



## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **ISSUES**

This matter involves the education of student. Student has been receiving educational services partly at home school (the LEA in the Ferguson-Florissant School District in conjunction with the Special School District of St. Louis County) and another part at Giant Steps of St. Louis. The IEP team proposed an IEP that would have transitioned student from part-time at Giant Steps to a full day at the LEA where student would receive all educational and related services.

The District's position is that student needs to be in home school. That the longer student is allowed to remain at Giant Steps the further student will fall behind regular education classmates, student's peers. The parent requests related services for student to be continued at Giant Steps.

The IEP team wrote the March 11, 2005 IEP with a view toward transitioning student from partial time at Giant Steps to a full day at the LEA. By the filing of the requests for due process and denial of the opportunity to conduct the evaluations, the parent has effectively prevented the districts from implementing the logical transition plan as outlined in the March 11, 2005 IEP. That time has passed. It is now time to move forward with student's education and for this Hearing Panel to order placement in the more appropriate educational setting, the least restrictive environment, at the LEA.

### **I. Facts**

#### **A. Overview**

1. Student is a ten (10) year old (DOB: ) who resides with parent within the boundaries of the Ferguson-Florissant School District (Ferguson-Florissant) and the Special School District of St. Louis County ("SSD").
2. Student resides with parent and four siblings. They all live with and in student's maternal grandparents' home which is located directly across the street from the LEA, down the street approximately houses (Tr. II, p. 20-21, 1.5-25; 1.1-11).
3. Ferguson-Florissant is a Missouri school district organized pursuant to Section 162.461 *et seq* RSMo.
4. SSD is responsible for identifying and serving special education students in the Ferguson-Florissant School District, pursuant to the directives of the Missouri Department of Elementary and Secondary Education ("DESE") and Missouri State Plan for Special Education ("State Plan").
5. Student was evaluated and determined to be eligible for services as a child with an educational disability of autism. (Ex. R-1 at p. 1 and Tr. II, p. 19, 1. 3-10). In addition, student has a speech delay and a medical diagnosis of Tourette's Syndrome. (Ex. R-20 at p. 182 and Tr. II, p. 19, 1. 19-23).
6. Parent enrolled student in Kindergarten in the Ferguson-Florissant School District. Student was assigned to a self-contained classroom at the Halls Ferry Elementary School but parent pulled student out of school. (Tr. II, p. 8, 1. 16-18). On November 8, 2001, an annual Individualized Education Program ("IEP") was developed for student. (Ex. R-1). The IEP called for 874 minutes per week of special education services. (Ex. R-1 at p. 15). The IEP did not specifically call for any related services to be provided to student. However, that IEP did call for the placement to be in a separate

school for special education services. (Ex. R-1 at p. 16). The separate school that student attended was Giant Steps. (Tr. II, p. 27, 1. 18-22). Student completed the 2001-2002 school year attending Giant Steps approximately two and one-half days a week and the LEA the other two and one-half days. (Tr. II, p. 27, 1.13-22).

7. SSD, at no cost to parent, has paid and continues to pay the costs for educating student through a contract with Giant Steps. (Tr. I, p. 120, 1.2-5).

8. During student's first grade year (2002-2003) an IEP was developed on November 7, 2002. That IEP provided for 150 minutes per week of special education instruction in social skills and academics and 30 minutes per week of speech therapy to be provided in a special education purchase of service agency (Giant Steps). The 30 minutes per week of speech therapy was the only related service called for in the IEP. The IEP also provided for supports across all school environments. Student attended Giant Steps for one-half day for special education services and home school for the remainder of the week. Student received 1,620 minutes per week of general education services. (Ex. 2 at p. 36).

9. During student's second grade year, 2003-2004, an IEP was developed on October 8, 2003. The IEP provided for 210 minutes per week of special education instruction in reading and math in a special education setting (the LEA) and 630 minutes per week (one and one-half days) of "instruction in task completion, reading, writing, math, OT and slang" in a special education/purchase of service setting (Giant Steps). (Ex. R-4 at p. 63). The IEP identified no separate related services to be provided for student in the "Related Services" section on the Services Summary page of the IEP. (Tr. I, 200, 16-19). Goals in the October 8, 2003, IEP addressed completing activities,

reading passages and demonstrating comprehension, increasing math skills, increasing speech intelligibility, increasing ability to spontaneously ask and answer questions, and increasing sound/symbol relationships in words. (Ex. R-4 at p. 59 to 62).

10. As a result of the two (2) requests for due process filed by parent, and the stay put provisions of the IDEA, the Oct. 8, 2003, IEP Goals have been the Goals addressed by school staffs for the 2003-2004 and 2004-2005 school years (Tr. I, p. 201, 1. 13-18). Student has made progress on these goals. (Ex. R-9 at p. 104 to 107).

11. During student's third grade year, 2004-2005, an IEP was developed on October 4, 2004. The IEP called for 420 minutes per week of special education instruction in social skills and instruction in written language in a special education private separate day school facility, 240 minutes per week of special education instruction in reading and math, 1,044 minutes of instruction in a general education setting, 60 minutes of occupational therapy (OT) in a special education setting, 60 minutes of speech and language therapy in a special education setting, 60 minutes per week of occupational therapy (OT) in a special education purchase of services setting, and 60 minutes of speech and language in a special education purchase of services setting. The occupational therapy (OT) and speech/language therapy that were to be provided at both Giant Steps and the LEA are identified as related services. There are no other related services identified in the IEP. The IEP also called for full support across all environments. The IEP noted that student was to attend one day per week at a private separate day school facility. (Ex. R-9 at p. 112).

12. Parent disagreed with the proposed October 4, 2004 IEP and requested a resolution conference. The resolution conference was held on October 27, 2004. (Ex. R-

12). The Resolution Conference Chair, Ms. Vicki McNamara, Director of Special Education, sent a letter to parent with a summary from the Resolution Conference.

13. On November 9, 2004, parent wrote a letter to Ms. Pamela Williams, DESE, requesting a due process hearing. (Ex. 17 at p. 146). The request was received by the DESE on November 15, 2004. On December 3, 2004, parent filed a First Amended Due Process Hearing Request. (Ex. 17 at p. 141-145). The specific issue identified in the request was the proposed change in the placement/location of services from Giant Steps to the LEA. Because of parent's disagreement with the October 4, 2004, IEP, the October 8, 2003, IEP became then the "stay-put" IEP. (Tr. I, p. 241, 1. 5-25 and p. 241, 1. 1-3).

14. On February 24, 2005, parent withdrew the November 15, 2004, request for a due process hearing. (Ex. R-17 at p. 140). Although parent withdrew the request for a due process hearing challenging the October 4, 2004, IEP (R-9), the school staffs agreed to continue to implement the October 3, 2003 (R-4) IEP.

15. On March 11, 2005, the IEP team convened to develop an IEP (R-19). The IEP had two separate Services Summary pages. For the balance of the 2004-2005 school year, the IEP called for 300 minutes per week of special education instruction in reading and math in a special education setting until August 14, 2005, 280 minutes per week of special education instruction in social skills and written language in a private separate school until August 14, 2005, 60 minutes per week of occupational therapy (OT) in a special education setting until August 14, 2005, 15 minutes per week of occupational therapy – consult until August 14, 2005, 120 minutes per week of language therapy in a special education setting until August 14, 2005, and 60 minutes per week of occupational therapy (OT) in a private separate school until August 14, 2005. (Ex. R-19 at p. 163).

The IEP identifies the occupational therapy, OT – consult and language therapy as related services. There are no other related services identified in the IEP. Student would have attended Giant Steps one day per week and the LEA four days per week for the balance of the 2004-2005 school year. The IEP identifies modifications and accommodations on the Alternate Form Parts 1 and 2. Modifications and accommodations include a sensory diet and support across all environments as needed. (Ex. R-19 at p. 169 and p. 170 and Tr. I, p. 224, l. 12-25).

16. The March 11, 2005, IEP planned services for the 2005-2006 school year to include 600 minutes per week of special education instruction in academics and social skills, 120 minutes per week of language therapy, 60 minutes per week of occupational therapy (OT), and 10 minutes per week of OT – consult. The language therapy, occupational therapy, and OT – consult are identified as the only related services required. (Ex. R-19 at p. 164). For the 2005-2006 school year, the IEP called for all of student's services to be provided at the LEA.

17. At the March 11, 2005 IEP, the team requested additional evaluations in the areas of music therapy, OT sensory, and assistive technology. (Tr. II, p. 36, l. 11-25). Parent did not allow the SSD to proceed with the evaluations. (Ex. R-24; Tr. II, p. 37, l. 24-25; p. 42, l. 20-23).

18. At the hearing, parent agreed to allow the SSD to conduct the requested evaluations in the areas of music therapy, OT – sensory evaluation and an assistive technology evaluation. (Tr. II, p. 83, l. 1-7; Tr. II, p. 86, l. 9-12; Tr. II, p. 94, l. 20-25; Tr. II, p. 95, l. 8-17).

19. Ms. Vicki McNamara testified that the purpose in requesting the evaluations was to begin the transition from Giant Steps to the LEA, the least restrictive environment, with the appropriate supports in place. The District wanted to complete the evaluations and have the approximate 10 weeks of transition. (Tr. II, p. 137, l. 14-25; Tr. II, p. 138, l. 1-11). The team proposed one day per week at Giant Steps and four days per week at the LEA in order to introduce some of the therapies in the school setting at the LEA that had been performed at Giant Steps, including the OT and speech services. The transition plan called for full day placement at the LEA, once there was time to transition student and complete the evaluations. (Tr. II, p. 146, l. 13-15).

20. Parent informed Ms. Berger and Giant Steps that there was no need for the Giant Steps staff to attend the March 11, 2005 IEP. (r. I, p. 192, l. 4-9; Tr. II, p. 78, l. 12-24).

21. On March 17, 2005, the Missouri Department of Elementary and Secondary Education received a request for a due process hearing from parent. (Ex. R-20). Parent had written the request for the due process hearing the day before the IEP. (Ex. R-20 at p. 186 and Tr. II, p. 32, l. 13-21).

22. The October 4, 2004 IEP became the "stay-put" IEP when parent filed a request for due process. However, the SSD and parent agreed to continue the placement of one and one-half days per week at Giant Steps for the balance of the 2004-2005 school year. (Tr. II, p. 34, l. 3-17).

23. Parent identified the issue for due process as the change of placement and location of services from Giant Steps to the LEA. Parent seeks reinstatement of the placement at Giant Steps through August 20, 2006, and that student receive music

therapy, listening therapy, two hours of speech therapy, and social skills therapy at Giant Steps. (R-20).

24. Nowhere in any of the IEPs does it say that music therapy is a related service. (Tr. II, p. 45, 1. 21-24).

25. No speech therapist from the LEA has ever worked with any of parent's children. When challenged on parent's opposition to allowing speech therapy at the LEA, parent stated that parent "would have to go back on that one" regarding the complaint about the quality of speech therapy at the LEA. (Tr. II, p. 57, 1. 6-24).

26. Parent does not have a problem with the occupational therapist servicing student at the LEA. Parent respects the occupational therapist at the LEA very much and indicated that the OT has helped parent's other student out immensely. (Tr. II, p. 63, 1. 18-25).

27. Giant Steps is a separate private school for students with autism. The school currently has approximately 22 students. SSD has several students with IEPs at Giant Steps. Ms. Betty Berger is the director of the Giant Steps St. Louis program.

28. Ms. Berger testified that we are stressing students by putting them in the regular education setting; and "we're doing that for good reason, because they gain a lot from being with their typical peers." (Tr. I, p. 125, 1. 4-8). Ms. Berger indicated that student has "already been successful at [the LEA]" and "does wonderful at [the LEA], and [student] manages to maintain [student's], you know, [student's] appropriate school behavior." (Tr. I, p. 136, 1. 2-10).

29. Ms. Jean Burns has been student's special education teacher at Giant Steps since student has attended Giant Steps. (Tr. I, p. 27, 1. 2-3).

30. Ms. Burns testified that while at Giant Steps student does not see typical behavior, dealing with other students. And that when student is at school at the LEA, student is going to see kids that are more typical kids. (Tr. I, p. 67, 1. 4-21; Tr. I, p. 39, 1. 7-16).

31. Ms. Betty Berger testified that student has benefited from education at the LEA. She noted student really benefits from being in a classroom of typical peers because student is modeling their behaviors, and student has really gained a lot by being with typical peers. (Tr. I, p. 180, 1. 8-17).

32. Student attended Giant Steps on Monday afternoons and all day Thursday during the 2004-2005 school year. Student's schedule at Giant Steps was:

Monday afternoon:

12:15 to 12:30	Sensory Activities
12:30 to 1:30	OT (with sensory)
1:30 to 2:00	Snack/Therapeutic Listening (described as listening to CD)
2:00 to 3:00	Academics

Thursday

9:00 to 10:00	Speech/language therapy
10:00 to 10:30	Snack/Listening Therapy
10:30 to 11:30	Academics
11:30 to 12:00	Lunch
12:00 to 12:30	Undesignated activity
12:30 to 1:30	Play therapy
1:30 to 2:00	Sensory time
2:00 to 3:00	Music therapy (group)

33. Ms. Burns testified that student has made progress in the educational program (Tr. I, p. 63, 1. 16-17).

34. During the 2004-2005 school year, Ms. Jannie Noise was assigned as student's paraprofessional. Ms. Noise accompanied student at both the LEA and Giant Steps (Tr. I, p. 270, 1. 13-16).

35. The LEA is a regular education home school in the Ferguson-Florissant School District. While at the LEA, student participates in the regular education curriculum offered by the LEA. (Tr. II, p. 164, 1. 1-6). The LEA is student's home school and the street student lives on leads directly to the school. The LEA has also been designated as a Reading First School by the United States Department of Education under the provisions of Title I, also known as the No Child Left Behind Act (NCLB). All the LEA students in grade kindergarten through grade three participate in Reading First. (Tr. I, p. 203, 1. 22-25 and p. 204, 1. 1-12).

36. Student participated in the Reading First program on the days of the week that student was at the LEA. Student received 90 minutes of direct reading instruction from Ms. Roe and 30 minutes of one-on-one reading interventions from Ms. Pickardt. (Tr. II, p. 204, 1. 16-24). The Reading First program requires assessment of skills every two weeks using a DIBELS assessment. (Ex. R-27 and Tr. I, p. 212, 1. 14-25).

37. Ms. Jacquelyn Roe was student's third grade teacher at the LEA. Ms. Roe holds life certification as an elementary teacher. She has earned a bachelor's degree, a master's degree, and has thirty additional credit hours beyond her master's degree. She has 31 years of experience as a teacher at different grade levels. She has worked in Ferguson-Florissant since 1976. Ms. Roe provided instruction to student with the general education curriculum approved by Ferguson-Florissant.

38. Ms. Roe noted that the transition to third grade was difficult for many students. Third grade is the first grade where students receive letter grades. (Tr. II, p. 177, 1. 22-25, p. 178, and p. 179, 1. 1-6). Ms. Berger also testified of the dramatic change from second to third grades, (Tr. I, p. 124, 1. 13-20).

39. Ms. Roe testified that student made progress in her classroom during the 2004-2005 school year. That progress is reflected in the Third Grade progress report. (Ex. R-25 at p. 224).

40. Dr. Gwendolyn Diggs is principal at the LEA. Dr. Diggs has earned a bachelor's degree, master's degree, and a doctorate degree in education. She holds Missouri certification both as a teacher and an administrator. (Tr. II, p. 185, 1. 9-15).

41. Student has never been referred to Dr. Diggs' office due to inappropriate behaviors. (Tr. II, p. 196, 1. 8-10).

42. Student's behaviors have not been an issue at school. (Tr. II, p. 88, 1. 1-5; Tr. I, p. 126, 1. 21-25; Tr. I, p. 136, 1. 2-9; Tr. II, p. 107, 1. 18-20; Tr. II, p. 110, 1. 4-11; Tr. II, p. 119, 1. 6-14).

43. At the LEA, all students participate in a social skills program adopted through the SSD. The social skills program (High Five program) teaches five concepts of being kind, safe, cooperative, peaceful and respectful. (Tr. II, p. 200, 1. 4-10). In Dr. Diggs' observations, student follows all the high Five social skills rules. (Tr. II, p. 202, 1. 1-2).

44. Student's attendance has been an issue. Dr. Diggs, principal at the LEA, testified that student was absent 26 days in kindergarten, absent 20 days in first grade, absent 27 days in second grade, and absent 27 days in third grade. In addition, student was tardy 24 days in kindergarten, 54 days in first grade, 27 days in second grade, and 56 days in third grade. (Tr. II, p. 193, 1. 12-21; Ex. R-14 at p. 130; Ex. R-26 at p. 227 to p. 240; and Ex. R-26 at p. 241 to p. 296). Student was also tardy at Giant Steps.

45. Ms. Pickardt and Ms. Roe testified that it was their professional opinions that student's attendance and tardies have impaired his achievement at school. (Tr. I, p. 230, 1. 6-13).

46. Dr. Diggs and Ms. Roe expressed an opinion that student could attend the LEA full time. (Tr. II, p. 198, 1. 16-25 and Tr. II, p. 170, 1. 25 and p. 171, 1. 1-5).

47. Ms. Susan Pickardt was student's special education teacher at the LEA. Ms. Pickardt is certified by the State of Missouri in special education for grades kindergarten through twelfth grade in behavior disorders and mental retardation. She also has certification as an elementary teacher. She has both a bachelor's degree and a master's degree. She has 29 years of teaching experience with 27 of those years with the SSD. (Tr. I, p. 198, 1. 16-25 and p. 199, 1. 1-10).

48. The 2004-2005 school year was the first school year that Ms. Pickardt worked with student. She saw student for about 210 minutes each week for the four days student was at the LEA. Because of her schedule, she was able to see student on a one-on-one basis. (Tr. I, p. 202, 1. 12-24). Ms. Pickard testified that student made progress in her resource classroom during the 2004-2005 school year. Ms. Pickardt noted student made progress in reading as documented by student's performance in the DIBELS assessments (Ex. R-27) and Bright Surprises (Ex. R-28) reading intervention. (Tr. I, p. 207, 1. 23-25 and p. 208, 1. 1). She also noted progress in math using the Scott Foresman. (Tr. I, p. 227, 1. 24-25 and p. 228, 1. 1; Ex. R-29). Ms. Pickardt also noted progress on student's IEP goals. (Tr. I, p. 202, 1. 4-8 and Ex. R-33).

49. Ms. Roe and Ms. Pickardt had a communication procedure in place to coordinate student's educational program at the LEA. They frequently talked and shared

information (Tr. I, p. 226, 1. 20-25) using a student profile sheet (Ex. R. 30 at p. 318) and an assignment sheet (Ex. R-32 at p. 321 to p. 356) and weekly teacher notes (Tr. I, p. 228, 1. 19-25).

50. The communication with Giant Steps was mainly through the paraprofessional, Ms. Noise. (Tr. I, p. 228, 1. 15-24 and Tr. II, p. 171, 1. 24-25 and p. 172, 1. 1-8).

51. Ms. Carol O'Neil is an occupational therapist employed by the SSD. She is certified by the National Board of Occupational Therapy and is registered in the State of Missouri as an occupational therapist. (Tr. I, p. 87, 1. 8-16). She has also had specific training in sensory integration. (Tr. I, p. 187, 1. 4-12). Ms. O'Neil serves students attending the LEA. (Tr. I, p. 91, 1. 8-11). Ms. O'Neil has not worked with student, but knows student from being at the school. (Tr. I, p. 92, 1. 24-25 and p. 93, 1. 1-4).

52. Parent respects Ms. O'Neil and has no problem with the OT services at the LEA (Tr. II, p. 63, 1. 18-24).

53. Parent testified that student needed sensory interventions and sensory equipment available at Giant Steps. Ms. Roe indicated an awareness of student's sensory needs. She noted that student had a "fidget" ball in student's desk and cushion that could be used as needed. She noted a decreased need for the "fidget" ball as the year progressed. (Tr. II, p. 169, 1. 13-22). Ms. Pickardt was also aware of student's sensory needs. She provided a break at the start of her session to allow student time to address sensory needs in the resource room. (Tr. I, p. 209, 1. 15-25 and p. 210, 1. 1-12). Neither Ms. Roe nor Ms. Pickardt could identify sensory needs that could not be addressed at the LEA. Ms. Carol O'Neil, the occupational therapist, indicated that if it was found that

student needed a specific piece of equipment, that it could be made available at the LEA.  
(Tr. I, p. 98, 1. 17-19).

## **II. Conclusions of Law**

### **A. The Individuals With Disabilities Education Act ("IDEA") – FAPE**

As a student with an educational disability, under the IDEA and the Missouri State Plan, student is entitled to a free, appropriate public education in the least restrictive environment. 20 U.S.C. Section 1412. The 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." Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 189, 195, 198 (1982). Rather, a local educational agency fulfills the requirement of FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Breen v. St. Charles R-[VI] School District, 2 F. Supp. 2d. 1214, 1221 (E.D.Mo. 1997), aff'd 141 F. 3d 1167, 1998 WL 172602 (8<sup>th</sup> Cir. 1998) (unpublished decision); see also, Rowley, 458 U.S. at 200, 102 S.Ct. 3034; Reese v. Board of Education of Bismarck R-V School District, 225 F. Supp. 2d 1149, 1155 (8<sup>th</sup> Cir. 2002).

The free appropriate public education ('FAPE') called for in the IDEA is defined at 20 U.S.C. Section 1401(8):

The term "free appropriate public education" means special education and related services that –

- (A) have been provided at public expense, under public supervision and direction, and 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(d) of this title.

The primary vehicle for carrying out the IDEA's goals is the individualized education program ("IEP"). 20 U.S.C. Section 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 207; Gill v. Columbia 93 Sch. Dist., 217 F. 3d 1027, 1035-36 (8<sup>th</sup> 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.*

The question presented for consideration by this panel is not whether the Districts have provided student with a free, appropriate public education. Nor is it whether there was an open door for student. The question basically comes down to what door will student walk through to receive his education.

### **B. Least Restrictive Environment**

In addition to the FAPE requirement found in the IDEA, there is also the "strong congressional preference" for educating students in the least restrictive environment. Carl D. v. Special School District of St. Louis County, Mo., 21 f. Supp. 2d 1042, 1058 (E.D. Mo. 1998) ("IDEA evidences a strong congressional preference for mainstreaming").

Educating students in the public school is presumed to be preferable to educating students in private schools. Blackmon v. Springfield R-XII School District, 198 F. 3d

648, 661 (8<sup>th</sup> Cir. 1999) ("statutory language gave rise to a presumption in favor of the defendant's placement in the public schools").

The IDEA mandates that the school district educate students in the least restrictive environment (LRE). The LRE provision requires the District to ensure that children with disabilities are educated with non-disabled children to the maximum extent appropriate. Separate schools (such as Giant Steps) should only be utilized when the severity of the disability is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily. 34 CFR 300.550(b).

There is ample testimony that student's IEP services can be provided at the LEA. The LEA is the least restrictive environment and is student's home school.

**C. The IEPs appropriately and adequately identified student's disability and his educational needs.**

The data gathered as part of an initial evaluation should be sufficient to determine (1) whether a child has a particular IDEA disability, (2) the present levels of performance and educational needs of the child, (3) whether the child needs special education and related services, and (4) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable goals in the IEP and to participate in the general curriculum. 34 C.F.R. Section 300.533 (a)(2). SSD's IEPs appropriately did these things.

Each of the IEPs developed by SSD and Ferguson-Florissant address student's unique needs. West Platte county R-II Sch. Dist., 102 LRP 14487 (SEA Missouri 2002); *see also*, 34 C.F.R. Section 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").

**D. The SSD and Ferguson-Florissant Provided student with a FAPE**

The key inquiry in determining whether a school district is providing a FAPE is to assess "whether a proposed IEP is adequate and appropriate for a particular child at a given point in time." Burlington v. Dept. of Educ., 736 F. 2d 773, 788 (1<sup>st</sup> cir. 1984). Thus, the determination of whether an IEP is appropriate and reasonably calculated to confer educational benefit must be measured from the time the IEP was offered to the student. Fuhrmann v. East Hanover Bd. Of Educ., 993 F. 2d 1031, 1035, 1040 (3d Cir. 1993). In making the appropriateness determination, the panel must give deference to decisions made by professional educators. *See*, Independent Sch. Dist. No. 283 v. S.D., 88 F. 3d 556, 561 (8<sup>th</sup> Cir. 1996) (affirming the decision of a hearing officer and noting that the hearing officer was required to give "sufficient weight to the views of the School District's professional educators"); Independent Sch. Dist. No. 284 v. A.C., 32 IDELR 143 (D. Minn. 2000) (noting that courts are to "afford[] deference to the expertise of school officials responsible for the child's education"); Burilovich v. Board of Educ. of the Lincoln Consol. Schs., 200 F. 3d 560 (6<sup>th</sup> Cir. 2000) (noting that "when reviewing an IEP we must keep in mind that the state and local educational agencies are deemed to possess expertise in education policy and practice").

Parent only took issue with the proposed placement (or location of where the services were to be provided) in the March 11, 2005. Parent has never challenged any aspects of the present level of performance ("PLEP") or goals and objectives in any IEP. Parent appeared comfortable with Giant Steps' program that apparently placed few

demands on student. Parent expressed concern that student might respond to demands at school with behaviors leading to police involvement and a referral to juvenile authorities if student were not allowed to continue at Giant Steps and be allowed to access sensory activities and equipment whenever student felt student needed such interventions. These expressed fears are countered by a reality that shows that student has never engaged in any of those types of inappropriate behavior at school, that student has never referred to the school principal for discipline, and that student can address sensory needs within the general education curriculum and program at the LEA.

School staff recommended the change from Giant Steps because they could see that student was receiving a very real harm by being removed from the general education curriculum for one and one-half days per week to attend Giant Steps where student received a total of two hours of academic instruction. The panel must weigh the very real harm accrued to student against the hypothetical behavioral concerns imagined by parent.

Even though the appropriateness of an IEP is to be determined based on what was known at the time the IEP was developed, the evidence of student's progress confirms the appropriateness of the IEPs. The credible testimony of SSD's witnesses and the documentary evidence showed that student made significant progress. See Grapevine-Colleyville, 31 IDELR at 6; Cavanagh v. Grasmick, 75 F. Supp. 2d 446 (D. Md. 1999) (noting that "teachers who work with the Student day in and day our are, logically, better able to gauge his progress toward the goals and objective identified in the IEP"). Parent's clear expressions of satisfaction with the services and only expressed dissatisfaction with the proposed placement for student serve to confirm the other evidence of progress. See , 75 F. Supp. 2d 446 (D. Md. 1999) (noting that "teachers who work with [the student] day

in and day out are, logically, better able to gauge [student's] progress toward the goals and objective identified in the IEP"). Parent's clear expressions of satisfaction with the services and only expressed dissatisfaction with the proposed placement for student serve to confirm the other evidence of progress. See Wachlarowicz v. School Bd. Of Indep. Sch. Dist. No. 832, 2004 WL 2237069, at \*4 (D. Minn.) (finding that student received educational benefit based, in part, on parents' e-mails to school expressing satisfaction with student's program). The proof is in the pudding, and the pudding shows that student's program was reasonably calculated to provide educational benefit. See, O'Toole, 144 F. 3d at 707, 707 n. 20 (finding that IEP was reasonably calculated to provide a FAPE even when progress "was not steady in all areas" and even if all goals were not fully met).

**E. The Panel must override parent's refusal to provide consent**

The district had the duty and the obligation to evaluate the child. The proposed evaluations will not result in a change in student's diagnosis. The evaluations will be helpful in determining what additional services are required at the LEA to ensure that student continues to benefit from special education services and made the transition from Giant Steps to the LEA full time a success.

While under ideal circumstances the evaluations would have been completed prior to the recommendation for a change of placement, parent's refusal to provide consent to reevaluate has left the Districts no other choice other than to proceed with the hearing and seek recourse from the hearing Panel.

Student has received 'music therapy' at Giant Steps, but music therapy has never been identified as a related service in any of student's IEPs. Giant Steps identified a

number of therapies such as play therapy, listening therapy, art therapy, dance therapy, and music therapy that are a part of their program, but are not identified as specific related services needs for student. The Panel must order parent to permit the SSD the opportunity to conduct a music therapy evaluation to determine if music therapy is a related service required in order for student to benefit from special education service. (Tr. II, p. 70, 1. 12-23).

Similarly, Giant Steps and the LEA staff have provided interventions to address student's sensory needs. However, the Districts have not completed a formal sensory integration evaluation. There also was no documentation of a formal sensory integration evaluation in the records received from Giant Steps in response to the request for records. Again, the requested assessment of sensory needs will not change student's educational diagnosis but may help staff in better understanding and addressing the sensory needs of student.

The third assessment that the District seeks is in the area of assistive technology. Student has demonstrated capabilities in the use of the computer for writing. Additional assessment in the use of assistive technology may provide information to enhance student's use of technology. Again, such assessment will not change student's educational diagnosis.

### **CONCLUSION OF LAW**

The preponderance of the evidence demonstrates that student is capable of learning in an educational environment significantly less restrictive than the private placement desired by parent at Giant Steps.

Student has demonstrated capability of participating in and benefiting from the general education curriculum at the LEA. The Director of Giant Steps noted the benefit student receives from being educated with peers without disabilities. Contrast student's day at Giant Steps where, on Thursday in a six and one-half hour day, student receives only one hour of instruction in academics and all instruction is in a school with only disabled students with some form of autism, to the days at the LEA where student could receive 90 minutes of reading instruction from Ms. Roe and 30 additional minutes of reading intervention from Ms. Pickardt. In addition, when at the LEA, student will be able to participate in academic instruction in math, science, social studies, spelling, health, and all other components of the Ferguson-Florissant general education curriculum.

SSD's obligation is to provide student an education program that is calculated to provide student meaningful educational benefits. SSD determined that the program at Giant Steps, providing only one hour of academic instruction per day, did not meet student's educational needs. The only way SSD can assure that student receives meaningful educational benefit is by allowing student to participate in the general education curriculum five days per week in a setting that assures frequent communication between general education and special education staff.

SSD's evaluations provided an appropriate diagnosis and sufficient information to develop an appropriate education program. The March 11, 2005 IEP developed for student provides a free appropriate public education. Therefore, the SSD is entitled to judgment on all claims.

## **DECISION**

It is the conclusion of the panel that the preponderance of evidence supports the IEP of March 11, 2005, and therefore, orders that the March 11, 2005 IEP be implemented effective August 15, 2005.

Further, that the SSD shall be allowed to complete the requested evaluations in the areas of music therapy, sensory integration needs, and assistive technology. Such evaluations are to be completed and presented to the IEP team no later than September 30, 2005.

Further, with the results of the evaluations, to be completed by September 30, 2005, a new IEP is to be developed to incorporate the appropriate recommendations from the evaluations.

#### **APPEAL PROCEDURE**

Either party has the right to appeal this decision within 30 days to a State Court of competent jurisdiction pursuant to Chapter 536 of the Revised Statutes of Missouri, or to a Federal Court.

This decision was entered into on the 7th day of July, 2005, prior to the decision due date of July 11, 2005.

SO ORDERED:

/s/ Robert P. Baine, Jr.  
Robert P. Baine, Jr., Chairperson

Concur:

/s/ Rand Hodgson  
Rand Hodgson, Panel Member

Concur:

/s/ Larry Kelley  
Larry Kelley, Panel Member

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing was sent by electronic and regular mail, postage prepaid, this 7th day of July, 2005, to the following:

**Via electronic mail to:**

Department of Elementary & Secondary Education  
[WANDA.ALLEN@DESE.MO.GOV](mailto:WANDA.ALLEN@DESE.MO.GOV)

**Via U.S. Mail and facsimile to:**

Mr. Robert Thomeczek  
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**Via U.S. Mail to:**

Mr. Rand Hodgson  
10204 S. Outer Belt Road  
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Panel Member

Mr. Larry Kelley  
901 Falcon Drive  
Kennett, MO 63857  
Panel Member

Parent

/s/ Robert P. Baine, Jr.