

BEFORE THE THREE MEMBER DUE PROCESS PANEL  
EMPOWERED BY THE MISSOURI STATE BOARD OF EDUCATION  
PURSUANT TO RSMo. §162.961

STUDENT and PARENTS,	)	
	)	
Petitioners,	)	
vs.	)	December 18, 2006
	)	
LEE'S SUMMIT R-VII SCHOOL	)	
DISTRICT,	)	
	)	
Respondent.	)	

**COVER SHEET INFORMATION**

**The Parties**

- The Student is
- The Student's date of birth is
- Students' Parents are
- The Respondent is Lee's Summit R-VII School District
- The School District was represented by Ransom A. Ellis, III, Esq., Ellis, Ellis, Hammons & Johnson, P.C., The Hammons Tower, 901 St. Louis Street – Suite 600, Springfield, Missouri 65806-2505

**Hearing Officers**

- Dr. Diane Golden
- Dr. Karla Duff-Mallams
- Richard H. Ulrich, Esq.

**Relevant Dates/Procedural History/Explanation of Deviation from 45 Day Time Line**

- Request for due process hearing - August 23, 2005
- Dates of hearing: June 21 through June 23, 2006 September 12 – 13, 2006
  
- Date of decision: December 18, 2006
  
- Explanation of deviation from 45 day time-line: Contained within the body of the Decision

## Decision

This is the final decision of the hearing panel in an impartial due process hearing pursuant to the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. §1415(f), and Missouri law, §162.961.3-.5 RSMo.

### I. THE ISSUES

1. The following issues were presented to the Hearing Panel:

- Issue Number 1.** Was the District's evaluation of November 7, 2002 appropriate?
- Issue Number 2.** Was the IEP of November 21, 2002 appropriate?
- Issue Number 3.** Did the District provide the Student a free appropriate public education ("FAPE") from August 23, 2003 to August 23, 2005?
- Issue Number 4.** Was Giant Step, the private placement choice of the Student's Parents, an appropriate educational placement for the Student?
- Issue Number 5.** Did the Parents properly notify the District of their intent to withdraw the Student from the District and place her in a private school?
- Issue Number 6.** Was the District obligated to conduct an IEP, without request from the Parents, after the Parents unilaterally withdrew the Student from the District on September 23, 2003?
- Issue Number 7.** Was the placement of the Student at Marillac between August 2004 and August 23, 2005 an appropriate placement in the least restrictive environment?
- Issue Number 8.** In the event the Student was not afforded FAPE, within the applicable time frame of August 23, 2003 to August 23, 2005, what was the extent of that denial and the appropriate remedy?

### II. FINDINGS OF FACT

The hearing Panel makes the following Findings of Fact:

#### **A. The Parties, Participants and Providers of Educational Services to Student**

1. During all times material to this due process proceeding, the Student resided with her Mother and her Mother's boyfriend, who, at times, was referred to as Student's "Step-

Father”, who was very active in Student’s education, within the boundaries of the District. (DEX 1 and 3).<sup>1</sup> The primary mode of communication of the Student and Mother is written and spoken English.

2. The District is a Missouri Public School District which is organized pursuant to Missouri statutes. The District is located in Jackson County, Missouri and maintains approximately twenty-five (25) educational buildings (Tr. Vol. IV, p. 13).<sup>2</sup> The District educates approximately Sixteen Thousand Nine Hundred (16,900) students with approximately Two Thousand Five Hundred (2,500) employees. (Tr. Vol. IV, p. 14). As of December 1, 2005, the District had approximately Two Thousand Fifty (2,050) students who were receiving special education and related services. (Tr. Vol. IV, p. 14).

3. The Student and her Parents were represented at the hearing by Deborah S. Johnson, 9923 State Line Road, Kansas City, Missouri, 64114. The Student and Parents were also represented at various times by other counsel during this proceeding including:

- a. Thomas D. Munro of the law firm of Patterson & Ferguson, L.L.C., 7000 N.W. Prairie View Road, Suite 160, Kansas City, Missouri, 64151.
- b. Kathleen Kedigh of the Kedigh Law Firm, L.L.C., 1803 S.W. Meyer, Boulevard, Blue Springs, Missouri, 64015.
- c. James F. Adler of the law firm of Adler & Manson, L.C., 9233 Ward Parkway, Suite 240, Kansas City, Missouri, 64114-0400.

4. The District was represented by Ransom A Ellis, III who is with the law firm of Ellis, Ellis, Hammons & Johnson, P.C., 901 St. Louis Street, Suite 600, Springfield, Missouri 65806-2505.

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<sup>1</sup> References to Exhibits are: Petitioners’ (Parents’) PEX; Respondent’s (District) – DEX; and Panel Exhibits.

<sup>2</sup> References to the hearing testimony are to the transcript, respective Volume and page numbers “TR, Vol., p.”.

5. The Hearing Panel for the due process proceeding was:

Dr. Diane Golden	Panel Member
Dr. Karla Duff-Mallams	Panel Member
Richard H. Ulrich	Hearing Chairperson

6. During times relevant to this proceeding the following persons were employed by the District and have provided educational services to the Student:

Dr. Tony Stansberry	Superintendent
Dr. David McGehee	Superintendent (beginning school year 2006-2007)
Jerry Keimig	Director of Special Services
Donna (Myers) Southwick	Assistant Director of Special Services
Brian Sloan	Principal
John Eisenmenger	Principal
Dave Bouldin	Principal
Jane Mundy	SPED Coordinator
Pam Mershon	SPED Coordinator
Mary Ann Rhoads	Case Manager
Kathy McClanahan	Behavior Management Coordinator
Cindi Barfield	Behavior Management Coordinator
Diane Auchterlonie	Title I Teacher
Staci Mathes	SPED Teacher
Chris Carpenter	SPED Teacher
Stacie Greening	Regular Education Teacher
Judy Bartshe	SLP
Dyan Miller	SLP
Fred Geer	Psycho-Educational Consultant
Becky Bell	Educational Diagnostician
Karin Evans	Counselor
Debbie Kupronis	Aide
Virginia Cook	Aide

## **B. Procedural Background and Time-Line Information**

7. The Student's Parents requested due process by letter to the Department of Elementary and Secondary Education ("DESE") dated August 23, 2005, which was received by DESE that same day. (DEX 61 and 62).

8. On or about August 23, 2005, Ms. Pam Williams notified the Hearing Chairperson (DEX 62) and the Hearing Panel Members (DEX 68) that they had been selected to serve on the hearing Panel for the request for due process filed by the District.

9. On August 31, 2005, Jerry Keimig, the District's Director of Special Services sent a letter to the Student's Mother which provided the District's response to the Student's due

process Complaint pursuant to 20 U.S.C. § 1415(c)(2)(B). (DEX 66). The letter also scheduled a Resolution Session for September 6, 2005.

10. On September 2, 2005, Jerry Keimig, the District's Director of Special Services sent a letter to the Student's Mother rescheduling the Resolution Session to September 8, 2005, at the request of the Student's attorney, James Adler. (DEX 67). This rescheduled Resolution Session was later postponed at the request of the Student's Parents. (DEX 70).

11. On September 14, 2005, the Hearing Chairperson scheduled the due process hearing for September 30, 2005, and established the time line for rendering a decision as October 6, 2005. (DEX 71).

12. On September 27, 2005, Ransom Ellis, III, entered an appearance on behalf of the District. In this same letter the District informed the Hearing Chairperson that it had not waived the holding of a Resolution Session, and while arrangements had been made for two such Sessions, the Sessions had been postponed at the request of the Parents. The letter also requested that the hearing scheduled for September 30, 2005, be postponed and the hearing time lines be extended to December 30, 2005. (DEX 73). Parents' attorney joined in the request for a continuance.

13. On September 28, 2005, the Hearing Chairperson issued an Order postponing the hearing scheduled for September 30, 2005, and extended the time lines of the hearing to December 30, 2005. (DEX 74).

14. On October 3, 2005, Jerry Keimig wrote the Student's Parents again offering to schedule the Resolution Session. (DEX 75).

15. On November 22, 2005, the Hearing Chairperson conducted a telephone conference with counsel, Tom Munro and Ransom Ellis, III. During the conference the parties agreed that the hearing would be scheduled on March 8 through 10, 2006, and the time line could be extended to April 14, 2006. Also during the telephone conference, attorney for Petitioners advised that it was his desire to amend the complaint and the relief requested. Respondent's attorney objected to the amendment. On November 29, 2006, the Hearing Chairperson issued an Order setting the requested hearing dates and extending the time line. (DEX 76). In addition, the Hearing Chairperson ruled that Petitioners had until December 2, 2005, to file a request to amend the complaint and relief requested therein and granted Respondent until December 12, 2005 to respond.

16. On November 29, 2005, Petitioners' attorney submitted, in letter form, "a more detailed list of issues to be raised during the due process hearing". (DEX 77, p. 1)

17. On January 4, 2006, the parties conducted a Resolution Session at the District's Administrative Offices. The Resolution Session was deemed unsuccessful on that date.

18. On January 12, 2006, District's attorney submitted, in letter form, an objection to the expansive interpretation of the due process Complaint contained in Mr. Muno's letter of

November 29, 2005, and to the extent said letter was deemed by the Hearing Chairperson to constitute a request to amend the due process Complaint, an objection was made. (DEX 78, p. 2)

19. At the direction of the Hearing Chairperson, the attorneys and the Hearing Chairperson had a telephone conference on January 16, 2006, wherein the issues to be presented by the Petitioners were discussed, with Petitioners' attorney being directed to clarify said issues.

20. On January 20, 2006, in letter form, Petitioners' attorney expounded on the issues in an "attempt to clarify" them. (DEX 80, p. 1)

21. On January 23, 2006, the Hearing Chairperson issued an Order that continued the date of the hearing from March 8-10, 2006, to April 3-7, 2006, and extended the time lines for the case to May 10, 2006 at the mutual request of the parties. (DEX 81).

22. On January 27, 2006, District filed an objection to Parents' Request to Amend Due Process Complaint and in the Alternative for More Definite Statement. (DEX 82)

23. On February 1, 2006, the Hearing Chairperson entered an Order overruling District's Objection to Parents' Request to Amend but granted portions of the District's Motion for a More Definite Statement. (DEX 83)

24. On February 2, 2006, Petitioners filed a More Definite Statement of Amended Complaint. (DEX 84)

25. On March 6, 2006, the Hearing Chairperson issued an Order clarifying the Complaint before the panel. (DEX 85).

26. On March 21, 2006, the Hearing Chairperson issued an Order which continued the date of the hearing from April 3-7, 2006, to June 21-23, 2006, and extended the time lines for the case to July 21, 2006, at the mutual request of the parties. (DEX 86).

27. The first portion of the open due process hearing was held on June 21 through 23, 2006, in Lee's Summit Missouri.

28. On June 28, 2006, the Hearing Chairperson issued an Order that set the date for the resumed due process hearing as September 12-14, 2006 and extended the time line for the case to November 14, 2006, at the mutual request of the parties. (Panel Exhibit 2)

29. The second portion of the open due process hearing was held on September 12-13, 2006, in Lee's Summit Missouri. On September 13, 2006, Parents' attorney filed a motion for an order to compel Respondent to produce a copy of a video recording of a television news clip concerning the Student and the District's use of a room adjacent to the Student's classroom. Cindi Bayfield testified that Jerry Keimig showed her a copy of the video recording, and the District had not provided a copy of the video recording to Petitioners. Petitioners maintained that the tape constituted an educational record of the Student and, as such, should have been copied and provided to Parents pursuant to the Parents' request for all educational records. The

District responded by maintaining that the tape, which was taped from a local newscast by a staff member, was not an educational record and currently did not exist. The custodian of Student's educational records, Jerry Keimig, testified that the tape was taped by a staff member from a local newscast, did not depict the room adjacent to the Student's classroom and did not now exist. Although Mr. Keimig saw the tape, it no longer existed as it was either destroyed or taped over. Parents' motion to produce was denied as being moot. (Tr. Vol. V, pp. 5-17). (Panel Exhibit 1.). The hearing record was closed on September 13, 2006.

30. On September 14, 2006, the Hearing Chairperson issued an Order that extended the time line for the case to December 13, 2006, at the mutual request of the parties.

31. On or about November 13, 2006, at the mutual request of the parties as conveyed by electronic mail (to facilitate the filing of their post-hearing briefs), the time for issuing the decision was extended to December 18, 2006.

32. All continuances of the hearing were by request of the parties and by consent. The stay put provisions of IDEA assured that the Student received educational benefit from her current placement during the pendency of this matter.

33. During the initial and resumed hearing, Exhibits were introduced and received into evidence. The following documents were admitted and made a part of the record in this case: District Exhibits ("DEX"): 1 through 30; 32 through 40; 41 (pages 468-469 only); 42 through 51; 53 through 89 and Petitioner's Exhibits ("PEX"): 1-2; 4-7; 9-13; 15; 18-24; 26-41. The Panel, to fully complete the record, has added, sua sponte, Panel Exhibits 1 and 2.

### **C. Background Facts**

34. The Student entered the District in September, 2001, as a pre-Kindergarten Student in the District's Title I Preschool Program located at the District's Early Childhood Center. (Tr. Vol. IV, p. 18). The Student's teacher was Diane Auchterlonie. (DEX 1).

35. Prior to entering the District, the Student had been receiving counseling from Westport Counseling Associates since she was two years of age. (DEX 47, p. 510).

36. On August 21, 2002, the Student entered Kindergarten at Westview Elementary School, within the District, where she was in the classroom of Kindergarten teacher Stacy Greening. (Tr. Vol. IV, p. 19; DEX 2-4).

37. On September 9, 2002, the Student's Mother requested that the Student be tested. Initially, the Student's Mother indicated that she intended to have the Student examined by a physician for possible Attention Deficit Hyperactivity Disorder and wanted the District to perform an IQ test on the Student. (Tr. Vol. III, p. 667; DEX 4, p. 27).

38. The Parent Input/Contact Form prepared by the Student's Mother (DEX 6) indicated that the Mother had concerns about the Student in the following areas: Hearing,

Communication, Cognitive/Adaptive Behavior, Academic/Transition and Social, Emotional and Behavioral. (Tr. Vol. III, p. 668; DEX 6, p. 30).

39. On October 3, 2002, District personnel met with the Student's Mother and provided her with a Summary of Existing Data/Evaluation Plan (DEX 8) and a Description of Areas to be Assessed and Known Tests To Be Used (DEX 7). The District personnel recommended that an additional assessment needed to be made on the Student in the areas of Speech and Language; Cognitive/Intellectual; Academics; and Social/Emotional/Behavioral. (DEX 8, pp. 34-35). The Student's Mother's signature appeared on the Evaluation Plan. (Tr. Vol. III, p. 669).

40. On October 3, 2002, the Student's Mother consented to the additional evaluation of the Student by signing the Notice/Consent For Additional Assessment form. (Tr. Vol. III, p. 669; Tr. Vol. IV, p. 29; DEX 9).

41. The District's educational evaluation of the Student covered the areas identified in the Evaluation Plan (DEX 8) and consisted of the following:

- a. Written observations of the Student by the Parent (DEX 6, pp. 29-30) and the Student's classroom teacher. (DEX 5, p. 28);
- b. Screening tests in the areas of language (DEX 3, p. 8); vision (DEX 1, p. 3); and, hearing. (DEX 3, p. 8);
- c. Preparation of the Comprehensive Inventory of Basic Skills-Revised (CIBS-R) administered by Stacy Greening;
- d. Administration of standardized tests including:
  - (1) The Test of Language Development – Primary. (DEX 13, p. 46);
  - (2) The Bracken - Basic Concept Scale-Revised and Test of Language Development-Primary (TOLD-P:3) by Judy Bartshe. (DEX 13, pp. 46-47);
  - (3) An Informal Speech-Language Sample by Judy Bartshe. (DEX 13, p. 49);
  - (4) The Stanford-Binet Intelligence Scale: Fourth Edition. (DEX 13, p. 50) by Karin Evans;
  - (5) The Young Children's Achievement Test (DEX 13, p. 53) administered by Becky Bell;
  - (6) The Brigance Diagnostic Comprehensive Inventory of Basic Skills-Revised (DEX 13, p. 55) administered by Becky Bell;

- (7) Behavior Evaluation Scale (DEX 13, p. 58); and,
  - (8) Burks' Behavior Rating Scales – Preschool and Kindergarten Edition by Stacy Greening. (DEX 13, pp. 58-60).
- e. An outside Psycho-Education Report obtained from Dr. Fred Geer, which included: a social developmental history, informal interviews with the principal, counselor and student, preparation of the Devereux Behavior Rating Scale-School Form, the Scale for Assessing Emotional Disturbance and a review of records, including previous assessments (DEX 13, p. 61-66); and
  - f. A classroom observation (DEX 13, p. 68-69).
42. In analyzing the Student's November, 2002, evaluation, the Panel finds:
- a. The tests and evaluation materials used in the evaluation of the Student were selected and administered so that they were not discriminatory on a racial or cultural basis. (Tr. Vol. IV, pp. 33-34).
  - b. The District used a variety of assessment tools and strategies to gather relevant, functional, and developmental information about the Student. (Tr. Vol. IV, p. 35).
  - c. The tests and evaluation materials were administered to the Student in her native language. (Tr. Vol. IV, p. 34).
  - d. The information considered by the evaluation team included information provided by the Student's Parents. (Tr. Vol. IV, p. 35).
  - e. The information considered by the evaluation team included information that was related to enabling the Student to be involved in the general curriculum. (Tr. Vol. IV, pp. 35-36).
  - f. The District used standardized tests that have been validated for the specific purpose for which they were used during the evaluation of the Student. (Tr. Vol. IV, p. 36).
  - g. The tests administered during the evaluation were administered by trained and knowledgeable personnel in accordance with the instructions of the tests. (Tr. Vol. IV, p. 36).
  - h. The tests administered during the evaluation were selected and administered to meet the Student's needs. (Tr. Vol. IV, p. 36).

- i. The Student was assessed in all areas related to her suspected disability. (Tr. Vol. IV, p. 36).
- j. The Student's evaluation was sufficiently comprehensive to identify all of her special education needs. (Tr. Vol. IV, p. 36).

43. On November 11, 2002, the Student's Team conducted an evaluation staffing. Present at this meeting were Mary Ann Rhoads (Case Manager); Staci Mathes (Special Education Teacher); Jane Mundy (Special Education Coordinator); Stacy Greening (Regular Education Teacher); Judy Bartshe (SLP); Dave Bouldin (Principal); Kathy McClanahan (Behavior Management Coordinator); the Student's Mother and the Student's Aunt. (DEX 13, p. 71; DEX 37, p. 433). At this meeting, the Student's Team determined that the Student qualified for special education services with an educational diagnosis of "Emotionally Disturbed". The Student's Mother agreed with the educational diagnosis of the Student. (Tr. Vol. III, p. 670; Tr. Vol. IV, pp. 31-32, 39; Tr. Vol. V, p. 22; DEX 13, p. 71). During the meeting the Student's Mother was encouraged to visit the ED Classroom taught by Staci Mathes at Underwood Elementary School. (DEX 37, p. 433).

44. On November 21, 2002, the Student's Team met to develop the Student's initial Individual Education Plan ("IEP"). (DEX 14, p. 72; DEX 15, p. 73). The persons who were present at this meeting were the Student's Mother, the Student's Aunt, Stacie Greening (regular education teacher), Staci Mathes (special education teacher), Cindi Barfield (behavior specialist), Brian Sloan (Principal at Underwood Elementary), Dyan Miller (speech language pathologist), Karin Evans (counselor), Mary Ann Rhoads (LEA representative) and Jane Mundy (individual interpreting instructional implications of evaluation results). (DEX 15, p. 73). Cindi Barfield, the District's Behavior Specialist, was not present because she was out of town on family business. (Tr. Vol. IV, p. 139).

45. The Student's November 21, 2002, IEP included a Present Level of Educational Performance, measurable goals and objectives/benchmarks (including behavioral goals), and a behavior plan which included contingencies for managing behaviors, one of which was that the Student may be placed in "a recovery Room supervised by an adult" (DEX 15, p. 91). The Student's IEP also included information that the BIST model used by the District would be utilized as a part of the behavior management plan (DEX 15, p. 91).

46. During the November 21, 2002, IEP meeting, Cindi Barfield led the Student's IEP Team to develop a Behavior Intervention Plan for the Student. (Tr. Vol. IV, p. 140; DEX 15, pp. 70-71). The Behavior Intervention Plan was prepared at the meeting with the input of the Student's IEP Team, including the Student's Parents. (Tr. Vol. IV, pp. 141-142). Once the Behavior Intervention Plan was completed, it was discussed with the Student's Parents. (Tr. Vol. IV, p. 142).

47. On November 21, 2002, at the conclusion of the IEP Meeting, the Student's IEP Team considered placements of: (a) outside the regular class less than 21% of the time; (b) outside the regular class 21% to 60% of the time; and, (c) outside the regular class more than 60% of the time. The Student's IEP Team selected an educational placement of outside the

regular class more than 60% of the time. (DEX 15, p. 83). The Student's Mother signed the Notice and Consent for Initial Placement on November 21, 2002. (Tr. Vol. III, p. 673; Tr. Vol. IV, p. 39; DEX 16, p. 92). This placement was made by a group of persons, including the Student's Parents and other persons who were knowledgeable about the Student, the meaning of the evaluation data and the placement options that were available for the Student and the placement was in the least restrictive environment for the Student. (Tr. Vol. IV, p. 40).

48. The location of the Student's placement was in the ED classroom at Underwood Elementary School. The teacher in the classroom was Staci Mathes. The Student entered Ms. Mathes' ED classroom on November 25, 2002. (Tr. Vol. II, pp. 324-325; DEX 27, p. 158). Stacie Mathes was, by training, certification and experience, qualified to teach the Student. (Tr. Vol. II, pp. 313-317).

49. On December 20, 2002, Staci Mathes prepared a quarterly report of the Student's educational progress on the goals and objectives set forth in her IEP. The quarterly report was transmitted to the Student's Parents. The December 20, 2002, report was made after the Student had been in the ED classroom for seventeen (17) school days. (DEX 27, pp. 158-175). The quarterly report indicates, and the Panel finds, that the Student was making sufficient progress on two goals (Goals 2 and 3) and was not making sufficient progress on three goals. (Goals 1, 4 and 5). (DEX 17, pp. 93-97).

50. On February 10, 2003, the Student became angry when she received direction from Staci Mathes. As she was being assisted to the classroom's safe seat, she kicked the classroom aide in the stomach repeatedly and then slapped the classroom aide. The Student was suspended for two school days (February 11 and 12, 2003) for this conduct. (DEX 32, p. 421).

51. On February 13, 2003, the Student's Parents placed her in Crittendon Medical Center to receive psychiatric services. The Student remained as a patient in Crittendon for seven (7) days. (DEX 50, p. 1501; Tr. Vol. II, pp. 331-332).

52. On February 25, 2003, the Student returned to the ED classroom after her hospitalization. (Tr. Vol. II, p. 332; DEX 27, p. 210; DEX 50, p. 1501).

53. On March 7, 2003, Staci Mathes prepared a quarterly report of the Student's educational progress on the goals and objectives set forth in her IEP. The quarterly report was transmitted to the Student's Parents. The March 7, 2003, report indicates, and the panel finds, that the Student was making sufficient progress on all five goals.. (DEX 18, pp. 98-102).

54. On March 26, 2003, the Student was taken to Research Mental Health Services ("RMHS") to receive out-patient psychological services following her hospitalization at Crittendon. The Student was initially diagnosed as having ADHD (314.01). (DEX 48, pp. 531-538). The staff at RMHS recommended that the Student receive psychiatry services to evaluate and manage her need for medications and psychotherapy to address and improve management of her behavior at home and at school. (DEX 48, p. 538). The District did not receive this information until the hearing in this matter. Student's behavior was manifested by violence and aggressiveness toward peers, adults and animals. (DEX 48, pp. 532, 550, 558, 560 and 564.)

55. On April 30, 2003, the Student was suspended from school for two days (May 1-2, 2003) when she became out-of-control in the classroom, kicked the walls, took some of her clothes off and hit the teacher. (DEX 32, p. 422).

56. On May 23, 2003, the last day of the regular school year, Staci Mathes prepared a quarterly report of the Student's educational progress on the goals and objectives set forth in her IEP. The quarterly report was transmitted to the Student's Parents. The May 23, 2003, report indicates, and the panel finds, that the Student was making sufficient progress on four goals (Goals 2-5) and was not making sufficient progress on one goal (Goal 1). (DEX 17, pp. 93-97).

57. During school year 2002-2003, the Student was in the ED classroom at Underwood Elementary on ninety-six (96) school days. During the said school year:

- a. The Student was placed in a room adjacent to the classroom on twenty-two (22) different school days;
- b. When the Student was placed in the room, she spent an average of ninety-two (92) minutes in the room.
- c. The Student averaged slightly over twenty-one (21) minutes per school day in the room.

(DEX 50, pp. 1501-1503).

The primary issue in this case is the utilization of this room. The Petitioners and their representatives often characterized the Room as a closet and the District's representatives often characterized it as a quiet Room. To escape the semantic controversy, it shall be referred to as the Room. The room, adjacent to Staci Mathes' classroom, measures approximately 6½ feet square and 8½ feet in height. The floor of the Room was carpeted and it has windows in one wall as well as in the door. (Tr. Vol. III, pp. 474-475). The Panel during the course of the hearing visited the Room. Photographs depicting the Room were introduced into evidence. (DEX 49 at PEX 4) The floor plan of the Room was depicted by DEX 89. After February 10, 2003, Staci Mathes partially covered the windows with paper because the Student had partially disrobed while in the Room. (Tr. Vol. II, pp. 329-340). The Student was allowed bathroom and water breaks when needed. (Tr. Vol. II, pp. 287-289). When assigned to the Room to control her behavior, documentation of the Student's behavior was maintained by the adult supervising her. (DEX 29, pp. 297-367). When the Student was in the Room, the door was sometimes open and sometimes closed. (Tr. Vol. II, pp. 278-279). The Student was placed in the Room for a variety of reasons, i.e., to rest, to do school work, to be disciplined, and for quiet time. (DEX 50) While in the Room, apparently, on occasion, the Student would scratch wallpaper off the walls.

58. During school year 2002-2003, there were a number of occasions when the District learned that the Student had not received her prescribed medications prior to coming to school. (Tr. Vol. II, p. 336; DEX 39, p. 449 (April 24, 2003); DEX 27, p. 252 (April 25, 2003);

59. During school year 2002-2003, the Student was hospitalized by her Parents for six (6) school days, February 13 through February 21, 2003. (DEX 50, p. 1501).

60. During school year 2002-2003, the Student made meaningful progress towards meeting the goals contained in her IEP. (Tr. Vol. II, p. 335; DEX 15, pp. 77-80; 17, pp. 93-96; 18, pp. 98-102; 27, pp. 158-277).

61. On June 2, 2003, the Student began receiving Extended School Year services ("ESY") from the District. (DEX 28, p. 278). Staci Mathes continued as her teacher. (Tr. Vol. II, pp. 335-336).

62. On June 5, 2003, Staci Mathes and Cindi Barfield had a telephone conference with the Student's Mother, after the Student had behavioral issues at school. A decision was made that the Student should return to half-day attendance because she was able to behave properly during the morning hours, but had difficulty during the afternoon hours. Later, the Student's Mother indicated that the Student had been seen by RMHS and her medication levels had been increased to help control her behaviors. (DEX 28, pp. 281-283; DEX 39, pp. 449-450).

63. On June 6, 2003, Dr. David Harmon of RMHS medically diagnosed the Student as follows:

Axis I:	299.80	Pervasive Developmental Disorder NOS
	300.00	Anxiety Disorder NOS
Axis II:	V71.09	No Diagnosis
Axis III:	Medical	Recent Weight gain
Axis IV:	Stressors	Problems with primary support group -- moderate
		Problems with daily living skills -- moderate
		Social difficulties -- severe
		Academic problems -- moderate to severe

Although the RMHS reports were not provided to the District until the hearing in this matter, (DEX 48, pp. 542-543), on June 5, 2003, the Student's Mother reported to Staci Mathes that the Student's medical diagnosis was PDD NOS and Anxiety NOS. (DEX 39, p. 450). On June 6, 2003, Staci Mathes sent a Release of Information form home so the District could talk with the Student's medical providers. The form was not returned. (DEX 39, p. 450)

64. On June 18, 2003, Dr. Nancy Osborne at RMHS medically diagnosed the Student as follows:

Axis I:	314.01	Attention Deficit/Hyperactivity Disorder by history
	311.00	Depressive Disorder NOS by history
		R/O Pervasive Developmental Disorder
		R/O Bipolar Disorder
Axis II:	799.99	Deferred
Axis III:		None reported

Axis IV: Recent hospitalization; chronic behavioral problems;  
Family make-up changes often.  
GAF 51

(DEX 45). This information was first provided to the District by Dr. Osborne on September 17, 2003. (DEX 48, p. 563).

65. On June 26, 2003, the Student's Parents were notified, and the panel finds, that the Student made educational progress in four out of five of her academic goals and positive peer interactions (Goals 2 through 5) during the extended school year program in the Summer of 2003. (Tr. Vol. II, pp. 338-339; DEX 18, pp. 98-102). The Student did continue to have difficulty with her impulsive behaviors (Goal 1). (Tr. Vol. II, pp. 338-339). A copy of the annual Measurable Goal and Benchmarks report (DEX 18) was provided to the Student's Parents. (Tr. Vol. II, p. 339).

66. On or about August 20, 2003, the Student began her First Grade year in the ED classroom at Underwood Elementary School with Staci Mathes. (DEX 29, p. 297). There were five other students in the classroom while the Student attended. (Tr. Vol. II, p. 340).

67. On August 21, 2003, the Student was suspended from school for two school days (August 21-22, 2003) after she attempted to bite and then slapped Staci Mathes. (DEX 33, p. 423; DEX 39, p. 451). On August 21, 2003, Staci Mathes called the Student's Mother and explained the circumstances of the suspension and indicated that the re-entry meeting for the Student would be on Monday morning, August 25, 2003. (Tr. Vol. II, pp. 341-342; DEX 39, p. 451).

68. Under the District's disciplinary procedure, a student who is suspended out-of-school must have a re-entry meeting before he/she is allowed to return to school. (Tr. Vol. I, pp. 34-35). The primary purpose of the re-entry conference is to help the student be accountable for his/her behavior and to develop a plan to help the student keep from making the same mistake again. (Tr. Vol. I, p. 36).

69. On August 22, 2003, Staci Mathes called the Student's Mother again to remind her about the re-entry meeting on the morning of August 25, 2003. The Student's Mother indicated she could not meet until 3:00 p.m. on August 25, 2003, due to a work schedule conflict, so a meeting was scheduled for that time. (Tr. Vol. II, p. 343; DEX 39, p. 451). Because the meeting was rescheduled to a time after school on Monday, August 25, 2003, in order to accommodate the work schedule of the Student's Mother, consistent with the District's re-entry policy, the Student was unable to return to school until Tuesday, August 26, 2003. (Tr. Vol. II, p. 343). Ms. Mathes informed the other District members of the Student's Team about the change in the meeting time. (DEX 51, p. 1507).

70. On August 25, 2003, the suspension re-entry meeting was held with the Student's Mother, Brian Sloan, Cindi Barfield, Jane Mundy and Staci Mathes. During the meeting, the Student was able to describe the behaviors she had exhibited that caused her to be suspended and District personnel talked with her about how she could avoid those behaviors in the future. Staci

Mathes discussed the use of the Room with the Student's Mother and told her that if she believed the Student's behaviors were about to escalate, that she would have the Student work in the Room as a "preventative measure." (Tr. Vol. I, pp. 42-45; Tr. Vol. II, pp. 346-347; DEX 29, p. 328). Staci Mathes also explained that when the Student used the Room to "rest" she was provided a pillow and blanket and books to read. The time she spent in the Quiet Room to "rest" was not separately logged. (Tr. Vol. I, pp. 42-45). The Student's Mother asked if the Student could be placed in a "BD Room". (DEX 38, p. 438).

71. Due to the Student's behaviors in her classroom, and her out-of-school suspension, Staci Mathes continued to periodically update the other District members of the Student's IEP Team concerning the Student's progress/behaviors in her classroom. (Tr. Vol. II, pp. 345-347; DEX 51, pp. 1508-1510).

72. On September 5, 2003, the Student was suspended from school for two school days (September 8-9, 2003) after the Student hit Staci Mathes and bit another teacher. (DEX 33, p. 424).

73. On September 10, 2003, a re-entry conference was held for the Student. (Tr. Vol. II, pp. 350-351; DEX 39, pp. 451-452). During the meeting, the Student was able to verbalize what she had done wrong. (Tr. Vol. II, p. 350). Following the re-entry meeting, Staci Mathes emailed the other District members of the Student's IEP Team to keep them informed of the status of the Student. (Tr. Vol. II, p. 351; DEX 51, p. 1510).

74. On September 18, 2003, the Student was again suspended from school for one school day (September 19, 2003) after she slapped and kicked Staci Mathes. (Tr. Vol. II, p. 352; DEX 33, p. 426). A re-entry meeting was scheduled for Monday, September 23, 2003. (Tr. Vol. V, pp. 35-36).

75. On September 19, 2003, the Student's Mother wrote a note to Brian Sloan which requested that the re-entry meeting scheduled for Monday morning, September 23, 2003, be converted to an "IEP Review Meeting." (Tr. Vol. III, p. 674; DEX 88, p. 1604). That same day, Mr. Sloan responded to the Student's Mother stating:

"Due to the time frame involved and with Cindi and Jane being out of town today, we are unable to put such a meeting together so quickly. We want to make sure we do this right so that [the Student's] needs are adequately addressed.

I've asked Jane to try to put together our meeting as soon as possible. Please continue to be patient and we will do our best to get things accomplished."

(DEX 88, p. 1604).

76. On Monday, September 23, 2003, a meeting was held at Underwood school. Present at this meeting were the Student, the Student's Mother and Father, the Student's "Step-

Father," the Student's Aunt, Marilyn McClure (MPAC Representative), Michele Tavenner (Giant Step), Brian Sloan, Jane Mundy, Stacey Martin and Staci Mathes. (DEX 38, p. 439). Notes concerning this meeting were taken by Jane Mundy. Those notes depict what transpired at the meeting:

"Introductions. Purpose of meeting. Parent group balked at having re-entry meeting -- only wanted IEP meeting. Mundy asked what they wanted to discuss about IEP. Mother said quiet Room and amount of time [the Student] had spent there as well as meeting her educational needs. We shared [the Student's] diagnosis is ED and her goals dictated her educational program. At this time she is frequently unsafe to herself and others. Staci shared behaviors that were interfering with educational programming. She does receive instruction in quiet Room when possible. Parents concerned about quiet Room in general and why she was required to go to quiet Room after re-entry meeting for her actions. It is part of BIST model which our district follows. Parent asked why she went to quiet Room when they requested no quiet Room, safe seat or regular seat for her. Reply -- part of BIST model and her behavior needs.

Parent requested outside placement at Giant Steps [sic] -- a private school. We declined the placement. Parent requested in writing the outside placement and prior written notice for refusal for outside placement. I requested that we reconvene to review [the Student's] IEP and programming. Parents voiced concern that we were not addressing her PDD-NOS which was, according to [the Student's Mother], diagnosed in early June. We do not yet have a written copy of PDD-NOS and have requested, but not received. Stacey Martin, shared that there is a difference between ED diagnosis or autism/PDD-NOS and medical diagnosis. Programming is to meet individual needs of children."

(DEX 38, pp. 439-440). The notes taken during the meeting by Staci Mathes further state that Jane Mundy "requested that we reconvene to review the IEP and decide whether placement is still appropriate." (DEX 39, p. 454). During the re-entry meeting the Student's Mother gave the District a written note signed by Mother and Father that asked for an "outside placement." (Tr. Vol. III, pp. 676-678; Tr. Vol. V, p. 38; DEX 88, p. 1605).

77. The September 23, 2003, meeting was not an IEP meeting.

78. On September 23, 2003, following the re-entry meeting, the District prepared and sent a Notice of Action to the Student's Parents. (DEX 19, p. 103). The Notice of Action indicates that the:

"District refuses to place [the Student] at parent selected placement option of Giant Steps Special Needs Day Program. District asserts that [the Student's] needs can best be served in the Emotionally Disturbed Program at Underwood Elementary."

The District also noted that the District's team "believes that an IEP review must take place prior to any change in placement and will be arranged as soon as possible to meet parents' schedule." (DEX 19, p. 103).

79. On September 25, 2003, Jane Mundy called the Student's Mother to set up an IEP meeting to discuss the Student's progress and programming. The Student's Mother told Ms. Mundy that she would contact her sister and call Ms. Mundy back. (Tr. Vol. V, pp. 39-40; DEX 38, p. 440).

80. On September 28, 2003, Jane Mundy again called the Student's Mother, who indicated that:

"[The Student] will not be returning to Underwood. She is attending private school. Her father does not want her returning to that building. Mom said, we were to remove her from our roles [sic] due to her attending private school at this time."

(Tr. Vol. V, p. 41; DEX 38, p. 440). Ms. Mundy followed this conversation up by sending an email to the other District members of the Student's IEP Team. (DEX 51, p. 1513). The Student was officially dropped from the District on October 1, 2003. (DEX 1, p. 1). The Student did not return to the District's educational program until June 1, 2004, when she began receiving ESY services. (DEX 30, p. 368).

81. Parents removed the Student from the District on or about September 23, 2003.

82. During the 2003-2004 school year, before being officially dropped from the District on October 1, 2003, the Student was assigned to the ED classroom at Underwood Elementary for Twenty-four (24) school days. During this time, the Student was placed in the Room on at least Fourteen (14) different school days, ranging from 420 minutes a day in the Room to 70 minutes. The Student was placed in the Room for an equivalent of over nine (9) full days (3,860 minutes – 420 minutes in a full school day) (DEX 50, p. 1503). Of the twenty-four (24) school days the Student was absent three (3) days, and received out-of-school suspension six (6) days. (DEX 50) There is only one (1) day during the 2003-2004 school year (24 attendance days) that Student remained in the ED classroom the entire day. (DEX 50).

83. During the 2003-2004 school year, when the Student was in the Room, she was occasionally given school work, was sometimes supervised by an adult and sometimes worked her way out of the Room. (DEX 29, pp. 299; 303-306; 308-310; 313-316; 318-320; 322-327; 330-331; 337; 340-342; 352-354; 357-359; 361-362).

84. During the time the Student was in Staci Mathes' classroom, she frequently came in tired or sleepy and was allowed to rest, at times in the Room. (Tr. Vol. II, p. 349; DEX 28, pp. 280, 282-283, 287, 289, 294, 295; DEX 29, pp. 307, 311, 321, 328, 338).

85. Beginning sometime after September 23, 2004, the Student attended the Giant Step daycare program during school hours, until she began receiving ESY services from the District in the Summer of 2004. (Tr. Vol. II, pp. 444-445; Tr. Vol. III, pp. 546-547). Giant Step is a daycare program, (Tr. Vol. II, p. 389), which is not certified by the Missouri Department of Elementary and Secondary Education, (Tr. Vol. II, p. 439; Tr. Vol. III, p. 541), "affiliated" with DESE (Tr. Vol. III, pp. 576-577), or licensed by the State as a daycare operation. (Tr. Vol. II, p. 439). Giant Step is licensed by the Missouri Department of Mental Health as a day program. (Tr. Vol. II, p. 440).

86. The Student's Parents enrolled the Student at Giant Step without the consent of or referral by the District, as the District issued a Notice of Action dated September 23, 2005 refusing the placement of the Student at Giant Step as requested by the Parent. (DEX 19)

87. Michelle Tavanner, the Education Director for Giant Step testified she did not know when the Student began full time services at the daycare, (Tr. Vol. II, pp. 405-406). Ms. Tavanner also testified that:

- a. She kept data on her computer and a portfolio about the Student's work. (Tr. Vol. II, p. 422). No such documents were produced for the record.
- b. While she had attended Central Missouri State University, she did not graduate. (Tr. Vol. II, pp. 437-438).
- c. She has no certifications from the Missouri Department of Elementary and Secondary Education and has never been employed as a classroom teacher with any school district in Missouri. (Tr. Vol. II, p. 438).
- d. She terminated her employment with Giant Step in 2005. (Tr. Vol. II, p. 441).
- e. She was unable to identify the names of staff members who worked at Giant Step between September, 2003, and May, 2004, except her mother and brother. (Tr. Vol. II, p. 444).
- f. She did not have Service Plans for any child that were prepared in conjunction with any school district. (Tr. Vol. II, p. 445).
- g. The Student's Parents left the program because Ms. Tavanner was a "babysitter" and did not have the credentials to teach. (Tr. Vol. II, p. 452, lns. 14-25; p. 453, lns. 1-15).

- h. During the period between September, 2003, and May, 2004, the Student was the only school age child at the Giant Step facility. (Tr. Vol. II, pp. 444-445).
88. Mary Guthrie, Director of Giant Step testified that:
- a. The Student started receiving educational services at Giant Step "somewhere between Thanksgiving and Christmas, maybe." (Tr. Vol. III, p. 495, lns. 1-5).
  - b. She does not have a college degree and has never taught in a public school in Missouri. (Tr. Vol. III, p. 539).
  - c. During the period between September, 2003, and May, 2004, Giant Step averaged 32 to 52 children per week. (Tr. Vol. III, p. 543).
  - d. During the period between September, 2003, and May, 2004, the Student was the only school age child at the Giant Step facility. (Tr. Vol. III, p. 546-547).
  - e. During the period between September, 2003, and February, 2004, Michelle Tavanner, the Giant Step Education Director worked approximately 20 hours per week. (Tr. Vol. III, p. 548). Beginning in February, 2004, Ms. Tavanner went back to full time employment at Giant Step. (Tr. Vol. III, p. 548).
  - f. During the period between September, 2003, and May, 2004, there were two other full time employees. Neither of these employees had a college degree or certifications from the Missouri Department of Elementary and Secondary Education. (Tr. Vol. III, p. 550). None of the part-time employees who worked at Giant Step during this period had college degrees, except for a part-time speech language pathologist. (Tr. Vol. III, pp. 560-564).
  - g. With respect to the bill for nine thousand one hundred thirty-six dollars and fifty cents (\$9,136.50) relating to the costs of services received from Giant Step, represented by the August 9, 2004, letter (PEX 22, p. 981), which was written at the request of the Student's "stepfather" (Tr. Vol. III, pp. 578-579), she could not recall how she arrived at the dollar amount, (Tr. Vol. III, p. 564), and the "bill" does not appear on the Giant Step books. (Tr. Vol. III, p. 566). The amount was never paid. (Tr. Vol. III, p. 579).
  - h. The services provided to the Student by Giant Step, during the period between September, 2003 and May, 2004, which were represented by the

bill for nine thousand one hundred thirty six dollars and fifty cents (\$9,136.50), were provided "for free." (Tr. Vol. III, p. 567, lns. 2-6).

89. A) Giant Step did not have a staff which was qualified to provide appropriate educational services to the Student; B) the Student experienced a lack of educational progress at Giant Step. (Tr. Vol. V, pp. 158-159); C) the personnel at Giant Step were not in a position to implement an IEP. (Tr. Vol. IV, p. 47); and D) after November 21, 2003, there was no current IEP in place for the Student, because the Student's November 21, 2002, IEP expired. (DEX 15, p. 73);

90. On October 16, 2003, the Attorney for the Student's Parents, Jim Adler wrote a letter to the District "demanding" that the District immediately provide the outside placement that had been requested previously by the Student's Parents (Giant Step) and pay the Parents for the money they had expended for the "private school" where they had enrolled the Student. (DEX 53).

91. On December 5, 2003, a meeting was held to consider different locations. Meeting participants included the Student's Mother and Father; Jim Adler (Parents' attorney); Staci Mathes; Jane Mundy; Brian Sloan; Donna Myers; Jerry Keimig; and John Duncan (the District's attorney) (DEX 38, pp. 442-443; DEX 40, p.455; Tr. Vol. V, pp. 42-44, 118-121). At this meeting, the District offered to:(1) continue to serve the Student in the ED classroom at Underwood Elementary School; or, (2) to serve the Student in any of the other elementary schools within the District that had an ED program; or, (3) to contract with an outside service provider to serve her. (Tr. Vol. V, pp. 43, 119). The Student's Parents rejected consideration of Underwood and other District schools with ED classrooms. (DEX 38, p.442; Tr. Vol. V, pp. 43, 97-98, 119). The Student's Parents indicated that they were interested in a day treatment program. (Tr. Vol. V, pp. 121-122).

92. Following the meeting, Donna Myers made arrangement for the Student's Parents to visit and tour Gillis Center on December 9, 2003, and meet the staff there. (Tr. Vol. V, p. 122; DEX 40, p. 455). Gillis operates a residential and a day treatment program. (Tr. Vol. V, p. 120). On December 8, 2003, Ms. Myers called the Parents to remind them of the appointment. On December 9, 2003, Ms. Myers went to Gillis and waited for the Student's Parents to arrive. The Parents did not arrive so Ms. Myers rescheduled the appointment and tour for December 17, 2003, at 2:00 p.m. (Tr. Vol. V, pp. 121-122; DEX 40, p. 455). On December 16, 2003, Ms. Myers called the Student's Parents to remind them about the appointment. On December 17, the tour commenced without the Student's Mother. As the tour was concluding, the Student's Mother arrived and the Gillis staff also took her on a tour of the facility. Donna Myers informed the Parents that she needed to know, as soon as possible, if they wanted to enroll the Student at Gillis because it would be difficult to hold the space after Friday, December 19, 2003, the beginning of the Winter Break. (Tr. Vol. V, pp. 123-124; DEX 40, p. 455). The Parents did not contact Ms. Myer about the Gillis opening until January 5, 2004, when the Student's Mother called to say that the Parents were not interested in the Gillis placement. (Tr. Vol. V, pp. 125-127; DEX 40, p. 455).

93. On January 5, 2004, during a telephone conversation with the Student's Mother, Donna Myers asked if the Parents wanted to place the Student's name on the waiting list for Belton Ozanam Southland Cooperative ("BOSCO"), another day special education program in the Kansas City area. (Tr. Vol. V, pp. 120-121, 127-128). The Student's Mother indicated she did want the Student placed on the waiting list and wanted to tour the BOSCO facility. (Tr. Vol. V, p. 128; DEX 40, p. 455). Ms. Myers checked with BOSCO and learned that they had no current openings. On January 13, 2004, Ms. Myers was finally able to get in touch with the Student's Mother and related this information to her. Ms. Myers explained to the Student's Mother that BOSCO did not offer tours of its facility unless they had openings. Ms. Myers told the Student's Mother that she would contact her when she heard that BOSCO had an opening. (Tr. Vol. V, pp. 127-128; DEX 40, p. 456).

94. On February 10, 2004, the Director of BOSCO notified Ms. Myers that there was a possible opening in the day program at BOSCO. (Tr. Vol. V, pp. 128-129). Ms. Myers immediately contacted the Student's Mother, informed her of the possible opening, and asked that she provide BOSCO with a signed release of information form. Ms. Myers contacted Jane Mundy who sent a release of information form to the Student's Mother on February 11, 2004. The completed release of information form was returned to the District by the Student's Parents two weeks later, on February 25, 2004. On February 26, 2004, Ms. Myers sent the release of information form to the Director of the BOSCO day program. (Tr. Vol. V, pp. 129-130; DEX 40, p. 456).

95. On March 16, 2004, Ms. Myers contacted the Director of BOSCO about the potential opening. The BOSCO Director indicated that the openings did not occur because the students who were scheduled to leave the program were unable to successfully transition back into their regular schools. (Tr. Vol. V, p. 130). Ms. Myers telephoned the Student's Mother and relayed this information. She, again, offered Gillis Center and the other District Elementary School ED programs as possible placements for the Student. The Student's Mother indicated that she wanted to keep the Student at Giant Step. (DEX 40, p. 456).

96. On April 9, 2004, James Adler, the attorney for the Student's Parents wrote the District's attorney, Jonathan Duncan, a letter which complained that the Student had not been offered an appropriate placement. (DEX 54, p. 1517).

97. On April 15, 2004, Jonathan Duncan responded to Mr. Adler's letter. (DEX 55, p. 1518). In his letter, Mr. Duncan stated, in pertinent part, as follows:

"Contrary to your clients' belief that the District is "out of options," the School District remains willing and able to explore a number of placement options with your clients. Specifically, options which may be appropriate for [the Student] include public schools in the District (such as Pleasant Lea Elementary and Richardson Elementary) and private schools (such as Marillac Center). Gillis Center also remains an option, but your clients were not interested after touring the facility. Although school officials would also talk

with your clients about Belton Ozanam Southland Cooperative (BOSCO), as of this date there are no vacancies at that school."

(DEX 55, p. 1518). Mr. Duncan further indicated that the District would be willing to meet with the Student's Parents during the week of April 26 or May 3, 2004, to discuss the placement of the Student.

98. In May, 2004, the District received word from Marillac that they had decided to open a day program facility somewhere in the Kansas City Area and were interested to know whether the District had any students it felt could be appropriately placed at the new facility. (Tr. Vol. V, p. 131). Ms. Myers discussed the opportunity for a placement at Marillac with the Student's Parents and they toured the facility. (Tr. Vol. V, p. 131).

99. By letter dated May 6, 2004, from their attorney, the Student's Parents requested that the District place the Student at Marillac. (DEX 56, p. 1522).

100. On May 24, 2004, the District convened an IEP Meeting to discuss the Student's IEP and placement. Participants included the Student's Mother and Father; the Student's Aunt; Staci Mathes; Jane Mundy; Cindi Barfield; Brian Sloan; Jerry Keimig; and, Donna Myers. During the meeting, an IEP was developed that contained all required components, including a "present level of educational performance," three academic goals, three behavioral goals, and a behavior intervention plan. (DEX 20, pp. 104-119).

101. During the May 24, 2004, IEP meeting, Cindi Barfield helped the Student's IEP Team to develop a Behavior Intervention Plan for the Student. (Tr. Vol. IV, p. 143; DEX 20, pp. 118-119). The Behavior Intervention Plan was prepared in a manner similar to that which she described for the development of the Plan at the Student's November 21, 2002, IEP meeting. (Tr. Vol. IV, pp. 143-144).

102. On May 24, 2004, the District provided notice to the parent that the child would be placed at a private day school (Marillac). The notice indicated that the Student's Parents preferred the placement at Marillac. The Student's Mother signed the Notice of Action consenting to the placement of the Student at Marillac. (Tr. Vol. III, p. 680; Tr. Vol. V, p. 132; DEX 21, p. 120).

103. The Student was provided with extended school year (ESY) services at the District's Trailridge Elementary School during the Summer of 2004. (Tr. Vol. II, p. 375).

104. At the beginning of school year 2004-2005, the Student entered the Second Grade at Marillac in Susie Hadel's classroom. During the school year, Ms. Hadel met with the Student's Mother and provided her with grade reports that indicated the Student was making educational progress in the educational program provided for her at Marillac. (Tr. Vol. III, p. 680, lns. 22-25; p. 681, lns. 1-10; DEX 24, pp. 150-152).

105. The educational program provided to the Student at Marillac also utilizes a segregated Room where a Student is placed as a part of her behavior intervention program. (DEX 43 and 44).

106. On May 2, 2005, the Student's IEP team was reconvened to review and revise the Student's IEP. Present at the meeting were the Student's Mother, Father and "Stepfather;" the Student's Aunt; Colleen Farley (Marillac Principal); Susie Hadel; Alex Kiefer (Marillac therapist); Jane Mundy; Kathy McClanahan; Mary Ann Rhoads; and Jennifer Barnett-Garner. The IEP that was developed at this meeting contained all required components, including a "present level of performance," four language goals, two academic goals, two behavioral goals, and accommodations for positive reinforcements. (DEX 23, p. 127-149).

107. At the beginning of school year 2005-2006, the Student entered the Third Grade at Marillac, again in Susie Hadel's classroom. During the school year, Ms. Hadel met with the Student's Mother and provided her with grade reports that indicated the Student was making educational progress in the educational program provided for her at Marillac. (Tr. Vol. III, p. 680, Ins. 22-25; p. 681, Ins. 1-10; DEX 24). The Student's Mother testified that she believed that her daughter's grades reflected progress while she was at Marillac and Mother had no reason to believe otherwise. (Tr. Vol. III, p. 681, Ins. 11-13).

108. The Student made educational progress while she has been enrolled at Marillac, from August, 2004, through the date of the due process hearing. (Tr. Vol. III, p. 680, Ins. 22-25; DEX 24 and 26).

109. Dr. Ronald Reese was called as an expert witness by the Student's Parents.<sup>3</sup> Dr. Reese testified to the following information:

- a. He has never met the Student or done any testing on her. (Tr. Vol. I, p. 123).
- b. He has never observed the Student in person or on videotape in a classroom or other setting. (Tr. Vol. I, p. 123).
- c. He admitted that while it would be important for him to know about the Student's history at home and her home environment, he was not provided with that type of information. (Tr. Vol. I, pp. 124-125).
- d. He has never been to Underwood Elementary School or spoken with any of the Student's teachers. (Tr. Vol. I, p. 126).

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<sup>3</sup> Dr. Reese is a clinical associate professor of pediatrics at the University of Kansas Medical Center, and the director of training of the Developmental Disabilities Center, which is a part of pediatrics. (Tr. Vol. I, p. 76). Dr. Reese has a bachelor's degree in psychology, a master's degree in clinical psychology and a Ph.D. in developmental psychology with an emphasis in deviant development, challenging behavior, and behavior disorders (Tr. Vol. I, pp. 77). Dr. Reese has expertise in developmental disabilities and challenging behavior problems, and has been involved in behavior interventions and challenging behaviors since the mid-1970's. (Tr. Vol. I, pp. 78-79)

- e. He has never been to Marillac, viewed videotapes of the program there, or spoken to anyone at Marillac about the Student. (Tr. Vol. I, p. 127).
- f. He was not familiar with the Missouri State Plan. (Tr. Vol. I, p. 128).
- g. He has never served as a member of an IEP Team in Missouri. (Tr. Vol. I, p. 128).
- h. He has no knowledge of Giant Step. (Tr. Vol. I, p. 128).
- i. He agreed that the BIST model was a good starting point for the development of a behavior intervention plan, but that it would definitely need to be modified according to the child's behaviors. (Tr. Vol. I, p. 134).
- j. He was unable to give an opinion on whether or not there was sufficient data prepared, that he had reviewed, to be able to say that the District's program of special education and related services, that was provided for the Student, was appropriate or inappropriate. (Tr. Vol. I, pp. 134-135).
- k. If a Room is used for time-out purposes "it should be as devoid of material as possible." (Tr. Vol. I, p. 137).
- l. When data is gathered to determine "where the big problem behavior was occurring" and what the "triggers for the target behavior" were, he would need to see data collected for a minimum period of one month. (Tr. Vol. I, p. 130, lns 15-25; p. 131, lns. 1-3).

Although Dr. Reese's familiarity with the Student, as reflected by the above, was virtually non-existent, his concerns regarding the use of the Room have merit in that: 1) The lack of clearly defined procedures regarding the conditions mandating use of the Room, what was tried before, and under what conditions a student would be permitted to get out of the Room (Tr. Vol. I, pp. 90-91); 2) The time period a child should be allowed to come out of the Room after being quiet. While Dr. Reese placed the time at 15 or 30 seconds (Tr. Vol. I, p. 91), which the Panel questions, Ms. Cindi Bayfield, the District's Behavior Specialist, testified that it would only be appropriate "to place a child in some sort of isolation Room or time out Room for a period exceeding thirty minutes" if the child is unsafe to himself or others or in special circumstances such as disrobing, or upon request with the door open and with a desk. (Tr. Vol. IV, pp. 166-167); 3) The Room was used for a multitude of purposes causing confusion which could increase or prolong behavior problems. (Tr. Vol. I, pp. 93-94); 4) The amount of time the Student had to have good behavior in order to get out of the Room was not consistent (Tr. Vol. I, p. 74); 5) It was inappropriate to have a child start a day in the Room prior to any misbehavior on that day (Tr. Vol. I, p. 91); 6) The District had no policies regarding the use of the Room, other than BIST (Tr. Vol. I, p. 283); 7) No restrictions or limitations were imposed that would prevent placing the Student in the Room without educational materials for an unlimited amount of time (Tr. Vol. I, p. 154); and 8) Prior to the use of the Room, there should have been a functional assessment of the Student's behavior (Tr. Vol. I, pp. 90-91);

110. During the time that the Student received services within the District's Underwood Elementary School, the BIST model of behavior management was employed (DEX 15, p. 91; Tr. Vol. II, pp. 266-267, 325; Tr. Vol. IV, pp. 128-136). Dr. Reese testified that the program used by the private day school (Marillac) was "very similar to the BIST model, if it wasn't the BIST model." (Tr. Vol. I, p. 136). The use of a Room was a feature of both the program at Underwood Elementary and at Marillac (DEX 43, p. 489-503). A time-out format was also used with the Student at Crittenton when she was hospitalized there in February, 2003. (PEX 11, p. 703). No evidence was provided as to how, or if, the BIST model was modified according to a specific child's behavior at Marillac.

111. The BIST model has been used in the District since the early to mid-1990's (Tr. Vol. IV, p. 43). Jerry Keimig described the BIST program as follows:

"BIST is an intervention model that we use in all of our classrooms. It's not just for students with special needs and it's not utilized just in special education classrooms. All of our teachers, all 1200 plus, receive training in the BIST model. The BIST program is essentially a model of student conduct, student management, reinforcement of positive behaviors, how do we deal with behaviors that interfere with student learning. It's basically, a model [which] has the primary focus to preserve student dignity during the disciplinary process. The prosocial model in terms of teaching kids appropriate behaviors. So it's a District wide model that's used in all classrooms in Lee's Summit."

(Tr. Vol. IV, pp. 43-44).

112. Cindi Barfield played a part in the development of the BIST model, which was originally developed by Nancy Osterhaus, the former Principal at Ozanam. Ms. Barfield was part of the collaborative team at Ozanam that developed the concepts and co-authored the manuals and books that have been developed for BIST. (Tr. Vol. IV, p. 128). Ms. Barfield described the way that the District uses the BIST plan as a "district-wide" plan which can be used for regular education or special education students. The BIST model involves prevention as well as intervention. If a student is "not okay," the student may be moved to a safe area in the classroom. If the student is still unable to manage in the safe area, the student will be moved to a recovery or focus Room. (Tr. Vol. IV, pp. 129-130). Ms. Barfield described the BIST program as it is applied to special education students as follows:

"Typically, it would look similarly for a student in a special education classroom. If the student happened to be in the ED classroom, for example, the ED teachers have safe spots within their ED classrooms as well. So if a student is struggling at their desk in the ED classroom . . . the teacher would intervene. If the teacher believed that the student needed to move to a safe spot within the ED classroom, they would. If that did not work, then, typically, the student would move to the quiet Room in the ED classroom. And then, as the student processes what happened with the

teacher, they would move from the quiet Room to a safe spot and back to their desk."

(Tr. Vol. IV, p. 131).

113. There was no evidence produced by the District that in implementing the BIST model, the interim step of first moving a child who is "not okay" to a safe area in the classroom before putting the Student in the Room was used.

114. As stated above, the Student was removed, by her Parents, from the educational program provided by the District, after twenty-four (24) attendance days of her First Grade year (school year 2003-2004). (DEX 50). However, that time frame was educationally dismal as the Student was suspended for six (6) days and was in the Room equivalent to nine (9) full days. The Panel's concerns over the use of the Room do not relate to its size or physical characteristics, but rather the ways in which it was utilized as set forth in paragraph 109 above.

115. At the September 23, 2003 meeting between the Student's Parents and the District, the Student's Parents asked the District to place the Student at Giant Step. While they may not have specifically informed the District that they were rejecting the placement of the Student or stated that they intended to enroll the Student at Giant Step, the District certainly was aware of the Parents' unhappiness over the Student's education at Underwood and were intent on seeking other alternatives.

### **III. CONCLUSIONS OF LAW**

116. The District is a Missouri Public School District which is organized pursuant to Missouri statutes.

117. The Student is now and has been during all times material to this proceeding, a "child with a disability" as that term is defined in the Individuals with Disabilities Education Act, 20 U.S.C. §1401(3)(a) ("IDEA") and its regulations, 34 C.F.R. §300.7.<sup>4</sup> The Student is now and has been a resident of the District during all times relevant to this due process proceeding, as defined by Section 167.020 RSMo.

118. The IDEA, its regulations and the *State Plan for Part B of the Individuals With Disabilities Education Act (2005)*, ("State Plan") set forth the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District in providing special education and related services to students with disabilities.

119. The State Plan was in effect at all material times during this proceeding. The State Plan constitutes regulations of the State of Missouri which further define the rights of students with disabilities and their parents and regulate the responsibilities of educational

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<sup>4</sup> All references to the IDEA regulations are to the regulations in effect at the time the due process request/complaint was filed (August 23, 2005), although even if the "new" regulations, which became effective on October 13, 2006 were referenced, this Decision would remain unchanged.

agencies, such as the District, in providing special education and related services to students with disabilities.

120. The purpose of the IDEA and its regulations is: (1) “to ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs”; (2) “to ensure that the rights of children with disabilities and their parents are protected”; and, (3) “to assess and ensure the effectiveness of efforts to educate those children.” 34 C.F.R. § 300.1.

121. The IDEA requires that a disabled child be provided with access to a “free appropriate public education.” (“FAPE”) *Board of Education of the Hendrick Hudson Central School District, Board Of Education, Westchester County v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982). The term “free appropriate public education” is defined by 34 C.F.R. § 300.8 as follows:

- “...the term ‘free appropriate public education’ means special education and related services that--
- (a) Are provided at public expense, under public supervision and direction, and without charge;
  - (b) Meet the standards of the SEA, including the requirements of this part;
  - (c) Include preschool, elementary school, or secondary school education in the State involved; and,
  - (d) Are provided in conformity with an IEP that meets the requirements of §§ 300.340--300.350.”

A principal component of the definition of FAPE is that the special education and related services provided to the student with a disability, “meet the standards of the SEA” (State Educational Agency), and “the requirements of this part”. 34 C.F.R. Part 300.

122. If parents believe that the educational program provided for their child fails to meet this standard, they may obtain a state administrative due process hearing. 34 C.F.R. § 300.506; *Thompson v. Board of the Special School District No. 1*, 144 F.3d 574, 578 (8<sup>th</sup> Cir. 1998); *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 610 (8<sup>th</sup> Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed 2d 1090 (1998). The right to file a request for a due process hearing is also available to the Local Educational Agency (“LEA”), which in this case is the District.

123. The request for due process in this case was filed by the Student's Parents on August 23, 2005. The Eighth Circuit recognizes a two-year statute of limitations for due process claims raised pursuant to the IDEA. *Strawn v. Missouri State Board of Education*, 210 F.3d 954, 959 (8th Cir. 2000). See 20 U.S.C. §1415(f)(3)(C). Accordingly, any claim that predates August 23, 2003, is time-barred.

124. The burden of proof in an administrative hearing arising under the IDEA is properly placed upon the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537 (2005). The due process complaint in this case was filed by the Student's Parents and accordingly, the burden of proof in this case rests with the Student's Parents.

125. The IDEA is designed to enable children with disabilities to have access to a free appropriate public education which is designed to meet their particular needs. *O'Toole by O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 698 (10<sup>th</sup> Cir. 1998). The IDEA requires the District to provide a child with a disability with a "basic floor of opportunity. . . which [is] individually designed to provide educational benefit to the handicapped child." *Rowley, supra.*, 102 S.Ct. 3034, 3047. In so doing the IDEA does not require that a school district "either maximize a student's potential or provide the best possible education at public expense," *Rowley, supra.*, 102 S.Ct. 3034, 3049; *Fort Zumwalt School District v. Clynes, supra.* 119 F.3d 607, 612; and *A.W. v. Northwest R-1 School District*, 813 F.2d 158, 163-164 (8<sup>th</sup> Cir. 1987). Likewise, the IDEA does not require a school district to provide a program that will, "achieve outstanding results", *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8<sup>th</sup> Cir. 1998); that is "absolutely [the] best", *Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6<sup>th</sup> Cir. 1998); that will provide "superior results," *Fort Zumwalt School District v. Clynes, supra.* 119 F.3d 607, 613; or, that will provide the placement the parents prefer. *Blackmon v. School District of Springfield, R-12*, 198 F. 3d 648, (8<sup>th</sup> Cir. 1999); *E.S., supra.* 135 F.3d 566, 569. See also: *Tucker, supra.*, 136 F.3d 495, 505; and *Board of Education of Community Consolidated School District No. 21 v. Illinois State Board of Education*, 938 F. 2d 712, 716-17 (7<sup>th</sup> Cir. 1991).

126. Article IX § 2(a) of the Missouri Constitution states in pertinent part that "[t]he supervision of instruction in the public schools shall be vested in a state board of education. . . ." The State Board of Education for the State of Missouri is the "State Educational Agency" ("SEA") for the State of Missouri, as that term is defined in the IDEA, 20 U.S.C. § 1401(28).

127. The evaluation conducted by the District dated November 7, 2002, (DEX 13) met the requirements of the IDEA, its Regulations and the State Plan, including, but not limited to 34 C.F.R. §§ 300.301; 300.304; and, 300.305. The determination of eligibility made by the District regarding the Student met the requirements of the IDEA, its Regulations and the State Plan. 34 C.F.R. §300.534.

128. The IEP prepared by the Student's IEP Team on November 21, 2002, (DEX 15), although not a model IEP, met the requirements of the IDEA, its Regulations and the State Plan. 34 C.F.R. §§ 300.342-300.347.

129. The educational placement of the Student made by the Student's IEP Team on November 21, 2002, outside the regular class more than 60% of the time, (DEX 15, p. 83), met the requirements of the IDEA, its Regulations and the State Plan, including, but not limited to 34 C.F.R. § 300.552. The Student's Mother consented to this placement.

130. During the Student's Kindergarten year (school year 2002-2003), including the Extended School Year Services during the Summer of 2003, the Student made educational

progress in the program of special education and related services set forth in her IEP. (DEX 15). The Student made meaningful progress towards meeting the goals contained in her IEP (Tr. Vol. II, p. 335; DEX 15, pp. 77-80; DEX 17, pp. 93-96; DEX 18, pp. 98-102; and DEX 27, pp. 158-277. The Student achieved the required educational progress in spite of the fact that some of her assignments to the Room seemed to be without educational purpose. Even though this school year yielded success, it was apparent that storm clouds were brewing that were the precursors for the downpour that occurred during the 2003-2004 school year.

131. The District is not responsible for payment of the cost of a unilateral private placement if it made FAPE available to the Student (34 C.F.R. §300.403). In addition, even if FAPE were not afforded, the costs of said education may be reduced or limited if the parents do not give the district appropriate notice (34 C.F.R. §300.403). In this case, the Panel finds that the District did not provide Student FAPE for the twenty-four (24) school days of the 2003-2004 school year. However, three (3) of these days, August 20, 21, and 22 are barred by the two (2) year statute of limitations. The Panel further finds that the issue of whether Parents afforded the District appropriate notice of their intent to unilaterally remove the Student from the District is moot, as the Panel finds that the placement of the Student at Giant Step was not an appropriate placement.

132. For the school year 2002-2003, the District made a free, appropriate public education available to the Student by providing a program of special education and related services to the Student:

- a. At public expense, under public supervision and direction without charge.
- b. That met the standards of the State Plan.
- c. That included elementary education.
- d. That was in provided in conformity with an IEP that meets the requirements of 34 C.F.R. §§ 300.340--300.350.

133. For the school year 2002-2003, the Student made meaningful educational progress on the goals and objectives contained in her IEP dated November 21, 2002.

134. Any claims for failure to provide FAPE before August 23, 2003 are time barred.

135. For the beginning of the school year 2003-2004, encompassing the time frame from August 20, 2003 to September 23, 2003, the District did not afford the Student with FAPE. Her access to educational materials in the Room was deminimis and there was no credible evidence of educational benefit during this time frame. Although the six (6) days of suspension did not constitute a change of placement, coupled with the nine (9) full days the Student spent in the Room, the Student went without any meaningful education on at least fifteen (15) days of the twenty-four (24) attendance days. The District accounts for this partially by asserting that it needed at least a month of collecting data to formulate a meaningful plan. However, the compilation of data garnered during this time period did not appear to constructively address the

Student's behavioral issues, and there was no movement from the District to reconvene the IEP team to address the problems - - many of which had been brewing the year before.

136. At the time the Student's Parents enrolled the Student at Giant Step, the District did not make FAPE available to the Student.

137. The placement of the Student at Giant Step from sometime after September, 2003 through June 1, 2004, was not an appropriate placement in the least restrictive environment for the Student for the following reasons:

- a. Giant Step is a "day-care" or "child care" facility and is not accredited by DESE as a pre-school or school program. There is no credible evidence on the record that Giant Step:
  - 1) Provided the Student with an academic curriculum or developmentally developed instruction based on the particular needs of the Student;
  - 2) Utilized the DESE Early Childhood Learning Standards with the Student;
  - 3) Provided on-going technical assistance or personnel development for its staff; or,
  - 4) Assessed the Student on a regular basis to measure her progress and make modifications the curriculum and instructional strategies that were being applied to her.
- b. None of the full time staff members at Giant Step have college degrees or certifications from DESE to teach in the public schools in the State of Missouri and therefore were not qualified to provide special education and related services to the Student. See: Section 168.011 RSMo; 34 C.F.R. §§ 300.23, 300.135 and 300.136.
- c. The Student was the only school-age student in the facility.
- d. The class size was larger than twenty (20) children per classroom.
- e. There is no written evidence on the record that Giant Step prepared an IEP (or a Service Plan) for the Student. If Giant Step did, it was without the assistance of the District. There is no evidence that any IEP (or Service Plan) that may have been prepared by Giant Step for the Student met the requirements of the IDEA, its Regulations or the State Plan.
- f. After November 21, 2003, the Student had no IEP in place that met the requirements of the IDEA, its Regulations or the State Plan as required for public schools by the IDEA, its Regulations and the State plan, including,

but not limited to 34 C.F.R. §300.342. Once the Student was unilaterally removed from the District by her Parents, the District had no legal obligation to develop and implement an IEP for the Student. *Carl D. v. Special School District of St. Louis County*, 21 F.2d 1042, 1057 (E.D. Mo. 1998). Petitioners cite the case of *Fort Zumwalt School District v. Missouri State Board of Education*, 923 F.Supp. 1216 (E.D. Missouri 1996) as contrary authority. There is no specific language in the *Fort Zumwalt* case mandating that once a student is voluntarily removed from a public school district that that district has an ongoing obligation to develop and implement ongoing IEPs. In the *Fort Zumwalt* case, an IEP that expired in May of 1991 was not developed until October of 1992, after the student had enrolled in the private school (Id. p. 1230). In the case at hand, there was an IEP in place in September of 2003 when the Student was removed from the District. In the *Carl D.* case, the court specifically held that:

“Based on a review of the regulations and persuasive authority, this court holds that a school district is not required to develop and implement on an annual basis, an IEP for a disabled student once he has been unilaterally placed in a private school by the parents.” (Id. p. 1057)

- g. There is no evidence that Giant Step kept the Student's Parents regularly informed, through such means as report cards, of the Student's progress on her educational goals as required for public schools by the IDEA, its Regulations and the State Plan. 34 C.F.R. § 300.347(a)(7)(A)
- h. There is no evidence on the record that the Student made educational progress while she was enrolled at Giant Step. Rather, the record indicates that, in fact, the Student did not make progress and regressed educationally, in that her May, 2004, IEP recited nearly the same goals and objectives that had been in her November 2002, IEP.
- i. While attending Giant Step, the Student: (1) was not educated with children who did not have disabilities; and, (2) was not integrated to the maximum extent possible which children of her own age group as required for public schools by the IDEA, its Regulations and the State Plan. 34 C.F.R. § 300.550.

138. While it is correct that a private school does not need to meet the state's education standards in order to be deemed an appropriate placement, *Florence County School District Four v. Carter*, 510 U.S. 7, 14 (1993), a private school placement, cannot be reviewed absent all considerations under the IDEA. Rather, private placements must “at a minimum, provide some element of special education services in which the public school placement was deficient.” *Berger v. Medina City School District*, 348 F.3d 513, 523 (6th Cir 2003). For example, while a “segregated environment does not disqualify schools that specialize in educating disabled

children,” *Justin G. v. Board of Education*, 148 F.Supp. 2d 576, 584, (S.D. Md. 2001), mainstreaming must remain “a consideration that bears upon a parent’s choice of an alternative placement and may be considered by the hearing officer in determining whether the [private] placement was appropriate.” *Reese v. Board of Education*, 225 F.Supp 2d 1149,1159-60 (E.D. Mo. 2002), citing *M.S. v. Board of Education*, 231 F.3d 96, 105 (2nd Cir. 2000).

139. The Student's Parents have failed to meet their burden of proving that the placement of the Student at Giant Step was appropriate for the reasons stated above.

140. The Student's Parents are not entitled to reimbursement for their unilateral placement of the Student at Giant Step, pursuant to 34 C.F.R. §300.403, for the reason that the placement of the Student at Giant Step was not an appropriate placement in the least restrictive environment.

141. In addition, if the Student was never removed from the District, as the Student's Parents contended, the Student's Parents would not be entitled to receive reimbursement for tuition for Giant Step, in that: (1) the Student had not reached the mandatory age for school attendance and the Parents were free to withdraw her from school pursuant to Section 167.031.1(3); or, (2) the Student's Parents were free, as a matter of law, to reject special education and related services offered by the District which, if it occurred, would constitute an exception to the requirement that a school district provide a student with a free appropriate public education. See: "Exception to FAPE" set forth in the State Plan, Section IV, page 29.

142. The IEP prepared by the Student's IEP Team on May 24, 2004, (DEX 20), met the requirements of the IDEA, its Regulations and the State Plan. C.F.R. §§ 300.342-300.347.

143. The educational placement of the Student made by the Student's IEP Team on May 24, 2004, "private separate school (day) facility," (DEX 20, p. 114), met the requirements of the IDEA, its Regulations and the State Plan. 34 C.F.R.§ 300.552. The Student's Mother consented to this placement. The location of the Student’s educational placement, Marillac Center, was an appropriate placement for the Student in the least restrictive environment.

144. During the Student's Second Grade year (school year 2004-2005), including the Extended School Year Services during the Summer of 2004, the Student made educational progress in the program of special education and related services set forth in her IEP. (DEX 20).

145. The IEP prepared by the Student's IEP Team on May 2, 2005, (DEX 23), met the requirements of the IDEA, its Regulations and the State Plan. 34 C.F.R. §§ 300.342-300.347.

146. The educational placement of the Student made by the Student's IEP Team on May 2, 2005, "private separate school (day) facility," (DEX 23, p. 139), met the requirements of the IDEA, its Regulations and the State Plan. 34 C.F.R.§ 300.552. The Student's Mother consented to this placement. The location of the Student’s educational placement, Marillac Center, was an appropriate placement for the Student in the least restrictive environment.

147. During the Student's Third Grade year (school year 2005-2006), the Student made educational progress in the program of special education and related services set forth in her IEP. (DEX 23 and 24).

148. Beginning on June 1, 2004, and continuing through the date of the due process hearing in this matter, the District has provided the Student with a free appropriate public education.

149. The Student's educational placement was not changed due to her out-of-school disciplinary suspensions during school year 2002-2003 (four school days), or her out-of-school disciplinary suspensions during school year 2003-2004 (Six school days). The IDEA Regulations, 34 C.F.R. § 300.520(a)(1)(i) provide that school personnel may order:

". . . the removal of a child with a disability from the child's current placement for not more than 10 consecutive school days for any violation of school rules . . .".

The use of the Room for the Student, did not in and of itself constitute a "change of educational placement" for her. OSEP Memorandum 95-16 (1995)(in-school disciplinary measures such as study carrels, time-outs or other restrictions in privileges are not considered to be a change in placement).

Accordingly, the Panel unanimously finds as follows:

- Issue Number 1.** The District's evaluation of November 7, 2002 was appropriate.
- Issue Number 2.** The IEP of November 21, 2002 was appropriate.
- Issue Number 3.** The District afforded the Student a free appropriate public education at all times prior to August 20, 2003, and further, any claims relating to failure to provide FAPE prior to August 23, 2003 are time barred. The District did not provide the Student FAPE from August 23, 2003, to September 23, 2003. At all other pertinent times, the District provided the Student FAPE, when required to do so.
- Issue Number 4.** Giant Step, the private placement choice of the Student's Parents, was not an appropriate educational placement for the Student.
- Issue Number 5.** It is a moot issue as to whether the Parents gave the District appropriate notice of their unilateral withdrawal of the Student from the District.
- Issue Number 6.** The District was not obligated to conduct an IEP without request from the Parents, after the Parents unilaterally withdrew the Student from the District on September 23, 2003.

**Issue Number 7.** The placement of the Student at Marillac between August, 2004, and August 23, 2005, and even through the due process hearing in this matter, was an appropriate placement in the least restrictive environment.

**Issue Number 8.** The Student was not afforded FAPE, within the time frame of August 23, 2003 to September 23, 2003.

**Remedy:** The District shall provide the Student with 54 hours of compensatory education for failure to provide FAPE from August 23, 2003, to September 23, 2003.

**Appeal Procedure**

This is the final decision of the Department of Elementary and Secondary Education in this matter. A party has a right to request a review of this decision pursuant to the Missouri Administrative Procedures Act, §§536.010 *et seq.* RSMo. A party also has a right to challenge this decision by filing a civil action in federal or state court pursuant to the IDEA. *See* 20 U.S.C. §1415(i).

Dated: December 18, 2006

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Richard H. Ulrich, Chairperson

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Diane Golden, Ph.D., Hearing Panel  
Member

\_\_\_\_\_  
Karla Duff-Mallams, Ph.D., Hearing  
Panel Member

All panel members concur.

## CERTIFICATE OF SERVICE

Copies of the foregoing were placed in the U.S. Mail, certified mail, return receipt requested, this 18<sup>th</sup> day of December, 2006 addressed to:

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