

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

PARENTS OF A MINOR CHILD, _____,)	
)	
Petitioners,)	
)	
vs.)	2004 - DESE - EFW/07
)	
PARKWAY C-2 SCHOOL DISTRICT)	
and SPECIAL SCHOOL DISTRICT)	
OF ST. LOUIS COUNTY,)	
)	
Respondent.)	

COVER SHEET INFORMATION

1. The minor child, _____ (“Student”), is the son of _____ (“Parents”). Student was born on _____. Student’s Social Security number is _____.
2. At all times material hereto, Student resided with Parents in within the boundaries of the Parkway C-2 School District (“Parkway”) and the Special School District of St. Louis County (“SSD”).
3. Parents initially filed their request for a Due Process Hearing by letter to the Department of Elementary and Secondary Education (“DESE”) on June 30, 2004.
4. The Three-Person Hearing Panel empowered to hear this cause consists of: George Wilson, (designated by School District), Rand Hodgson (designated by Parents), and Edward F. Walsh, Panel Chairperson.
5. The Due Process Hearing was convened on November 8, 2004 and continued November 9-10, 15 and 16, January 24-28, 2005, and March 16-17, 2005.

6. Petitioners were represented in this action by attorney Stephen Walker. Attorney John F. Brink represented respondent SSD. Attorney Ernest G. Trakas represented Parkway.
7. Petitioner dismissed Parkway from this action prior to the hearing.
8. At the hearing, the following issues were presented for the panel's determination:
 - a) The school failed to properly evaluate and fully identify [the Student]'s disabilities and thereafter failed to craft an appropriately drafted IEP [i.e. the IEP lacks sufficiently measurable Annual Goals and Short Term Objectives, functional and meaningful Objective or Evaluative Criteria, adequate Related and Support services] to address those needs for the 2002-2003 and 2003-2004 school years denying her a **Free Appropriate Public Education**.
 - b) The school failed to provide the parents **adequate Prior Written Notice** of their actions for the 2002-2003, 2003-2004 and in violation of **20 U.S.C. Section 1415(b)** and (C) and **34 C.F.R. Section 300.503**.
 - c) The school failed to provide necessary services for the 2002-2003 and 2003-2004 school years despite the student's entitlement and in so failing denied this student a **Free Appropriate Public Education** requiring the Petitioners to obtain these services privately and at their own expense.
 - d) The school failed to address all the student's educational and social emotional needs for the past and present school years and in so failing denied him a **Free Appropriate Public Education**.
 - e) The school failed to provide special education and related services designed to meet the individual educational, social and emotional needs of this student during the 2002-2003 and 2003-2004 school years and in so failing denied her a **Free Appropriate Public Education**.
9. The parties submitted post-hearing briefs.
10. The Decision was rendered on October 3, 2005 by a majority of the Panel.
11. A separate opinion in dissent by panel member Rand Hodgson will be issued subsequent to this Decision.

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

PARENTS OF A MINOR CHILD, _____,)	
)	
Petitioners,)	
)	
vs.)	2004 - DESE - EFW/07
)	
PARKWAY C-2 SCHOOL DISTRICT)	
and SPECIAL SCHOOL DISTRICT)	
OF ST. LOUIS COUNTY,)	
)	
Respondents.)	

DECISION AND ORDER

This is the final decision of the hearing panel in an impartial due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415(f) (1997), and Missouri law, §162.961.3, RSMo. The hearing panel, upon due consideration of evidence and argument presented in this matter, determines that the Petitioners have failed to demonstrate that the respondent Special School District of St. Louis violated the IDEA. In support of this decision, the hearing panel makes the following findings of fact and conclusions of law whereupon to issues its decision and order. A dissent issued by panel member Rand Hodgson will be issued separately.

PARTIES

1. Petitioners are the parents of the minor child, _____, and who reside within the boundaries of the respondents Parkway C-2 School District (“Parkway”) and the Special School District of St. Louis County (“SSD”).

2. Parkway¹ is a Missouri school district organized pursuant to section 162.461 et seq. RSMo.

3. SSD is responsible for identifying and serving special education students in Parkway pursuant to the directives of the Missouri Department of Elementary and Secondary Education (“DESE”) and in accordance with the Missouri State Plan for Special Education (“Missouri State Plan”).

PROCEDURAL HISTORY

4. On June 30, 2004, the DESE received Petitioners’ request for a due process hearing.

5. On July 13, 2004, DESE empowered a three-member due process hearing panel to hear the request and to render its decision on or before August 16, 2004. The decision deadline has been extended on various occasions at the request of the parties, either jointly or individually. Most recently, Respondent SSD requested and received an extension of the decision deadline through October 3, 2005.

6. The three-member hearing panel consists of George Wilson (Respondent’s selection), Rand Hodgson (Petitioners’ selection) and attorney Edward F. Walsh (DESE’s selection).

7. A due process hearing was convened in the above referenced cause on November 8,9,10, 15 and 16 2004; January 24-28, 2005; and March 16-17, 2005. A transcript of the hearing was prepared and written arguments submitted by both parties.

8. Petitioners are represented in this action by attorney Stephen Walker. Attorney John F. Brink represented respondent SSD. Attorney Ernest G. Trakas represented Parkway.

¹ On September 17, 2004, petitioners moved to dismiss the due process complaint against Parkway C-2 School District. On October 1st, the Panel Chair issued an Order dismissing Respondent C-2 from this proceeding.

EVIDENCE AND WITNESSES

9. Petitioner called the following witnesses to testify:
- a) Martha Disbennett, Director of Early Childhood Special Education Program for SSD;
- b) Joy Coulis, Early Childhood Speech/Language Pathologist for SSD at the Carmen Trails Elementary School;
- c) Mary Busch, Special Education Teacher for SSD the Carmen Trails Elementary School;
- d) Debra Bryant Kormann, Occupational Therapist; and
- e) Petitioner, Mother of the minor child.
10. Respondent called the following witnesses to testify:
- a) Joy Coulis
- b) Marry Busch
- c) Jeanie Hall, Occupational Therapist for SSD;
- d) Kelly Fagala, Independent Contractor for SSD who completed a music therapy evaluation of [the Student] in the fall of 2003;
- e) Julie Snider, Associate Behavior Analyst for SSD.
11. Petitioners' exhibits **P-1** through **P-237** were offered and admitted into the record. Respondent's objections to **P-76, 79, 142, 233 and 235-237** are overruled. (Tr. 252-263; 2800-2838).
12. Respondent's exhibits **R-1** through **R-156** were admitted into the record. Petitioners' objections to **R-72, 74, 78, and 118** are overruled. Petitioners' objections to R-76, 142 and 143 were withdrawn. (Tr. 252-275; 2800-2838).

ISSUES PRESENTED FOR CONSIDERATION

13. Petitioner submitted a *Revised Specification of the Issues* on July 29, 2005, wherein the followings issues were raised:
- a) The school failed to properly evaluate and fully identify [the Student]'s disabilities and thereafter failed to craft an appropriately drafted IEP [i.e.

the IEP lacks sufficiently measurable Annual Goals and Short Term Objectives, functional and meaningful Objective or Evaluative Criteria, adequate Related and Support services] to address those needs for the 2002-2003 and 2003-2004 school years denying her a **Free Appropriate Public Education**.

- b) The school failed to provide the parents **adequate Prior Written Notice** of their actions for the 2002-2003, 2003-2004 and in violation of **20 U.S.C. Section 1415(b)** and (C) and **34 C.F.R. Section 300.503**.
- c) The school failed to provide necessary services for the 2002-2003 and 2003-2004 school years despite the student's entitlement and in so failing denied this student a **Free Appropriate Public Education** requiring the Petitioners to obtain these services privately and at their own expense.
- d) The school failed to address all the student's educational and social emotional needs for the past and present school years and in so failing denied him a **Free Appropriate Public Education**.
- e) The school failed to provide special education and related services designed to meet the individual educational, social and emotional needs of this student during the 2002-2003 and 2003-2004 school years and in so failing denied her a **Free Appropriate Public Education**.

FINDINGS OF FACT

14. The Student at issue is _____, who was born on November 29, 1999, and resides with her parents within the boundaries of the Parkway C-2 School District ("Parkway").

15. Parkway is one of fifteen school districts served by the Special School District of St. Louis County ("SSD"), wherein SSD provides special education services. (**Tr. 355**).

16. At all times relevant to this inquiry, the Student attended the Carman Trails Elementary School ("Carman Trails") in the Parkway district.

17. SSD operates an early childhood special education ("ECSE") classroom at Carman Trails for children ages 3-5. (**Tr. 495-496, 528-529, 875-876**).

18. The ECSE classroom at Carman Trails is an integrated classroom wherein non-disabled children participate in the classroom as “model” students². **(Tr.358-361)**.

19. An integrated ECSE classroom is designed for children with disabilities and the primary teacher is ECSE certified. However, the classroom allows for integration with non-disabled peers by including in the classroom children without disabilities.

20. The ECSE classroom at Carman Trails typically had up to eight disabled children and up to four non-disabled children. **(Tr. 358)**.

21. The ECSE classroom at Carman Trails utilized the Project Construct curriculum³, which addresses social interaction, motor skills, and play skills. **(Tr. 361, 864-865)**.

22. The Student first attended the ECSE classroom at Carman Trails on December 2, 2002, as a model student. **(Ex. R-6 at 30; Tr. 586, 1665)**.

23. Mary Busch was the primary special education teacher for the ECSE classroom at Carman Trails. Ms. Busch began teaching at Carman Trails in January 2000 and was the Student’s primary special education teacher for the 2002-2003 school year and the 2003-2004 school year. However, she was on maternity leave from March 2004 through the end of the 2003-2004 school year. Ms Busch holds a bachelor’s degree in Speech and Language. **(Tr. 1410)**.

24. Joy Coulis is a speech/language pathologist for Carman Trails. She is in the ECSE classroom at the Carman Trails classroom primarily on Mondays and Wednesdays, and

² Model students attend tuition-free. **(Tr.360)**.

³ SSD uses the local school district curriculum, which in the case of Parkway is Project Construct, and which is a State-approved, developmentally-appropriate curriculum. **(Tr.361, 863)**.

provided language services to the Student from February 2003 until the end of the 2003-2004 school year. **(Tr. 578-79, 647, 853, 1085).**

25. Ms. Coulis has both Bachelor's and Master's degrees in Speech Pathology and an additional 30 graduate hours of related education.

26. In the fall of 2002, the Petitioners contacted a SSD representative to inquire about having the Student attend the ECSE classroom at Carman Trails as a model (or non-disabled) student. Petitioners testified that the Student was not succeeding in her current preschool environment and it was thought that the ECSE classroom might provide the Student with a more positive environment.⁴ **(Tr. 1665-1666, 1671).**

27. The Petitioners, however, testified that they did not believe the Student necessarily had special needs and the Petitioners did not ask that the Student be evaluated to determine whether she needed special education and related services at that time or at any time before the Student turned three. **(Tr.1675, 1786. 1931).**

28. The Student began attending the ECSE classroom on December 2, 2002 -- the first school day after her third birthday -- as a model student. She attended the classroom two days per week. **(Ex. R-6 at 30, Tr. 586, 1677).**

29. This date appears to be the first time the student had contact with anyone from SSD. **(Tr. 359, 898-899).**

30. At this time, the Student had not been identified as a child with a disability, nor did she have an Individualized Education Program ("IEP").

31. On either the Student's first or second school day in December 2002, Petitioners were pulled aside by Mary Busch and Joy Coulis and advised to obtain a screening from

⁴ At this time, Petitioners had concerns about the Student not responding to her name, playing by herself a lot, appearing to be in her own world. **(Tr. 1661-1662).** There was also concern about her use of functional language.

Parkway because the instructors had concerns about the Student's socialization skills, eye contact and lack of following directions. **(Tr. 1677)**.

32. Ms. Coulis testified that she recalled telling the Petitioner that about developmental concerns she had observed in regard to the Student's functional communication, play skills, and social interactions. **(Ex. R-6 at 30; Tr. 902-908, 1677, 1955, 1961)**.

33. Ms. Busch also recalled noting that the Student had concerns with functional language, play skills, and interaction with peers. **(Tr.X:2192, 2196, 2199, 2304)**.

34. Screening activities to determine whether an evaluation for eligibility for special education should be conducted were initiated by Parkway in early December 2002. **(Ex. R-7, R-9 at 59)**.

35. The Student was referred for a special education evaluation in the areas of language, gross motor, social/emotional, and adaptive behavior on December 20, 2002. **(Ex. R-10 at 56, R-11, R-15, R-19 at 85)**.

36. Petitioners provided consent for the initial evaluation on January 23, 2003. The evaluation was subsequently completed on that date. **(Ex. R-15 at 68, R-19 at 84; Tr. 500-503, 566-568)**.

37. The evaluation process included background information provided by the Petitioners, which noted that they were not concerned about the Student's development in the area of motor skills. Instead, the Petitioner's were concerned about the Student's communication development. **(Ex. R-19 at 85-86)**.

38. The evaluation process included background information from Ms. Busch indicating that the Student was generally not able to make her want/needs known verbally, made

little eye contact, demonstrated little socialization skills with peers, and preferred to play by herself.

39. The evaluation process also included the following components: observation of the Student in the ECSE classroom on two different occasions, adaptive behavior assessment using the Scales of Independent Behavior – Revised, social and emotional behavior assessment using the Achenbach rating scales, assessment of communication skills using the Preschool Language Scale, and assessment of physical development using the Developmental Assessment of Young Children observation criteria. **(Ex. R-19).**

40. Based on the evaluation, SSD made a determination that the Student met the necessary criteria under the Missouri State Plan for being diagnosed as a *Young Child with a Developmental Delay* in the areas of communication, social/emotional/behavior, and adaptive behavior. **(Ex. R-19 at 89; Tr. 531-533).**

41. Under the Missouri State Plan, the diagnosis of *Young Child with a Developmental Delay* is defined as “a child ages 3 through 5 who is experiencing developmental delays, as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development, and who need special education and related services.” **(Missouri State Plan, Regulation III – Identification and Evaluation, pg. 22 (MoDESE 2001-2004).**

42. The criteria⁵ for determining initial eligibility for children ages 3 through 5 includes:

- A. The child’s development is at or below 1.5 standard deviations, or equivalent levels, of the mean in any TWO areas of development OR at or below 2.0 standard deviations, or equivalent levels, in any ONE area of

⁵ **Id.**

development. Areas of development that can be used to determine eligibility include physical, cognitive, communication, social/emotional or adaptive.

B. The child needs special education and related services.

43. Alternatively, the diagnosis may be given if in the professional judgment of the evaluation team:

A. The evaluation report documents (through formal and informal assessment) that a significant deficit exists -- even though the standard scores, or equivalent levels, do not meet the stated criterion levels, or,

B. The team determines that a child who is functioning above the stated criterion level and because of intensive early intervention, is eligible for services based on expected regression if services were to be terminated.

44. With respect to the Student, she had delays in communication, social/emotional/behavior, and adaptive behavior. The delay in communication was characterized as a mild delay, which typically means she demonstrated a 1.5 standard deviation from the average test score. In this case, the Student actually scored within the minus 1 standard deviation. Thus, eligibility in the area of communication was based on professional judgment rather than meeting objective criteria. **(Tr.289, 530-533; 962-966; Ex. R-17, R-19).**

45. The delays in social/emotional/behavior and adaptive behavior were characterized as moderate⁶ delays in that she demonstrated a 2.0 or greater standard deviation from the mean on the standardized test. **(Tr. 530-531; Ex. R-19).**

46. No delays were noted in the areas of fine and gross motor skills.

47. Under the Missouri State Plan, SSD also had the discretion to give a categorical diagnosis if warranted. **(Tr. 503).**

48. Under the Missouri State Plan, a categorical diagnosis of Autism is permissible when certain criteria are met.

⁶ A delay is characterized as severe if it is a 3.0 or greater standard deviation.

49. Autism is defined as “developmental disability significantly affecting verbal or nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child’s educational performance is adversely affected primarily because the child has an emotional disability as defined in this document. A child who manifests the characteristics of autism after age three could be diagnosed as having autism if the criteria above are satisfied.” (Missouri State Plan, Regulation III, pg. 13 (MoDESE 2001-2004)).

50. The January 23, 2003 evaluation was a comprehensive evaluation that adequately addressed areas of concern identified at that time. This initial evaluation of the Student was completed within the required timeframe and complied with necessary criteria set forth in the Missouri State Plan.

51. For a three-year-old child who undergoes an initial evaluation and meets the eligibility criteria for a diagnosis of *Young Child with a Developmental Delay*, there is no evidence offered in the record to support a finding that that SSD is required to instead identify the child using a categorical diagnosis label.

52. SSD’s initial diagnosis of *Young Child with a Developmental Delay* for the Student was appropriate.

53. The Student began attending the ECSE classroom at Carman Trails four days per week on or about January 29, 2003. (Ex. R-6 at 32).

54. An IEP was developed for the Student on February 7, 2003 as a result of the SSD evaluation. (Ex. R-25).

55. Both parents attended February 2003 IEP meeting. (**Id. at 103**).

56. The February 2003 IEP contained four goals that prioritized the Student's main areas of concern. The four goals were to be measured during the course of 12 months and were as follows: Goal #1: The Student "will respond to her name, 4 out of 5 opportunities." Goal #2: The Student "will imitate a variety of movements, 4 out of 5 opportunities." Goal #3: The Student "will use words to greet, depart, comment, request and protest, 4 out of 5 opportunities." Goal #4: The Student "will produce up to 4-5 part play schemes and interact with teachers and peers 4 out of 5 opportunities." (**Id. at 106-107**).

57. Each goal includes one or more benchmark/objectives.

58. Each goal is attributable in some fashion to the Student's Present Level of Educational Performance ("PLEP"), which reflects how the Student's disability impacts her involvement and progress with the general curriculum.

59. The goals in the February 2003 IEP describe measurable behaviors and include measurable criteria for assessing the Student's progress.

60. The February 2003 IEP called for 660 minutes per week of Early Childhood Special Education Instruction and 60 minutes per week of Language Therapy in an early childhood special education setting. (**Ex. R-25 at 108, 109**).

61. The February 7, 2003 IEP adequately addressed the Student's needs and allowed the child to receive meaningful educational benefit. (**Tr. 1973-1974, 2216**).

62. In February 2003, Petitioners took the Student to Garrett Burris, M.D., a pediatric physician, at the recommendation of the Student's pediatrician. (**Tr. 1717-18; Ex. R-143**).

63. In a letter dated February 20, 2003, Dr. Burris noted concerns generally related to the Student's social interaction. It was Dr. Burris's impression that the Student "falls within the

autism spectrum, albeit mild in view of what I believe to be of average intellect as well as normal language development.” (Emphasis added) (**Ex. R-143 at 990**).

64. Dr. Burris’ letter was not provided to SSD until sometime after the end of the 2003-2004 school year. Ms. Disbennett, for instance, testified that she first saw the document on July 7, 2004. (**Tr. 534-38**).

65. On or about February 24, 2003, the Student’s mother informed Ms. Coulis that Dr. Burris had diagnosed the Student as Pervasive Developmental Disorder Not Otherwise Specified (PPD NOS), which is on the autism spectrum. (**Tr. 694-96**).

64. Petitioners had regular contact with SSD as to the Student’s progress throughout the 2002-2003 and 2003-2004 school years.

65. In May 2003, an IEP/Reevaluation was completed and resulted in a recommendation that additional testing be completed in the areas of occupational therapy, music therapy and ABA. (**Ex. R-33 at 174; Tr. 1126-1129, 263**).

66. The PLEP of May 2003 IEP/Reevaluation stated that the IEP team felt that the Student was making sufficient progress on her current goals, but noted the parent’s request for a reevaluation to consider one-on-one intervention. (**Ex. R-32**).

67. At the end of the 2002-2003 school year, the Student’s mother completed an “Early Childhood Special Education Parent Evaluation.” In the evaluation, the Student’s mother strongly agreed with the following statements: “I am informed about my child’s progress,” “The information regarding my child’s progress is useful to me,” “My child’s teacher communicates regularly with me,” “My child’s teacher helps me to help my child learn at home.” (**Ex. R-40; Tr. 1377, 1840**).

68. The Student's mother also indicated that she like the fact that the ECSE classroom at Carman Trails provided individual attention; creative lesson plans; and a professional, personable & caring staff. **(Ex. R-40)**.

69. An occupational therapy evaluation for the Student was completed on June 25, 2003, at St. Louis Children's Hospital. **(Ex. R-43)**.

70. The evaluation was obtained in part to seek sensory strategies to assist with issues and/or problems at home.

71. The evaluation did not include input from the school staff.

72. Sensory integration is the ability of a person to take sensory input available to them in the environment and what is going on in the environment, to process that input, and then to produce an appropriate output. **(Tr.2341-2343)**.

73. The evaluation's purpose was to assess the Student's fine motor skills and sensory integration issues. **(Ex. R-69; Tr. 2348-2349)**.

74. On August 22, 2003, the Student was seen again by Dr. Burriss. Dr. Burriss noted that the Student's "primary problems have to do with eye contact, social interaction, and play skills." Dr. Burriss also noted that the Student was difficult child to place precisely, although she had "some autistic spectrum qualities."

75. Dr. Burriss' letter of August 22, 2003, was not seen by SSD until sometime after the end of the 2003-2004 school year.

76. The information from Dr. Burriss would not have changed the services SSD provided to the Student or her educational diagnosis. **(Tr. 1028, 1138)**.

77. Jeanie Hall was the occupational therapist in the Carman Trails classroom during the 2003-2004 school year until March 2004. Ms. Hall has a Bachelor's degree in Psychology

and a Master's degree in Occupational Therapy. She has worked in an early childhood program for SSD for eight years. **(Tr. 2344, 2338-39).**

78. Ms. Hall conducted an OT evaluation of the Student in the fall of 2003. **(Ex. R-69).** The OT evaluation concluded that the Student had a mild delay in fine motor skills and significant difficulty with sensory integration. **(Ex. R-56, R-69 at 410; Tr.2350, 2357).**

79. Ms. Hall recommended that the Student receive occupational therapy.

80. The ECSE classroom at Carman Trails included a variety of sensory activities within its daily schedule. **(Tr.2224-2226; 2346-2347).**

81. Julie Snider is employed by SSD as an associate behavior analyst with SSD's department of Applied Behavior Analysis ("ABA"). Ms. Snider has a Bachelor's degree in Psychology and Sociology, has taken Master's level courses in ABA, and is pursuing certification for Associate Level Behavior Analyst. **(Tr. 2602-2603, 2607-2610).**

82. ABA is a behavior methodology based on principles of behaviorism that uses prompting and reinforcement to modify behaviors.

83. Ms. Snider conducted an assessment during the summer and early fall of 2003 to determine whether ABA programming was appropriate for the Student. The report prepared by Ms. Snider concluded that the Student "may" benefit from ABA intervention. The report stated that if ABA was the methodology chosen by the IEP team, programs should focus on the areas of intraverbals⁷, toy play, and social interaction. The report did not conclude that the Student required ABA to benefit from special education and related services. **(Ex. R-64; Tr. 2610, 2631-34).**

84. Music therapy is the use of music to address non-musical goals.

⁷ An intraverbal is a task where a person answers a question verbally. **(Tr. 2628).**

85. Kelly Fagala is an independent contractor for SSD who completed a music therapy evaluation of The Student in the fall of 2003. Ms. Fagala has a Bachelor's degree in Music Therapy and a Master's degree in Psychology. She is a Board Certified Music Therapist and a Board Certified Behavior Analyst. Ms. Fagala's evaluation of the Student was the first music therapy evaluation that she had conducted for SSD. **(Tr. 2540, 2544).**

86. Ms. Fagala described the Student as very happy, friendly and outgoing, inquisitive, curious, and very active and interactive during her assessment. It was Ms. Fagala's understanding after speaking with Mrs. O'Dell and The Student's teachers that The Student had made progress in the areas of speech, social communication, imitation, social skills, play skills, and socialization with peers.

87. Ms. Fagala concluded in her report that music therapy was necessary for The Student to benefit from her special education because The Student appeared to receive a significant motivation or assist by music therapy strategies. **(Ex. R-63).**

88. A meeting attended by the Petitioners' was held on October 17, 2003, to review the results of the ABA assessment, the occupational therapy evaluation, and the music therapy evaluation. Written summaries of the findings were developed for each area. The written Music Therapy Assessment Report **(Ex. R-63)** was developed on October 12, 2003. The written ABBLS Basic Skills Review **(Ex. R-64)** was developed on October 17, 2003. The written Occupational Therapy Report **(Ex. R-69)** was completed on October 24, 2004. **(Tr. 834-837, 2360-2361, 2635).**

89. IEP meetings were held on October 30, 2003, November 4, 2003, November 10, 2003, November 19, 2003, and December 3, 2003. Each meeting lasted two to three hours and the meetings totaled approximately fifteen hours. **(Ex. R-84 at 521-525; Tr. 88-989, 1381).**

90. Petitioners attended each of the fall 2003 IEP meetings. Ms. Bryant Kornmann⁸ and two advocates, Jamie Huber and Jean Shoop, attended the meetings at the O'Dells' request. **(Ex. R-84 at 521-525; Tr.1382-1383, 1699).**

91. At the October 30, 2003 IEP meeting it was determined that the Student had met goals one and two in the February 7, 2003 IEP. At the December 3, 2003 IEP meeting it was determined that The Student was making sufficient progress toward meeting goals three and four by the time the IEP was scheduled to end on February 6, 2004. **(Ex. R-84 at 486-7).**

92. The December 2003 IEP notes the following changes since the Student's last IEP: readily imitates, uses words to request, comment, and protest, responds to her name, emergence of play schemes, level of play, overall development in all areas. **(Ex. R-84 at 484).** The changes reflect progress that the Student had made. The IEP references the OT, music therapy, and ABA assessments.

93. The Student received meaningful educational benefit from the February 2003 IEP and exhibited progress through December 2003.

94. Despite the Student's progress, the record shows that the Student would continue to benefit from an IEP.

95. The December 3, 2003 IEP contained twelve goals and called for 525 minutes per week of early childhood special education, 90 minutes per week of language therapy, 60 minutes per week of occupational therapy, 30 minutes per week of music therapy, and 15 minutes per week of music therapy consult in an early childhood special education setting. **(Ex. R-84 at 488-496).**

⁸ Ms. Bryant Kornman provides private ABA services. She observed the Student in the Carman Trails classroom on October 29, 2003, at the O'Dells' request. **(Ex. R-71).**

96. The goals and objectives included suggestions made by the O'Dells and their advocates. **(Tr.1859)**.

97. Goals contained in the December 3, 2003 IEP reflect an increasing level of difficulty compared to goals contained in the February 7, 2003 IEP. The increasing level of difficulty is evidence of progress that The Student made during the time the February 7, 2003 IEP was implemented. **(Ex. R-84 at 488-494, R-25 at 106-107; Tr. 2172-2173)**.

98. The December 3, 2003 IEP goals appropriately addressed the Student's needs in the areas of intraverbals, toy play, and social interaction.. The IEP services allowed the Student to benefit from the IEP goals and objectives. **(Tr. 2642-2647)**.

99. The December 2003 IEP appropriately addressed the Student's needs and allowed her to receive meaningful educational benefit.

100. Petitioners requested additional goals be added to the December 3 2003 IEP. SSD did not agree that some of the requested goals were needed. Notices of Action providing notice that SSD refused to include some of the requested goals were prepared and are included with the December 2003 IEP. **(Ex. R-84 at 507-519)**.

101. Petitioners requested that 15 hours per week of in-home, one-on-one ABA be included in the December 3, 2003 IEP. **(Ex. R-86)**. The request was denied and SSD provided a Notice of Action to that effect. **(Ex. R-84 at 520)**.

102. At all times, the services provided to the Student (i.e., special education and/or related services) were adequate.

CONCLUSIONS OF LAW

Jurisdiction

This matter arises under the Individuals with Disabilities Education Act, 20 U.S.C. §

1400, *et seq.* (“IDEA”) and Missouri law, § 162.670, RSMo., *et seq.* Pursuant to 20 U.S.C. § 1415⁹ and § 162.961, RSMo,¹⁰ this Hearing Panel has jurisdiction to hear this dispute.

IDEA Requirements

In exchange for federal funding, the IDEA requires states to identify, locate, and evaluate “all children residing in the State who are disabled . . . and who are in need of special education and related services . . .” 20 U.S.C. § 1412(2)(C) (1994). Participating states and their public education agencies are obligated to “provide all students with disabilities with free appropriate public education,” which is at times referred to as FAPE. *Breen v. St. Charles R-IV School District*, 2 F. Supp. 2d 1214, 1221 (Mo. E. Dist. 1997). FAPE is defined by federal statute to mean:

special education and related services that –

- (A) have been provided at public expense, under public supervision, without charge,
- (B) meet the standards of the State educational agency,
- (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and
- (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

⁹ A parent of a child with a disability has the right to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” 20 U.S.C. § 1415(b)(6). “Whenever a complaint has been received under subsection (b)(6) . . . , the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.” 20 U.S.C. § 1415(f)(1).

¹⁰ Subsection 3 states that a “parent, guardian or the responsible educational agency may request a due process hearing by the state board of education with respect to any matter relating to the identification, evaluation, educational placement, or the provision of a free appropriate public education of the child.”

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

Since its enactment, several court cases have shaped IDEA's interpretation and application of FAPE. Perhaps most notably, the Supreme Court announced in *Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-207 (1982), that:

The 'free appropriate public education' required by the Act is tailored to the unique needs of the handicapped child by means of an 'individualized educational program (IEP). **Section 1401(18).** The IEP . . . [is] a written document containing '(A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short term objectives. . . (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.' **Section 1401(19).** *Rowley* at 181-182.

Equally important, however, is that the *Rowley* decision holds that IDEA does not prescribe any substantive standard regarding the level of education to be accorded to disabled children and does not require "strict equality of opportunity or services." 458 U.S. at 189, 195, 198. Instead, the Local Educational Agency ("LEA") fulfills the requirement of FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203.

The primary vehicle for carrying out the IDEA's goal of personalized instruction is the Individualized Education Program ("IEP"). 20 U.S.C. § 1414. Significantly, an IEP is not required to maximize the educational benefit to the child or to provide each and every service and accommodation that could conceivably be of some educational benefit. *Rowley*, 458 U.S. at 199. Instead, an appropriate education program is one that is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207; *Gill v. Columbia* 93 Sch. Dist. 217 F.3d 1027, 1035-36 (8th Cir. 2000).

In articulating the standard for FAPE, the Rowley Court concluded that “Congress did not impose any greater substantive educational standard than would be necessary to make such access meaningful.” *Id.* at 192. According to the Court, Congress’s intent was “more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.” *Id.*

Issues Raised For Consideration

Petitioners raised the following the issues in their *Revised Specification of Issues*:

1. The school failed to properly evaluate and fully identify [the Student]’s disabilities and thereafter failed to craft an appropriately drafted IEP [i.e. the IEP lacks sufficiently measurable Annual Goals and Short Term Objectives, functional and meaningful Objective or Evaluative Criteria, adequate Related and Support services] to address those needs for the 2002-2003 and 2003-2004 school years denying her a **Free Appropriate Public Education**.
2. The school failed to provide the parents **adequate Prior Written Notice** of their actions for the 2002-2003, 2003-2004 and in violation of **20 U.S.C. Section 1415(b)** and (C) and **34 C.F.R. Section 300.503**.
3. The school failed to provide necessary services for the 2002-2003 and 2003-2004 school years despite the student’s entitlement and in so failing denied this student a **Free Appropriate Public Education** requiring the Petitioners to obtain these services privately and at their own expense.
4. The school failed to address all the student’s educational and social emotional needs for the past and present school years and in so failing denied her a **Free Appropriate Public Education**.
5. The school failed to provide special education and related services designed to meet the individual educational, social and emotional needs of this student during the 2002-2003 and 2003-2004 school years and in so failing denied her a **Free Appropriate Public Education**.

Evidence in support and against these issues was presented to the Three Member Due Process Panel over the course of a 14-day hearing. As to Petitioners’ first issue, it is the Panel’s determination that two related but distinct questions are posed: first, was this Student properly

diagnosed? Second, were the IEPs for this Student appropriately drafted? Upon consideration of all evidence and our review of the record as a whole the Panel is unanimous in its conclusion that for the 2002-2003 school year that the Student was appropriately diagnosed as a *Young Child with a Developmental Delay* in the areas of communication, social/emotional/behavior, and adaptive behavior. Petitioners assert that evidence supports a categorical diagnosis of autism as early as the February 2003 IEP. Alternatively, Petitioners assert that an autism diagnosis was warranted for the other IEP at issue. A majority of the Panel disagrees and finds that the diagnosis given by SSD was appropriate for the 2003-2004 school year.¹¹

As SSD testified and as the entire Panel understands relevant law to require, the diagnosis alone does not drive services provided to the Student. Under IDEA, 34 C.F.R. § 300.300(a)(3)(ii) “[t]he services . . . needed by each child with a disability to receive FAPE must be based on the child's unique needs and not on the child’s disability.” Therefore, the Panel disagrees that failing to diagnose the Student as autistic prevented SSD from crafting an appropriate IEP or prevented SSD from providing the necessary services to address the Student’s special education needs as required by FAPE.

Given that mild nature of the Student’s delay the Panel cannot say that the initial diagnosis of a *Young Child with a Developmental Delay* was improper given the criteria utilized in the Missouri State Plan. Petitioners offer little to no evidence to refute SSD’s contention that the Student’s delays were consistent with a *Young Child with a Developmental Delay*. The Panel majority also finds that diagnosis was appropriate for the December 2003 IEP. We agree that the Student exhibits certain characteristics that are associated with the autism spectrum. The majority also would not take issue with SSD if it had used a categorical diagnosis of autism.

¹¹ Panel Member Rand Hodgson as set forth in his separate opinion believes there was sufficient basis for an autism diagnosis at the time of the December 2003 IEP.

However, the record as a whole contains more than sufficient basis for the diagnosis actually rendered. Furthermore, both parties acknowledge that the diagnosis given does not drive the services provided to Student. The Student's unique needs drives the services provided.

The Panel is divided, however, on the remaining issues. As discussed below, two members of the Panel believes the evidence supports a finding in favor of SSD on all issues. One member of the Panel respectfully dissents and believes that evidence favors Petitioners. Unless otherwise indicated below, the following reflects the majority's position on the remaining issues.

A. The Appropriateness of the IEPs Drafted.

Under IDEA, an IEP must include: "a statement of the child's present levels of educational performance, including-(1) how the child's disability affects the child's involvement and progress in the general curriculum." **20 U.S.C. 1414(d)(1)(A)(I)**. Petitioners assert that these "critical pieces of information" are missing from the IEPs challenged and that without this information it is impossible to measurable Annual Goals and Short Term Objectives. However, the majority is aware of no binding legal authority that sets forth exact specificity requirements. See generally, *O'Toole v. Olathe Dist. Schs.*, 144 F.3d 692, 706 (10th Cir. 1998) ("there is no legal authority requiring a particular level of specificity in the statement of annual goals). Furthermore, "minor technical procedural violations should not lead to a finding of a denial of FAPE," *Doe v. Defendant I*, 898 F. 2d 1186, 1190 (6th Cir. 1990).

It is the majority's position that the evidence presented supports a finding and conclusion that the IEPs drafted by SSD for the Student contained sufficient Annual Goals and Short Term Objectives, including functional and meaningful evaluative criteria. This finding and conclusion does not mean the SSD cannot or should not attempt to write more comprehensive Goals and

Objectives when appropriate. Rather, based on the evidence presented and then current state of the law, it is the majority's position that the initial IEP goals and objectives (February 2003) were developed with Petitioners involvement¹², were consistent with the needs addressed in the Present Level of Educational Performance (PLEP), reflected how the Student's disability affected the child's involvement and progress in the general curriculum, and were reasonably calculated to confer educational benefit. The evidence shows the Petitioners were satisfied with the IEP and the student's progress through the spring of 2003. In response to later concerns of the Petitioners, SSD completed several additional evaluations and engaged in a lengthy IEP development process in the fall of 2003 and resulting the December 2003 IEP. The December 2003 IEP includes more goals and services than the February 2003 IEP, which should not be construed as an indictment of the initial IEP, but instead demonstrates the additional information gained about the Student (including parental input) during that time.

As SSD correctly notes, the key inquiry in determining whether a school district is providing FAPE is to assess "whether a proposed IEP is adequate and appropriate for a particular child at a given point in time." **Burlington v. Department of Educ.**, 736 F.2d 773, 788 (1st Cir. 1984). With respect to the February 2003 and the December 2003 IEPs, each IEP was adequate and appropriate at that given point in time. As a result, Petitioners' assertion that the Goals and Objectives were immeasurable is simply unpersuasive given the totality of the evidence presented.

B. The Adequacy of the Prior Written Notices.

¹² The Panel ruled at **Tr.169** that Petitioners had withdrawn its claim for relief with respect to the parent participation in the IEP process prior to the hearing and were barred from raising it.

Under IDEA Regulation 34 CFR Part 300 Sec. 300.503 (b), the content of a Notice of Action shall provide:

- (1) A description of the action proposed or refused by the Agency;
- (2) An explanation of why the agency proposed or refuses to take the action;
- (3) A description of any other options that the agency considered and the reasons why those options were rejected.
- (4) A description of each evaluation, procedure, test record, or report the agency used as a basis for the proposed or refused action.
- (5) A description of any other factors that are relevant to the agency's proposal or refusal. . .

Petitioners also contend that the Notice of Actions sent by SSD were inadequate. First, the majority is unable to find a single instance in the record where a Notice of Action was not sent. Second, it is the majority's determination that Notice of Actions sent in this case adequately provided the information required by the IDEA. See 34 C.F.R. § 300.503(b). Third, Petitioner's contention strikes the majority as impacting a technical procedural right in this particular instance as the Petitioners attended all meeting and had regular contact with SSD. Under *Doe v. Defendant I*, supra, such an error would not result in a denial of FAPE. Furthermore, the purpose of the IDEA's procedural safeguards is to ensure that parents are able to participate in the development of their child's IEP. See, Independent Sch. Dist. No. 283 v. S.D. by J.D., 88 F.3d 556, 562 (8th Cir. 1996). The evidence in the record, if anything, shows that the parents were interested in and participated in development of their child's IEP. Thus, the majority finds in favor of SSD on this issue.

C. The Adequacy of the Special Education and/or Related Services Provided

Petitioner in their *Revised Specification of Issues* (Issues #3 and #5) asserts that the special education and/or related services provided to the Student were not adequate and, therefore, in violation of FAPE. While the *Revised Specification of Issues* does not contain specific examples of the type services missing, Petitioners asserts in their brief that the failure to provide: a definitive sensory diet, ABA services, toileting goals and objectives, music therapy, occupational therapy and a shadow invalidates the February 2003 IEP and the services received in the 2003-2004 school year. The fact that some of these items were added to the December 2003 IEP does not mean SSD was in error in not providing them earlier. Furthermore, the fact that the IEP team did not include all of these items in the second IEP does not render it inadequate; nor does it render the services provided to the Student in the 2003-2004 school year in appropriate.

IDEA does not require SSD to provide the best possible education at public expense. See *Ft. Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997). Instead, IDEA requires an educational program “reasonably calculated to enable the child to receive educational benefits.” *Rowley*, supra. The supports SSD’s position that the services provided here met this goal. Therefore, the majority finds in favor of SSD on this issue.

D. Remaining Issues.

The only remaining issues are Petitioners’ assertion that the Student’s educational and social emotional needs were not properly addressed for the school years in questions and the separate issue of remedies owed by SSD for its asserted failures under FAPE. The majority believes the issue of education and social emotional has already been addressed in the findings and conclusions reached on the adequacy of the IEP and the services rendered. Therefore, the majority finds in favor of SSD on this issue. With respect to remedies, Petitioners assert they are

entitled to reimbursement for the out-of-pocket expenses incurred to date and for compensatory services for the 2002-2003 and 2003-2004 school years. This requested relief is denied due to the fact that Petitioners were not successful in their underlying claims.

CONCLUSION

The Panel unanimously concludes that the Student was appropriately diagnosed by SSD. A majority of the panel finds in favor of SSD on all other issues. Panel member Rand Hodgson dissents in part as set forth in his separate opinion and believes that portions of the IEP and/or the services provided there under violated FAPE.

NOTICE OF RIGHT TO APPEAL

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

SO ORDERED this ____ Day of October 2005.

EDWARD F. WALSH
CHAIRPERSON

Concurring in the Findings of Fact, Conclusions of Law, and Decision and Order entered on

October 3, 2005:

GEORGE WILSON

Concurring in part and Dissenting in part in the Findings of Fact, Conclusions of Law, and Decision and Order entered on October 3, 2005:

RAND HODGSON

Copies mailed to:

Rand Hodgson, Panel Member

George Wilson, Panel Member

Pam Williams, DESE

John F. Brink, attorneys for respondent SSD

Stephen Walker, attorney for petitioners