. Trisha Montez testified as follows:

Q. Tell me a little bit more about that. Was it individually that you saw her and --

A. Yes. When I -- I did not pick my daughter up from school every day. However, I on occasion I would pick my daughter up if there was a doctor's appointment... I walked into Lyn's office. Actually I knocked on the door, walked in, and she had him in the room with her.

Q. Okay. And she was providing therapy to him?

A. She was working with him.

Q. Working with him. And you're sure it was XX?

A. Yes, I know it was XX. The second time that I -- the very same thing...

Q. Okay. I'm not sure I understand.

A. Well, on one occasion Lyn had XX in a room working with him...

Q. Do you think she's a liar?

A. No, I don't.

Q. You didn't see Lyn perform service on XX every day?

A. Well, of course not. She had a room separate from where I was at.

Q. So you don't know what services were being provided to XX on the two occasions that you saw --

A. What I saw was Lyn sitting at a table, the child sitting at a table, a table that you do therapy at with things out on the table working with him. I interrupted the service. That's what I know.

(Transcript, p.129-137)

18. The Hearing Officer finds that the testimony of Trisha Montez is not persuasive on the issue of whether Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan for the period October, 2002, through August, 2003, for the following reasons, to wit:

a. Trisha Montez testified that she observed Marcia Lyn Murdock with XX on two isolated occasions from October, 2002, through August, 2003. (Transcript, p. 136).

b. Trisha Montez failed to testify that Marcia Lyn Murdock was providing individual developmental therapy services to XX on these occasions. (Transcript, p. 136)

c. Even if Trisha Montez observed Marcia Lyn Murdock providing individual developmental therapy service to XX on a single or limited number of occasions, the Hearing Officer cannot assume that Marcia Lyn Murdock and/or Cerebral Palsy of Tri County provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan. (Transcript, p. 135)

19. Melissa Wehmeyer testified as follows:

Q. How frequently did you and Lyn work with XX?

A. I -- I would -- I really didn't -- it was probably -- she popped in a lot. She popped in like maybe once a week.

Q. And when she would come in, did you personally observe her working with XX?

A. Yes. She would -- well, she would sit down and work with me...

Q. Yes. And how frequently would you see Lyn in the center working with XX?

A. Well, she would come in -- she come in whenever needed. I mean I had seen her at least once a week coming in to - to sit down. We would have circle time or whatever, and she would always come in and ask if there was any questions and sit down and do expressive languages and -- I mean --

Q. So she would sit down with XX and do work?

A. One thing we did with XX, like during circle time, our thing was to have him pay attention and to be able to respond to teacher and stuff. And Lyn would sit there and help him do that.

Q. Okay. And you said you saw her pop in occasionally?

A. Well, she - at least once a month, but she always popped in to make sure -- I'm sorry. Once a week. Sorry. Once a week. But she always came in, so.

Q. How long would she come in for?

A. Maybe 10, 15 minutes.

(Transcript, p. 139-149)

20. The Hearing Officer finds that the testimony of Melissa Dehmeyer is not responsive to the issue of whether Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan for the period October, 2002, through August, 2003, for the following reasons, to wit:

a. Melissa Dehmeyer lacks sufficient personal knowledge to determine whether Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan for the period October, 2002, through August, 2003. (Transcript, p. 148)

b. Melissa Dehmeyer failed to testify that she ever observed Marcia Lyn Murdock providing individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan for the period October, 2002, through August, 2003. (Transcript, p. 148)

c. Even if Melissa observed Marcia Lyn Murdock providing individual developmental therapy service to XX on a single or limited number of occasions, the Hearing Officer cannot assume that Marcia Lyn Murdock and/or Cerebral Palsy of Tri County provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan. (Transcript, p. 148)

21. Martha Waugh testified as follows:

Q. During the time that you worked at the center with Lyn... did you ever observe Lyn working with XX?

A. Yes... So at that particular time I saw her take XX in the room... And Lyn was sitting at this little table working with XX, and she had -- she was on his left hand side. She had her arm around him and they were working over a piece of paper... But -- an other than that, I can't say that I saw her -- or that I paid attention to her a lot of times, but I can just say I walked in on her those two or three times and that she was in a different room...

Q. So if the XXs were to claim that Lyn didn't ever spend any individual time individually with XX, based on what you saw, their claim would be incorrect, wouldn't it?

A. Yes. I mean I can say that those three times there was no one else in the room except Lyn and XX Now I can't say on other occasions, but on those three times they were in an individual therapy room with no one else in the room.

(Transcript, p. 150-161)

22. The Hearing Officer finds that the testimony of Martha Waugh is not persuasive on the issue of whether Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan for the period October, 2002, through August, 2003, for the following reasons, to wit:

a. Martha Waugh testified that she observed Marcia Lyn Murdock with XX on a three occasions. (Transcript, p. 154)

b. Even if Martha Waugh observed Marcia Lyn Murdock providing individual developmental therapy service to XX on a single or limited number of occasions, the Hearing Officer cannot assume that Marcia Lyn Murdock and/or Cerebral Palsy of Tri County provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan. (Transcript, p. 154)

23. In further support of its position that all individual developmental therapy was provided by Cerebral Palsy of Tri County and/or Marcia Lyn Murdock to XX in accordance with the Individualized Family Service Plan for the period October, 2002, through August, 2003, Respondent Missouri Department of Elementary and Secondary Education also offered the following exhibits, to wit:

Exhibit A	Description: DESE Child Complaint Files
Exhibit B	Description: DESE Child Complaint Decision

24. The Hearing Officer finds that the monthly attendance reports contained in Exhibit A are not credible, persuasive or responsive to the issue of whether Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan for the period October, 2002, through August, 2003, for the following reasons, to wit:

a. Respondent Missouri Department of Elementary and Secondary Education offered Exhibit A as a business record of Respondent Missouri Department of Elementary and Secondary Education by use of an affidavit prepared in accordance with Sec. 490.692 R.S.Mo. (2004).

b. Respondent Missouri Department of Elementary and Secondary Education failed to establish that the method and mode of the preparation of the monthly attendance reports or that the monthly attendance reports were of sufficiently trustworthiness.

c. Notwithstanding the above-referenced failure, Respondent Missouri Department of Elementary and Secondary Education offered Exhibit A (including the monthly attendance reports) into evidence and Exhibit A (including

the monthly attendance reports) was admitted into evidence without any objections by Petitioners XX and XX

d. Marcia Lyn Murdock testified that the monthly attendance records were not kept or otherwise prepared on a daily basis. (Transcript, p. 126) Marcia Lyn Murdock further testified that that the monthly attendance records were prepared at the end of each month based on her handwritten notes. (Transcript, p. 126)

e. Marcia Lyn Murdock and/or Respondent Missouri Department of Elementary and Secondary Education did not produce the handwritten notes used to prepare the monthly attendance reports and did not otherwise provide an adequate explanation why the supporting handwritten notes were not produced or otherwise offered into evidence at the hearing. (Transcript, pp. 115-116)

f. Marcia Lyn Murdock further testified that the entries contained in the monthly attendance reports included in Exhibit A were false. (Transcript, p. 126) Marcia Lyn Murdock admitted that the entries relating to units or minutes of individual developmental therapy service provided to XX on a particular date of service were actually performed on multiple days before, on and after the date of service recorded on the monthly attendance reports included in Exhibit A. (Transcript, p. 126).

f. The Hearing Officer expressly finds that the monthly attendance reports included in Exhibit A were not prepared in the normal course of business "at or near the time of the event recorded" (ie. date of delivery of individual developmental therapy services) and were not of sufficient trustworthiness and, therefore, the monthly attendance reports included in Exhibit A are wholly lacking in probative value relevant to the issue presented in this case.

25. The Hearing Officer finds that Exhibit B is not credible, persuasive or responsive to the issue of whether Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan for the period October, 2002, through August, 2003, for the following reasons, to wit:

a. Exhibit B is the Findings of Fact, Conclusions of Law, and Decision of Respondent Missouri Department of Elementary and Secondary Education regarding a Child Complaint filed by XX and XX (Exhibit B)

b. Respondent Missouri Department of Elementary and Secondary Education offered no testimony regarding the methodology for conducting the investigation, the identity of the investigator, the qualifications of the investigator, the identity of all individuals interviewed and/or all documents

reviewed, or the legal standard used to make the determinations set forth in the Findings of Fact, Conclusion of Law and Decision. (Exhibit B)

c. The investigation conducted by Respondent Missouri Department of Elementary and Secondary Education lacks the procedural safeguards set forth in 34 CFR 303.423 (2004) including, but not limited to, the right to present evidence, compel the attendance of witnesses and cross-examine witnesses.

d. The investigation conducted by Respondent Missouri Department of Elementary and Secondary Education applies a regulatory compliance standard that is different than the preponderance of the evidence standard applied in due process hearings.

e. The investigation conducted by Respondent Missouri Department of Elementary and Secondary Education is based or otherwise predicated on the monthly attendance reports and billing statements submitted by Cerebral Palsy of Tri County and/or Marcia Lyn Murdock. Exhibit B does not include any summary of the interview with Marcia Lyn Murdock. It is unclear from the record whether the investigator was aware of the mode or method of preparation of the monthly attendance reports and/or was aware that the entries contained in the monthly attendance reports were inaccurate and false. (Exhibit B)

f. The investigation conducted by Respondent Missouri Department of Elementary and Secondary Education included an interview with Shelly Keeling. Respondent Missouri Department of Elementary and Secondary Education did not call Shelly Keeling as a witness to testify at the due process hearing and did not offer any explanation why Shelly Keeling was not called as a witness. The Hearing Officer declines to rely on the hearsay statements attributed to Shelly Keeling in Exhibit B as the hearsay statements are not competent and substantial evidence. Further, to rely on these hearsay statements, Petitioners XX and XX would be deprived of their statutory right to confront and/or cross-examine Shelly Keeling as guaranteed by 34 CFR 303.422 (2004). (Exhibit B)

g. The Findings of Fact, Conclusions of Law and Decision set forth in Exhibit B are not binding on the Hearing Officer under 34 CFR 305.512 (2004).

26. In support of their position that the individual developmental therapy was not provided by Cerebral Palsy of Tri County and/or Marcia Lyn Murdock to XX in accordance with the Individualized Family Service Plan, Petitioners XX and XX offered the testimony of the following witnesses, to wit: (a) XX, (b) Sara Graue, Teacher/Current Employee of Cerebral Palsy of Tri County, (c)

Janie Harrison, Teacher's Aide/Current Employee of Cerebral Palsy of Tri County and (d) XX (Transcript)

27. Sara Graue testified as follows:

Q. ... what's your daily schedule?

A. I am in the classroom from about 8:30 until usually about 12:45, and then I take my lunch break from 12:45 until 1:30 and then come back from 1:30 and am in the room until 3:15.

Q. And did she provide any of those service to XX?

A. No, she did not.

Q. How do you know she did not work with XX?

A. Because I was with XX all -- I mean most of the day. If I wasn't with XX, then my assistant that was with me in the room at the time was with XX ... And I had questioned her about that too because it -- it was a very good concern that I had about her not coming in and working with XX

Q. ... Could you please tell us about that?

A. ... She was never working with the children that were in my care...

Q. Tell me about that.

A. ... There was no investigation. There was no -- Cathy was never back in the classrooms. She was never witness to the fact that, you know, if -- that Lyn was never in there...

Q. ... is it fair to say that you knew what therapists were coming in to either take out the children out of the classroom?

A. Yes.

Q. Did you ever see Lyn Murdock either pull a child out -- did you ever see Lyn Murdock pull a child out, pull XX out of the classroom?

A. No.

Q. Is it fair to say that you knew where XX was at all times during the day?

A. Yes.

Q. Is it your testimony that you never saw Lyn Murdock provide any individual developmental therapy for XX at any time during the entire period he was there?

A. Yes.

- Q. ... What was she busy with if she wasn't providing therapy?
A. I have no idea. The only thing she ever did was, she would come into out classroom, ask which children were there, take roll, and leave... But never actually involved with the child himself.
- Q. But not during the rest of the day? Because you had you own duties to do, correct?
A. Right. I just know that she wasn't in my classroom performing any type of developmental therapies with the kids in my classroom.

(Transcript, p. 191-227)

28. Janie Harrison testified as follows:
- Q. Okay. Did you ever see Lyn Murdock provide any type of services to XX?
A. I can't say anywhere else. All I can say is there was no service provided in that classroom.
- Q. Okay. Did you ever see Lyn Murdock come in and take XX out of the classroom?
A. No.
- Q. And you're specifically saying that you never saw her in your classroom with XX?
A. Now working with XX
- Q. Okay. And your testimony is that you never saw her in your classroom doing any of the work with XX or any of the other children except she walked through or once in a blue moon?
A. That's right.

(Transcript, p. 227-247)

29. The Hearing Officer finds that the testimony of Sara Graue and Janie Harrison is credible, persuasive and responsive to the issue of whether Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan for the period October, 2002, through August, 2003, for the following reasons, to wit:

- a. Sara Graue and Janie Harrison are current employees of Cerebral Palsy of Tri County. (Transcript, pp. 191 & 228)

b. From October, 2002, to August, 2003, Sara Graue and Janie Harrison were the classroom teacher and teacher's aide entrusted with the care and custody of XX between the hours of 8:30 a.m. and 2:30 p.m. (Transcript, pp. 192 & 232)

c. Sara Graue and Janie Harrison lack any motive, bias or self-interest to testify in favor of XX and against Cerebral Palsy of Tri County. Specifically, Sara Graue and Janie Harrison have no financial motive, have no personal relationship with XX and XX other than the provision of services to XX, and are testifying against or otherwise adversely to the interest of Cerebral Palsy of Tri County. (Transcript, pp. 191-247)

d. Sara Graue and Janie Harrison testified unequivocally and unconditionally that Marcia Lynn Murdock did not provide individual developmental therapy to XX during the period of October, 2002, through August, 2003. (Transcript, pp. 193 & 234)

e. Sara Graue and Janie Harrison further testified that Marcia Lyn Murdock was not present in the classroom, other than to record attendance and to request updates on the development of the children and on limited occasions to participate in "circle" therapy. Sara Graue and Janie Harrison further testified that Marcia Lyn Murdock did not provide individual development therapy services to XX during the nap time and lunch periods. (Transcript, pp. 193 & 234)

f. Sara Graue and Janie Harrison further testified that (1) Marcia Lyn Murdock did not remove XX from their classroom for individual development therapy, (2) they did not observe XX and Marcia Lyn Murdock in the hallways or on the playground, and (3) Marcia Lyn Murdock did not provide individual development therapy services to XX at any time. (Transcript, p. 193 & 234)

g. Sara Graue's testimony was consistent with the two or three complaints that she raised to Catherine Ann Cross regarding the failure of Marcia Lyn Murdock to provide individual development therapy services to XX and others as well as her interview with the Missouri Department of Elementary and Secondary Education. (Exhibit B; Transcript, p. 193)

30. XX and XX did not provide any relevant testimony regarding the issue of whether or not Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan for the period October, 2002, through August 23, 2003, except as noted below.

31. The Hearing Officer finds that the testimony of XX and XX is credible, persuasive and responsive to the issue of whether Cerebral Palsy of Tri

County and/or Marcia Lyn Murdock provided individual developmental therapy services to XX in accordance with the requirements of the Individualized Family Service Plan for the period October, 2002, through August, 2003, for the following reasons, to wit:

a. XX and XX testified that Cerebral Palsy Tri County and/or Marcia Lyn Murdock never communicated to XX or XX that XX's limited absences from Cerebral Palsy Tri County would result in the diminution or non-delivery of individual developmental therapy services to XX, that XX's limited absences from Cerebral Palsy Tri County had resulted in the diminution or non-delivery of individual developmental therapy services to XX or that individual development therapy services not provided to XX due to his absence from Cerebral Palsy Tri County were not provided on alternate dates. (Transcript, pp. 177-178 & 252)

b. The Hearing Officer finds that there is no relevancy to the testimony elicited regarding the motivation of XX and XX in filing the Request for Due Process Hearing. At the time of the alleged hotline or telephone call to police, XX and XX had already raised the issue of the denial or non-delivery of individual developmental therapy services to the Board of Directors of Cerebral Palsy Tri County and the alleged hotline or telephone call to police would appear to be in retaliation for raising the issue, not vice versa. (Transcript, pp.82, 270 & 279)

c. The Hearing Officer finds that there is no relevancy to the testimony elicited regarding the filing of the due process request relating to R.D. or regarding the filing of the child complaint regarding the denial or non-delivery of group development therapy services to XX (Transcript, pp. 82, 270 & 279)

32. The Hearing Officer expressly finds that Cerebral Palsy of Tri County and/or Marcia Lyn Murdock, as the service providers of Respondent Missouri Department of Elementary and Secondary Education, failed to provide individual developmental therapy to XX equal to 3,255 minutes (or 217 units) as required by the Individualized Family Service Plan. The Hearing Officer provides a credit against the minutes or units required by the Individualized Family Service Plan as follows: Testimony of Martha Waugh - 45 minutes (or 3 units).

33. The Hearing Officer expressly rejects the argument and evidence advanced by Respondent Missouri Department of Elementary and Secondary Education and/or Cerebral Palsy of Tri County that the failure of Cerebral Palsy of Tri County to implement the Individualized Family Service Plan and to deliver individual development therapy to XX was due to XX absences from the center operated by Cerebral Palsy of Tri County or due to operational schedule of the center operated by the Cerebral Palsy of Tri County for the following reasons, to wit:

a. The Individualized Family Service Plan mandates the provision of 300 minutes (or 20 units) of individual developmental therapy per month. (Exhibit A)

b. The Individualized Family Service Plan does not provide for any decrease or reduction in the provision of individual development therapy due to snow days, holidays, teacher vacations, summer vacation, or similar events, or non-excessive absences of XX from the center operated by Cerebral Palsy of Tri County. (Exhibit A)

c. The absence of XX from attendance at Cerebral Palsy of Tri County were documented as follows:

October, 2002	0 days
November, 2002	9 days
December, 2002	3 days
January, 2002	0 days – No Attendance Report
February, 2003	4 days
March, 2003	4 days
April, 2003	0 days – Attendance Report Not Legible
May, 2003	3 days
June, 2003	0 days – No Attendance Report
July, 2003	1 day
August, 2003	0 days

(Exhibit A)

d. XX was absent 24 days over an 11 month period (or 2.18 days per month). (Exhibit A)

e. During this same time period, other children receiving individual developmental therapy, were absent from the Cerebral Palsy of Tri County an average of 3.02 day per month. (Exhibit A)

f. The absenteeism of XX is consistent with the average number of days missed by the other children receiving individual developmental therapy services. (Exhibit A)

g. During the same period, Cerebral Palsy of Tri County was closed an average of 3.27 business days per month for holidays, snow days, personnel vacation and other reasons as set forth below:

October 28, 2002	1 day	No Therapy
November 28-29, 2002	2 day	No Therapy –Thanksgiving Break
December 4, 2002	1 day	No Therapy – Snow Day
December 23-27, 2002	5 days	No Therapy - Christmas Break

December 30-31, 2002	2 days	No Therapy - Christmas Break
January, 2003	Unknown	No Attendance Report
February 17, 2003	1 day	No Therapy
February 24-25, 2003	2 days	No Therapy – Snow Day
March 21, 2003	1 day	No Therapy
April 7, 2003	1 day	No Therapy
April 18, 2003	1 day	No Therapy
April 21, 2003	1 day	No Therapy
May 26, 2003	1 day	No Therapy – Memorial Day
June, 2003	Unknown	No Attendance Report
July 3-4, 2003	2 days	No Therapy – Independence Day
August 6-20, 2003 (Exhibit A)	15 days	No Therapy

h. Cerebral Palsy of Tri County did not notify XX or XX that (1) absenteeism would result in the denial of individual developmental therapy services to XX, (2) XX's absenteeism was excessive, or (3) XX's absenteeism interfered with the provision of individual development therapy to XX in accordance with the Individualized Family Service Plan. (Transcript, pp. 177-178 & 252)

i. To the extent that Cerebral Palsy of Tri County failed to provide individual developmental therapy to XX, the Hearing Officer expressly finds that the absenteeism of XX was not excessive, that a reasonable amount of absences was contemplated in the development of the Individualized Family Service Plan, and that the failure to provide the individual developmental therapy was attributable, in part, to the operational hours of Cerebral Palsy of Tri County and not to the special needs or circumstances of XX See, e.g., Adams v. Oregon, 195 F.3d 1141 (9th Cir. 1999).

34. Petitioners XX and XX have submitted an application for attorney's fees in the amount of \$1,830.00 based on 12.2 hours of legal work at the hourly rate of \$150.00 per hour for Dan Whitworth and Brad Barton.

CONCLUSIONS OF LAW

1. At all times relevant here. XX is and was eligible to receive Early Intervention Services under 34 CFR 303.300 (2004) and 34 CFR 303.322 (2004).

2. Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education had adopted and approved an Individualized Family Service Plan that provided for the provision of 300 minutes (or 20 units) of individual developmental therapy to XX per month for the period from October, 2002, to August, 2003.

3. Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education have stipulated that Petitioners XX and XX bear the burden of proof citing Weast v. Schaffer, 377 F.3d 449, 452 (4th Cir. 2004). Notwithstanding the stipulation of the parties, the Hearing Officer finds that Respondent Missouri Department of Elementary and Secondary Education bears the burden of proof to establish by a preponderance of the evidence that Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided 300 minutes (or 20 units) of individual development therapy to XX per month from October, 2002, to August, 2003, in accordance with the Individualized Family Service Plan. See, e.g., Blackmun v. Springfield R-XII Sch. Dist., 198 F.3d 648 (8th Cir. 1999); E.S. v. Independent Sch. Dist. 196, 135 F.3d 566 (8th Cir. 1997); Kroot v. District of Columbia, 800 F.Supp. 976 (D.D.C. 1992); Mills v. District of Columbia Board of Education, 348 F.Supp. 866 (D.D.C. 1972).¹

4. In determining whether a party has met its burden of proof, the Hearing Officer has the authority to determine the credibility of the witnesses and to weigh the evidence offered by the witness. See, e.g., Reese ex. rel. Board of Educ. of Bismarck R-V School Dist., 225 F.Supp. 2d 1149, 1165 (E.D.Mo. 2002).

5. In applying this standard, the Hearing Officer expressly resolves all credibility issues in favor of Petitioners XX and XX and against Respondent Missouri Department of Elementary and Secondary Education for the reasons more fully set forth in this Decision.

6. Respondent Missouri Department of Elementary and Secondary Education has failed to sustain its burden of proof that Cerebral Palsy of Tri County and/or Marcia Lyn Murdock provided 300 minutes (or 20 units) of individual development therapy to XX per month from October, 2002, to August, 2003, in accordance with the Individualized Family Service Plan.

¹ Neither Petitioners XX and XX nor Respondent Missouri Department of Elementary and Secondary Education have cited a single case directly on point relating to the burden of proof in due process hearings where the sole issue is whether Respondent Missouri Department of Elementary and Secondary Education implemented the IFSP in accordance with its terms (ie. delivered the services required by the IFSP). It is clear that the burden of proof is on Petitioners XX and XX to establish XX's eligibility for services under the Missouri First Steps Program and/or the inadequacy of the IFSP. After careful consideration, the Hearing Officer finds that Respondent Missouri Department of Elementary and Secondary Education, not Petitioners XX and XX, bears the burden of proof to establish that the IFSP has been implemented in accordance with its terms and that the services required by the IFSP were provided. This decision is supported by two primary factors, to wit: First, the provision of early intervention services is a federal mandate. As a result, Respondent Missouri Department of Elementary and Secondary Education should be vested with the responsibility of demonstrating that it has met the obligations imposed by the federal mandate. Placing the burden on Respondent Missouri Department of Elementary and Secondary Education is consistent with the state and federal statutory scheme. Second, the placement of the burden of proof on Respondent Missouri Department of Elementary and Secondary Education is consistent with the proposition that the burdens of persuasion and production should be placed on the party better able to meet those burdens. Respondent Missouri Department of Elementary and Secondary Education is in the unique position to insure that the services due XX were in fact provided in accordance with the IFSP through its general supervision and control over Cerebral Palsy TriCounty in connection with its administrative oversight over the Missouri First Steps Program.

7. Even if the Petitioners XX and XX had the burden of proof (given the stipulation of the parties), Petitioners XX and XX have offered competent and substantial evidence upon the whole record to establish by a preponderance of the evidence that Cerebral Palsy of Tri County and/or Marcia Lyn Murdock did not provide 300 minutes (or 20 units) of individual development therapy to XX per month from October, 2002, to August, 2003, in accordance with the Individualized Family Service Plan.

8. Notwithstanding that XX is currently ineligible for services under the First Steps Infants and Toddlers Program administered by Respondent Missouri Department of Elementary and Secondary Education due to his present age, the Hearing Officer has the power and authority to award compensatory services where the services under the Individualized Family Service Plan were inadequate to provide a meaningful benefit to XX or, in the alternative, were not provided in accordance with the Individualized Family Service Plan. See, e.g., Heidemann v. Rother, 84 F.3d 1021, 1033 (8th Cir. 1996)

9. Petitioners XX and XX, after being credited for the number of minutes of individual developmental therapy actually provided, are entitled to an award of 3,255 minutes (or 217 units) of compensatory services.

ORDER AND DECISION

IT IS THEREFORE ORDERED that Petitioners XX and XX request for compensatory services for the denial or non-delivery of individual developmental therapy to XX in accordance with the terms and conditions of the Individualized Family Service Plan is hereby granted.

IT IS FURTHER ORDERED that Petitioners XX and XX are hereby awarded compensatory services equal to 3,255 minutes (or 217 units) of compensatory services from Respondent Missouri Department of Elementary and Secondary Education.

IT IS FURTHER ORDERED that Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education shall meet and confer in good faith to determine the form and timing of the delivery of the compensatory services to XX

IT IS FURTHER ORDERED that this Final Administrative Order and Decision shall be published on the Missouri Department of Elementary and Secondary Education website, provided that all references to the child or his parents are redacted to protect the identity of the minor child.

IT IS FURTHER ORDERED that Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education are hereby directed to submit an application for attorney's fees, affidavits, and memorandum of law in support or opposition to the request for attorney's fees to the Hearing Officer within thirty (30) days of the date of this Decision setting forth:

- (1) Whether this proceeding is an "agency proceeding" as defined by Sec. 536.085 R.S.Mo. (2004);
- (2) Whether Petitioners XX and XX are the prevailing party under Sec. 536.087 R.S.Mo. (2004) as defined by Sec. 536.085 R.S.Mo. (2004);
- (3) Whether Petitioners XX and XX are eligible to receive an award of attorney's fees under Sec. 536.085 R.S.Mo. (2004) and Sec. 536.087 R.S.Mo. (2004);
- (4) Whether the position of Respondent Missouri Department of Elementary and Secondary Education was "substantially justified" as provided by Sec. 536.087 R.S.Mo. (2004);
- (5) Whether special circumstances exist that would make an award of attorney's fees or other expenses sought by Petitioners XX and XX unjust under Sec. 536.087 R.S.Mo. (2004);
- (6) The amount of attorney's fees or other expenses sought by Petitioners XX and XX;
- (7) Itemized billing statement including description of work performed, hours of work, and hourly rate;
- (8) Whether the attorney's fees or other expenses incurred by Petitioners XX and XX were necessary for the preparation of Petitioners' case as required by Sec. 536.085 R.S.Mo. (2004);
- (9) Whether the attorney's fees or other expenses incurred by Petitioners XX and XX were based upon the prevailing market rates for the kind and quality of legal services provided to Petitioners XX and XX as required by Sec. 536.085 R.S.Mo. (2004);
- (10) Whether there exists any special factor or special factors (e.g. limited availability of qualified attorneys, nature of subject matter, etc.) that supports an award of attorney's fees at a rate in excess of of the statutory rate of \$75.00 per hour under Sec. 536.085 R.S.Mo. (2004).

- (11) Whether the Hearing Officer, in the event of an appeal or judicial review of the underlying merits of the Decisions by Respondent Missouri Department of Elementary and Secondary Education, must reserve its ruling on the merits of the application for attorney's fees until an unreviewable decision is rendered by the court or the underlying merits of the case has been finally determined;
- (12) Whether Petitioners XX and XX seek an additional award of attorney's fees for the preparation and prosecution of the claim for attorney's fees;

IT IS FURTHER ORDERED that the issue of the award of attorney's fees and other expenses to Petitioners XX and XX shall be submitted based on the record of the proceedings as well as the application for attorney's fees, affidavits, and memorandum submitted by Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education unless Petitioners XX and XX or Respondent Missouri Department of Elementary and Secondary Education request a hearing on the issue or request oral argument on the issue within thirty (30) days of the date of this Decision.

IT IS FURTHER ORDERED all other and further relief not specifically granted herein shall be denied, except the Hearing Officer shall retain jurisdiction over the application for attorney's fees submitted by Petitioners XX and XX.

CERTIFICATION OF IMPARTIALITY

I, Ryan S. Shaughnessy, do hereby certify that I am an impartial person as defined or otherwise provided for in 34 CFR 303.421 (2004) insofar as (1) I am not an employee of the Missouri Department of Elementary and Secondary Education or Cerebral Palsy of Tri County and (2) I do not have any personal or professional interests that would conflict with, interfere with or otherwise impair my ability to act in an impartial and objective manner in the determination of this dispute. I serve as an appointed hearing officer and am paid for hearing officer services under a contract with the Missouri Department of Elementary and Secondary Education.

APPEAL RIGHTS

Petitioner and Respondent have the statutory right to file a motion for reconsideration of this Decision and/or to file an application for attorney's fees. In the event that a motion for reconsideration is filed, a new hearing officer may be assigned to hear and decide the motion for reconsideration. Notwithstanding the filing of a motion for reconsideration or the filing of an application for attorney's fees, the filing of the motion for reconsideration or the filing of an application for attorney's fees shall not stay or otherwise extend the statutory deadline for

seeking judicial review of this Decision in state or federal court. Petitioner and Respondent should seek legal advice on the issue of their appeal rights and should not rely on the statements set forth herein.

Date of Entry of Order: November 30, 2004.

SO ORDERED:

\s\ Ryan S. Shaughnessy
Ryan S. Shaughnessy, #39922
1800 Lafayette Avenue, Suite 200
Saint Louis, Missouri 63104
(314) 771-3691 (telephone)
(314) 771-4085 (facsimile)
Hearing Officer

CERTIFICATE OF SERVICE

I, Ryan S. Shaughnessy, do hereby certify that duplicate originals of this Final Administrative Decision and Order were deposited in the U.S. Mail, postage prepaid, this 30th day of November, 2004, addressed to the following parties and attorneys of record, to wit:

Dan Whitworth, Esq.
629 Buyers
Joplin, Missouri 64801

Victorine Mahon, Esq.
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102

Ms. Melodie A. Friedebach
Department of Elementary and Secondary Education
Division of Special Education
205 Jefferson Street
Jefferson City, Missouri 65102

BEFORE THE MISSOURI DEPARTMENT OF ELEMENTARY
AND SECONDARY EDUCATION

IN THE MATTER OF XX)	
)	
XX and XX, the PARENTS OF XX,)	
a Minor Child,)	
)	
Petitioners,)	Case No. 2004-DESE-RSS/01
)	
vs.)	
)	
MISSOURI DEPARTMENT OF)	
ELEMENTARY & SECONDARY EDUCATION,)	
)	
Respondent.)	

SUPPLEMENTAL HEARING DECISION COVERSHEET

Petitioners:

Child:
DOB:

Parents:
Parents' Legal Counsel:

Mr. Daniel D. Whitworth
Mr. Bradley R. Barton
Whitworth, McPherson & Longnecker, L.L.C.
626 Byers
Joplin, Missouri 64801

Respondent:

Lead Agency:
Lead Agency's Representative:

Missouri Dept. of Elementary & Secondary Education
Ms. Margaret Strecker, Assistant Director
Missouri Dept. of Elementary & Secondary Education
P.O. Box 480
Jefferson City, Missouri 65102

Lead Agency's Legal Counsel:

Ms. Victorine R. Mahon
Ms. Nikki Loethen
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, Missouri 65102

SPOE Provider:

Cerebral Palsy of Tri County

Hearing Officer:

Process Request:
Date of Hearing:

Hearing Officer: Ryan S. Shaughnessy
October 1, 2004
November 5, 2004

Decision:

Date of Decision:

For Respondent – Denial of Application for Attorney's
Fee only.
December 31, 2004

BEFORE THE MISSOURI DEPARTMENT OF ELEMENTARY
AND SECONDARY EDUCATION

IN THE MATTER OF XX)	
)	
XX and XX, the PARENTS OF XX, a Minor Child,)	
)	
Petitioners,)	Case No. 2004-DESE-RSS/01
)	
vs.)	
)	
MISSOURI DEPARTMENT OF ELEMENTARY & SECONDARY EDUCATION,)	
)	
Respondent.)	

FINAL ADMINISTRATIVE DECISION AND ORDER
ATTORNEY'S FEES APPLICATION ONLY

Petitioners XX and XX, the parents and legal guardians of XX, a minor child, (hereinafter collectively referred to as "Petitioners"), filed an Application for Attorney's Fees in this matter on or about December 1, 2004. The Hearing Officer, having taken judicial notice of the Application for Attorney's Fees and Memorandum in Opposition does hereby enter the following Order and Decision, to wit:

FINDINGS OF FACT

1. On or before November 30, 2004, Petitioners XX and XX submitted an Application for Attorney's Fees.
2. The Application for Attorney's Fees consists of an application alleging that Petitioners XX and XX are the prevailing party and a copy of the itemized billing statement from the law firm Whitworth, McPherson & Longnecker, L.L.C. for work performed on this matter.
3. On November 30, 2004, the Hearing Officer entered an Administrative Order directing Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education to file an amended application for attorney's fees, affidavits, and memorandum of law in support or opposition to the Application for Attorney's Fees.
4. Petitioners XX and XX have not filed an amended application for attorney's fees, affidavits or memorandum of law in support of their Application for Attorney's Fees.

5. On or about December 30, 2004, Respondent Missouri Department of Elementary and Secondary Education submitted its Memorandum in Opposition to Payment of Attorney's Fees.

6. The Memorandum in Opposition to Payment of Attorney's Fees consists of a legal memorandum and supporting affidavit.²

CONCLUSIONS OF LAW

A. IDEA Procedural Safeguards.

1. Petitioners XX and XX filed their request for a due process hearing under Part C of the Individuals with Disabilities Education Act, 20 U.S.C. 1431 (2004), et seq.

2. Under the Individuals with Disabilities Education Act (2004), Respondent Missouri Department of Elementary and Secondary Education as the lead agency for implementation of the Individuals with Disabilities Education Act (2004) was required to develop an administrative process for resolving complaints through impartial due process hearings.

3. Under the Individuals with Disabilities Education Act (2004), Respondent Missouri Department of Elementary and Secondary Education had the option to adopt the due process procedures under Part B of the Individuals with Disabilities Education Act (2004) or to develop a separate administrative process consistent with 34 C.F.R. 303.420 (2004), et seq.

4. Respondent Missouri Department of Elementary and Secondary Education elected to develop a separate administrative process by promulgating 5 C.S.R. 70-742.141 (2004) which incorporates by reference the Missouri State Application under Part C of the Individuals with Disabilities Education Act (2004).

5. The procedural safeguards set forth in the Missouri State Application under Part C of the Individuals with Disabilities Act (2004) adopt certain minimum federal procedural standards.

B. No Preemption of Missouri Administrative Procedures Act.

1. The procedural standards set forth in the Missouri State Application under Part C of the Individuals with Disabilities Education Act (2004) provide

² Respondent Missouri Department of Elementary and Secondary Education filed a document designated as a Declaration. Although the Declaration does not allege that the person making the Declaration was duly sworn or under oath, the Hearing Officer accepts the Declaration as an affidavit and takes the Declaration under submission together with the evidence adduced at the impartial due process hearing.

general guidelines that ensure that the impartial due process hearings filed under Missouri State Application under Part C of the Individuals with Disabilities Education Act (2004) comply with the minimum requirements set for in Part C of the Individuals with Disabilities Act (2004), its implementing rules and regulations and the due process standards mandated by Fifth Amendment and Fourteenth Amendment to the United States Constitution.

2. The procedural standards set forth in the Missouri State Application under Part C of the Individuals with Disabilities Education Act (2004) do not constitute a comprehensive procedural code or scheme and, therefore, only supplement the procedural safeguards and other requirements set forth in the Missouri Administrative Procedures Act, Sec. 536.010 R.S.Mo. (2004), et seq.

3. The Individuals with Disabilities Education Act (2004) and the Missouri State Application under Part C of the Individuals with Disabilities Act (2004) create minimum standards and do not contain any express language preempting the application of the Missouri Administrative Procedures Act, Sec. 536.010 R.S.Mo. (2004) to impartial due process hearings conducted by Respondent Missouri Department of Elementary and Secondary Education under the Individuals with Disabilities Education Act (2004) and the Missouri State Application under Part C of the Individuals with Disabilities Education Act (2004).

4. The Individuals with Disabilities Education Act (2004) and the Missouri State Application under Part C of the Individuals with Disabilities Education Act (2004) do not preempt the procedural safeguards and other requirements set forth in the Missouri Administrative Procedures Act, Sec. 536.010 R.S.Mo. (2004), et seq.³

C. Availability for Attorney's Fees.

1. There is no express provision for an award of attorney's fees in due process hearings under Part C of the Individuals with Disabilities Education Act (2004).

³ Respondent Missouri Department of Elementary and Secondary Education argues that the Missouri Administrative Procedures Act does not apply and is supplanted or preempted by the adoption by 5 C.S.R. 70-742.141 (2004). However, the Missouri General Assembly has not expressly exempted due process hearings conducted by Respondent Missouri Department of Elementary and Secondary Education from the Missouri Administrative Procedures Act. See, e.g., Sec. 536.018 R.S.Mo. (2004) (exempting institutions of higher learning) and Sec. 536.085 (exempting child custody proceedings, eminent domain proceedings, driver's license proceedings, vehicle registration proceedings, proceedings to establish or fix a rate, or proceedings before the state tax commission). Absent an express statutory exemption, the Hearing Officer is not willing to extend the statutory exemptions to include impartial due process hearings conducted by Respondent Missouri Department of Elementary and Secondary Education under the Missouri State Application under Part C of the Individuals with Disabilities Act (2004).

2. There is no express provision for attorney's fee for an award of attorney's fees in due process hearings under the Missouri State Application under Part C of the Individuals with Disabilities Education Act (2004)

2. However, such a right to attorney's fees may exist in limited circumstances under Sec. 536.087 R.S.Mo. (2004).

3. Under Sec. 536.087 R.S.Mo. (2004), attorney's fees may be awarded in "agency proceedings" brought by or against the State of Missouri, including Respondent Missouri Department of Elementary and Secondary Education.

4. An agency proceeding is defined in Sec. 536.085 R.S.Mo. (2004) as "an adversary proceeding in a contested case... but does not include proceedings for determining the eligibility or entitlement of an individual to a monetary benefit or its equivalent, child custody proceedings, eminent domain proceedings, drivers license proceedings, vehicle registration proceedings, proceedings to establish or fix a rate, or proceedings before the state tax commission."

5. An impartial due process hearing to determine whether or not services were performed or otherwise provided by Respondent Missouri Department of Elementary and Secondary Education or its service providers under the Missouri State Application under Part C of the Individuals with Disabilities Education Act (2004) in accordance with the approved IFSP is not a proceeding to determine the eligibility or entitlement of an individual to a monetary benefit or its equivalent.⁴

⁴ This case does not involve a request for due process hearing challenging the adequacy or sufficiency of the IFSP. More importantly, Petitioners XX and XX do not challenge or otherwise seek a determination regarding their eligibility or entitlement to services under Part C of the Individuals with Disabilities with Education Act (2004) or under the State Application under Part C of the Individuals with Disabilities Education Act (2004). Rather, Petitioners XX and XX seek an order awarding compensatory services for individual development therapy services not provided in accordance with the IFSP. Respondent Missouri Department of Elementary and Secondary Education argues that the award of "compensatory service" is a "monetary benefit or its equivalent." For purposes of this analysis, the Hearing Officer assumes, without deciding, that compensatory services are monetary benefits or their equivalent. Although Sec. 536.085 R.S.Mo. (2004) expressly prohibits the award of attorney's fees in cases to determine Petitioners XX and XX's eligibility or entitlement to monetary benefits or their equivalent, Sec. 536.085 R.S.Mo. (2004) does not expressly prohibit the award of attorney's fees in cases to enforce the payment or provision of a monetary benefit or its equivalent to which Petitioners XX and XX have already been determined to be eligible or entitled.

D. Application for Attorney's Fees.

1. Sec. 536.087 R.S.Mo. (2004) provides, in pertinent part, as follows:

A party seeking an award of fees... shall... submit... an application which shows that the party is a prevailing party and is eligible to receive an award... and the amount sought, including an itemized statement from any attorney... representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the state was not substantially justified.

2. The application for attorney's fees submitted by Petitioners XX and XX fails to allege that Petitioners XX and XX are a "party" or are "individual[s] whose net worth did not exceed two million dollars [or four million dollars] at the time of the ... agency proceeding was initiated."

3. The application for attorney's fees submitted by Petitioners XX and XX fails to allege that the position of Respondent Missouri Department of Elementary and Secondary Education "was not substantially justified."

E. Compliance with Administrative Order.

1. On November 30, 2004, the Hearing Officer entered the following Administrative Order directing Petitioners XX and XX to submit an application for attorney's fees, affidavits, and memorandum of law in support of their request for attorney's fees as follows:

IT IS FURTHER ORDERED that Petitioners XX and XX Respondent Missouri Department of Elementary and Secondary Education are hereby directed to submit an application for attorney's fees, affidavits, and memorandum of law in support or opposition to the request for attorney's fees to the Hearing Officer within thirty (30) days of the date of this Decision setting forth:

- (1) Whether this proceeding is an "agency proceeding" as defined by Sec. 536.085 R.S.Mo. (2004);
- (2) Whether Petitioners XX and XX are the prevailing party under Sec. 536.087 R.S.Mo. (2004) as defined by Sec. 536.085 R.S.Mo. (2004);
- (3) Whether Petitioners XX and XX are eligible to receive an award of attorney's fees under Sec. 536.085 R.S.Mo. (2004) and Sec. 536.087 R.S.Mo. (2004);

- (4) Whether the position of Respondent Missouri Department of Elementary and Secondary Education was "substantially justified" as provided by Sec. 536.087 R.S.Mo. (2004);
- (5) Whether special circumstances exist that would make an award of attorney's fees or other expenses sought by Petitioners XX and XX unjust under Sec. 536.087 R.S.Mo. (2004);
- (6) The amount of attorney's fees or other expenses sought by Petitioners XX and XX;
- (7) Itemized billing statement including description of work performed, hours of work, and hourly rate;
- (8) Whether the attorney's fees or other expenses incurred by Petitioners XX and XX were necessary for the preparation of Petitioners' case as required by Sec. 536.085 R.S.Mo. (2004);
- (9) Whether the attorney's fees or other expenses incurred by Petitioners XX and XX were based upon the prevailing market rates for the kind and quality of legal services provided to Petitioners XX and XX as required by Sec. 536.085 R.S.Mo. (2004);
- (10) Whether there exists any special factor or special factors (e.g. limited availability of qualified attorneys, nature of subject matter, etc.) that supports an award of attorney's fees at a rate in excess of of the statutory rate of \$75.00 per hour under Sec. 536.085 R.S.Mo. (2004).
- (11) Whether the Hearing Officer, in the event of an appeal or judicial review of the underlying merits of the Decisions by Respondent Missouri Department of Elementary and Secondary Education, must reserve its ruling on the merits of the application for attorney's fees until an unreviewable decision is render by the court or the underlying merits of the case has been finally determined;
- (12) Whether Petitioners XX and XX seek an additional award of attorney's fees for the preparation and prosecution of the claim for attorney's fees;

IT IS FURTHER ORDERED that the issue of the award of attorney's fees and other expenses to Petitioners XX and XX shall be submitted based on the record of the proceedings as well as the application for attorney's fees, affidavits, and memorandum submitted by Petitioners XX and XX and Respondent Missouri Department of Elementary and Secondary Education unless Petitioners XX and XX or Respondent Missouri

Department of Elementary and Secondary Education request a hearing on the issue or request oral argument on the issue within thirty (30) days of the date of this Decision.

2. As of January 2, 2005, Petitioners XX and XX have not submitted any amended application for attorney's fees, affidavits, or memorandum of law in support of their Application for Attorney's Fees as directed by the Administrative Order, dated November 30, 2004.

F. Entitlement to Award of Attorney's Fees.

1. The Hearing Officer lacks the subject matter jurisdiction to hear and decide the Application for Attorney's Fees submitted by Petitioners XX and XX where the Application for Attorney's Fees fails to plead the elements necessary for recovery set forth in Sec. 536.085 R.S.Mo. (2004) and Sec. 536.087 R.S.Mo. (2004).

2. Even if the Hearing Officer has the subject matter jurisdiction to hear and decide the Application for Attorney's Fees submitted by Petitioners XX and XX have failed to plead or prove the following elements necessary to support an award of attorney's fees to wit:

a. That Petitioners XX and XX are individuals with a net worth less than \$2 million individually or \$4 million jointly and, therefore, are "parties" eligible to obtain an award of attorney's fees.

b. That the position taken by Respondent Missouri Department of Elementary and Secondary Education was not substantially justified.

3. Based on the Declaration submitted by Respondent Missouri Department of Elementary and Secondary Education and the evidence adduced at the due process hearing, the Hearing Officer expressly finds that the position of Respondent Missouri Department of Elementary and Secondary Education was substantially justified as follows:

a. Respondent Missouri Department of Elementary and Secondary Education received a child complaint relating to the provision of individual and group development therapy services to H.D.

b. Respondent Missouri Department of Elementary and Secondary Education conducted an investigation into the ancillary child complaint filed on behalf of H.D.

c. The investigator took statements from witnesses (including employees of Cerebral Palsy of Tri-County) to determine whether individual and

group development therapy services were provided to H.D. in accordance with the IFSP.

d. The investigator concluded that H.D. received the individual development therapy services required by the IFSP.

e. Respondent Missouri Department of Elementary and Secondary Education offered the testimony of Catherine Cross, Trisha Montez, Melissa Wehmeyer, Martha Waugh, and Lyn Murdock in support of its position.

f. Respondent Missouri Department of Elementary and Secondary Education offered certain billing records submitted to Respondent Missouri Department of Elementary and Secondary Education by Cerebral Palsy of Tri-County.

g. Respondent Missouri Department of Elementary and Secondary Education adopted its position regarding whether H.D. had received the individual therapy services required by the IFSP based on the investigative report, statements offered by the above-referenced witnesses, and the billing records submitted by Cerebral Palsy of Tri-County.

h. Petitioners XX and XX have offered no evidence that would support a finding that Respondent Missouri Department of Elementary and Secondary Education knew or should have known that the testimony offered by witnesses or that the of billing records submitted by Cerebral Palsy of Tri-County were inaccurate or false.

i. There is no competent and substantial evidence to support a finding that the position taken by Respondent Missouri Department of Elementary and Secondary Education was taken in bad faith or was not substantially justified under the circumstances.

ORDER AND DECISION

IT IS ORDERED that the Application for Attorney's Fees submitted Petitioners XX and XX is hereby denied.

IT IS FURTHER ORDERED that the Request for Hearing on the Application for Attorney's Fees made by Respondent Missouri Department of Elementary and Secondary Education is hereby denied as moot.

CERTIFICATION OF IMPARTIALITY

I, Ryan S. Shaughnessy, do hereby certify that I am an impartial person as defined or otherwise provided for in 34 CFR 303.421 (2004) insofar as (1) I am not an employee of Respondent Missouri Department of Elementary and Secondary Education or Cerebral Palsy of Tri Count and (2) I do not have any personal or professional interests that would conflict with, interfere with or otherwise impair my ability to act in an impartial and objective manner in the determination of this dispute. I serve as an appointed hearing officer and am paid for hearing officer services under a contract with Respondent Missouri Department of Elementary and Secondary Education.

APPEAL RIGHTS

Petitioner and Respondent have the statutory right to file a motion for reconsideration of this Decision and/or to file an application for attorney's fees. In the event that a motion for reconsideration is filed, a new hearing officer may be assigned to hear and decide the motion for reconsideration. Notwithstanding the filing of a motion for reconsideration or the filing of an application for attorney's fees, the filing of the motion for reconsideration or the filing of an application for attorney's fees shall not stay or otherwise extend the statutory deadline for seeking judicial review of this Decision in state or federal court. Petitioner and Respondent should seek legal advice on the issue of their appeal rights and should not rely on the statements set forth herein.

Date of Entry of Order: January 2, 2005.

SO ORDERED:

\\s\ Ryan S. Shaughnessy
Ryan S. Shaughnessy, #39922
1800 Lafayette Avenue, Suite 200
Saint Louis, Missouri 63104
(314) 771-3691 (telephone)
(314) 771-4085 (facsimile)
Hearing Officer

CERTIFICATE OF SERVICE

I, Ryan S. Shaughnessy, do hereby certify that duplicate originals of this Final Administrative Decision and Order were deposited in the U.S. Mail, postage prepaid, this 3rd day of January, 2005, addressed to the following parties and attorneys of record, to wit:

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