

**THREE MEMBER DUE PROCESS HEARING PANEL
EMPOWERED PURSUANT TO 162.961 R.S.MO.
HEARING DECISION**

Student's Name:

Parent's Name:

The mother, , was present at the hearing

This was an open hearing at the request of the parents

State Education Agency (SEA): State Schools for the Severely Handicapped

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Hearing Dates: May 27-29, 2008; and June 10, 2008.

Time Line: Complaint received by DESE March 20, 2008

Decision Extended until August 29, 2009 (see attached decision for explanation of
 timeline)

Date of Report: August 29, 2007

Chief Hearing Office: Samara N. Klein
Hearing Officer chosen by the Parents: Pamela Walls
Hearing Officer chosen by the School District: George Wilson

BEFORE THE THREE MEMBER DUE PROCESS PANEL

EMPOWERED BY THE MISSOURI STATE BOARD OF EDUCATION

In the matter of

et al.

Petitioner.

v.

State Schools for the Severely Handicapped

Respondent.

DECISION

This is the final decision of the hearing panel in an impartial due process hearing pursuant to the Individuals with Disabilities in Education Act (IDEA) 20 U.S.C.

§1415(f) (2004) and Missouri law §162.961.3 RSMO.

STATEMENT OF ISSUES

Based on the first amended complaint, this decision addresses the following three issues:

Issue 1: Whether the Mapaville State School failed to appropriately implement the Student's 2007-2008 IEP starting in the fall of 2007?

Issue 2: Whether "homebound" is the appropriate placement for implementing the Student's 2008-2009 IEP?

Issue 3: Whether audio surveillance or some other type of independent observation should be built into the Student's 2008-2009 IEP?

During the course of the hearing, Petitioners occasionally brought up matters that seemed to be outside the scope of the pleadings, such as whether the Student's 2008-2009 IEP should have included a behavior intervention plan. During a conference with the hearing chair and on record at the hearing, the parties stipulated that the first two issues stated above were before the panel. Tr. Vol. II, 358-361. The Petitioners argued that the content of the 2008/2009 IEP was one of the issues to be decided by the panel. The Respondent did not believe it had notice that Petitioners were upset with the content of the 2008-2009 IEP other than that the Petitioners wanted homebound placement pending the installation of audio/visual surveillance. On page four of the Amended Complaint the Petitioners generally allege the Student's "IEP is not reasonably calculated to enable the student to receive educational benefit." However, in alleging what is defective about the IEP on pages five and six of the complaint, all allegations refer to the need for independent observation, such as audio/visual surveillance. There were no other discussions in the pleadings before the hearing to suggest that other goals in the 2008-2009 IEP were in question.

To the extent questions about the content of the 2008-2009 were not sufficiently pled, Petitioners argued that the panel had the discretion to mandate a broad range of remedies, including remedies that involved the 2008-2009 IEP. Given that IDEA would allow the panel discretion in ordering remedies if there was a finding against the Respondent, some of the testimony about the content of the 2008-2009 was allowed into evidence because it could have been relevant to compensatory education. However, the content of the 2008-2009 IEP, other than independent monitoring, was not raised in the complaint and therefore was not decided by the panel.

TIMELINE FOR THE HEARING/ PROCEDURAL OVERVIEW

The Petitioners' initial Complaint was received by the Department of Secondary and Elementary Education on March 20, 2008. On March 31, 2008, the Chief Hearing Officer received from the Respondent, the State Schools for the Severely Handicapped, a notice of insufficiency and an answer to the complaint. On April 4, 2008 the Respondent also filed Motions to Dismiss and in Limine. The Chief Hearing Officer found the Complaint to be sufficient on April 5, 2008. Petitioners were granted leave to amend their complaint and did so on April 11, 2008. Because Respondent stated that they intended to file a Motion to Dismiss in response to Petitioners' Amended Complaint, the Chief Hearing Officer never ruled on the Respondent's initial Motion to Dismiss.

After the complaint was amended, both parties agreed to a hearing on April 11, 2008, and for the final decision to be on June 25, 2008. Respondent filed another Notice of Insufficiency and Motion to Dismiss on April 14, 2008. The Chief Hearing Officer ruled that the Complaint was sufficient on April 19, 2008. In response to Respondent's Motion to Dismiss, the Chief Hearing Officer issued a ruling on May 15, 2008. Though

the complaint was not dismissed, all claims not directly related to the Student's rights under IDEA were dismissed. Also, Petitioners' claims for monetary damages under IDEA were also dismissed. The parties agreed upon dates for the hearing and a Scheduling Order setting forth those dates were issued on May 7, 2008. Both parties offered pre-trial briefs, and at the request of the Chief Hearing Officer, also filed pre-hearing briefs. These pre-hearing briefs addressed the admissibility of evidence and potential student privacy issues mainly involving audio tapes Petitioners wished to introduce into evidence and play at an open hearing.

The hearing convened on May 27, 2008 at the Holiday Inn in Festus, Missouri. On the first day of the hearing, in response to concerns by the Chief Hearing Officer about the privacy of other students involved in the hearing, Petitioners submitted consent forms from other parents of children in the Student's classroom who might be exposed during the hearing.

Several times during the hearing, while questioning witnesses, Petitioners referenced "compensatory education." Because "compensatory education" was not asked for in the Amended Complaint and because the complaint focused on other remedies, such as audio visual surveillance, the Chief Hearing Officer asked Petitioners to submit in writing what the Petitioners thought the compensatory education should consist of if relief was granted. On May 28, 2008, The Petitioners submitted a short written statement concerning what compensatory education they were requesting. On May 28, 2008, Respondent told the Chief Hearing Officer and the Petitioners that there were concerns about the ability of Mary Schilling, the former Building Administrator, to testify due to very serious health reasons. Based on Respondent's communication with Ms. Schilling,

arrangements were made for her to testify the first thing in the morning on May 29, 2008. However, Ms. Schilling did not appear that morning. Respondent reported that Ms. Schilling was still too ill to testify and could not verify that she would be able to testify anytime before the hearing adjourned.

The parties agreed to have Ms. Schilling testify by stenographic means by conference call with all the hearing officers present on June 10, 2008. The Chief Hearing Officer agreed to this arrangement because (1) there was some uncertainty as to whether Ms. Schilling would actually be able to testify in person, and the Chief Hearing Officer did not believe it prudent to reconvene the panel given such uncertainty; and (2) the parties arrived at the agreement on their own and both seemed satisfied with the arrangement. Therefore, on May 29, 2008 the parties agreed to resume the hearing on June 10, 2008. Also, at the hearing and on the record, the parties moved by joint motion to set the date for post-trial briefs on July 15, 2008 and to likewise extend the date for the final decision to August 15, 2008. As an aid to the panel, Petitioners later moved to extend the date of the final decision to August 29, 2008. The Respondent agreed and the extension was granted. The hearing was therefore completed on June 10, 2008.

The hearing resumed June 10, 2008. Mary Schilling testified by stenographic means from Festus, Missouri. The hearing officers were available via conference call and a videotape of the conference was made available to them. The witness, attorneys, and hearing officers were all able to communicate with each other during the testimony. Petitioners noted an objection to receiving an exhibit late. Petitioners claimed the exhibit, which was received on June 5, 2008, had been subject to subpoena and stated the Petitioners were prejudiced because the exhibit was received late. Petitioners claimed that

had they received the exhibit earlier, they would have changed their strategy including which witnesses would have been called to testify at the hearing.

The exhibit in question was an incident report regarding a fall the Student had on school property during the school day. The Chief Hearing Officer asked if Petitioners wanted to schedule additional hearing dates so that they could recall witnesses or call additional witnesses to address the new evidence. Petitioners wanted more time to think about the situation and agreed to discuss it further by conference call.

During a conference call on June 13, 2008, Petitioners stated they did not want to reopen the hearing because of the untimely receipt of the report. However, because Respondent was at fault for not producing the report, Petitioners moved to have the report submitted as evidence even though the hearing was over and the five day rule had passed. Respondent agreed, and all the hearing officers received the exhibit. Petitioners filed a motion Nunc Pro Tunc to amend the due process complaint to assert a procedural violation under IDEA. The motion was denied, but the incident report was received into evidence.

Both parties filed post-hearing briefs by the August 15, 2008 due date.

I. FINDINGS OF FACTS

A. Review of the Evidence

1. date of birth is. DEX 1 at 72. He will be referred to as “the Student” hereinafter.’s Parents, , initiated this Complaint. They will be referred to as “the Parents” hereinafter. will hereinafter be referred to as “the Student’s Mother.”

2. The Student was evaluated on August 21, 2002 and met the criteria of a young child with developmental delay. He was reevaluated by the Special Services Cooperative of Jefferson County on September 7, 2005 at which time it was determined that the Student met “the eligibility criteria to be diagnosed as severely retarded” under IDEA. This was

based on his medical diagnoses of “Cortical Vision Impairment, including delayed processing, Dandy Walker Syndrome, and Seizure Disorder.” In addition, his test results indicated he was “functioning within the severe range of mental retardation cognitively, adaptively, academically, linguistically, and motorically.” DEX 16 at 7, 15.

3. The Student attended the State School for Severely Handicapped at Mapaville during the 2005-2006 and 2006-2007 school years in the classroom of Debbie Sanderson. Tr. Vol. I, 188-189.

4. Petitioners were satisfied with the progress of the Student while in Ms. Sanderson’s class. Tr. Vol. I, 162-163; Vol. II, 399.

5. The Student’s IEP, the implementation of which is the primary issue in this case, was developed at an IEP conference on March 20, 2007. DEX 7 at 95-104.

6. The March 20, 2007 IEP contained the following five goals: (1) “The student will complete a task presented in a small group setting with supervision”; (2) “The student will attend to literacy-based materials”; (3) “The student will recognize or demonstrate relative positions in space”; (4) “The student will identify the relationship between force and motion”; and (5) “The student will demonstrate one-to-one correspondence between objects and counting words.” Each goal included from one to four benchmarks. DEX 7 at 98-102.

7. The March 20, 2007 IEP consisted of 1,800 minutes per week of special education services, including the following related services: 30 minutes per week of physical therapy, 60 minutes per week of occupational therapy, 30 minutes per week of speech therapy, 60 minutes per week of vision consultant, and 30 minutes per week of orientation and mobility. DEX 7 at 103. This IEP also noted the Student’s eligibility for extended school year services. DEX 7 at 104.

8. The March 20, 2007 IEP was initiated on or about March 21, 2007 by Debbie Sanderson. DEX 7 at 95.

9. As indicated in the March 20, 2007 IEP, the Extended School Year Service was to be provided from on or about July 2, 2007 through on or about August 10, 2007. DEX 7 at 104; DEX 17 at 572.

10. The implementation of the March 20, 2007 IEP, which is at issue in the Complaint, was to be provided under the supervision of Karen Shepherd and other staff members beginning on or about August 20, 2007 until the Student stopped attending on or about February 21, 2008. Tr. Vol. II, 427; Tr. Vol. I, 189.

11. The mother of another student (hereinafter “Mother 1”), who is also a party to a related due process complaint, has a child in the same classroom as the Student.¹ Mother 1 sent her son to school with a tape recorder hidden in the headrest of his wheelchair on both January 28, 2008 and Feb. 20, 2008. Tr. Vol. I, 42-43. The recordings from those dates prompted the Parents to withdraw the Student from the classroom and to complain to the State Schools. PEX 1; Vol. 1, Tr. 188, 195. (The audio from January 28, 2008 will hereinafter be referred to as “PEX 1A” and audio from Feb. 20, 2008 will hereinafter be referred to as “PEX 1B.” The Petitioners provided the audio on a zip drive and did not distinguish them as separate exhibits.)

12. Mother 1 testified that during the 2007-2008 school year she was at the school on about seven or eight occasions to conduct business. Mother 1 said that while visiting the school she observed the Student’s classroom and the Student. She saw him sitting at a rainbow shaped table staring into space; no one was interacting with him. Mother 1 said a teacher was supposed to stand in front of him and talk to him, but instead she observed the Student speaking into thin air. Tr. Vol. I, 38, 75.

13. Mother 1 testified that when she visited she spent about a few minutes to ten minutes in the classroom. She also said she would check with her son’s therapist and teacher to see how her son was doing. Tr. Vol. I, 107.

14. Mother 1 testified that she sent her child into the classroom with the recording device because of changes she saw in her own child’s behavior during the 2007-2008 school year. She did not know whether to attribute these changes to issues outside of the classroom (her son had had two surgeries and her father had recently been killed in an accident), or to occurrences at school. She also reported she was concerned about what was happening in school in part because of what she had heard from other people. Tr. Vol. I, 38-41.

15. Mother 1 described the recording device as a blue and silver Olympus tape recorder, which would fit in the palm of a person’s hand, with stop/start, hold, and erase buttons. It held three different types of files and up to 12 hours of tape. Tr. Vol. I, 42.

16. There was no other evidence other regarding the recording device by either Mother 1 or by any other witness. Specifically, there is no showing of the range in which the recording device could pick up noise, no evidence of its ability to operate with ambient noise, and no evidence regarding the ability of the device, that was placed in headrest of a wheelchair, to pick up noise not level with the device, that may have been occurring lower to or higher than the device which was under the headrest.

¹ The names of the Parents and Student who are a party to the case are omitted in due process decisions. Here, there were other parents who were not named plaintiffs in this case this case who testified. These parents and their children were also pursuing their own complaints against the State Schools. Although these parents submitted signed releases and testified at an open hearing, in the interest of making extra efforts to preserve the privacy of the children involved, the names of these witnesses will not be used in this decision.

17. Mother 1 said that her child got on the bus about 8:30am so she turned on the tapes about 8:22 to 8:25am. Tr. Vol. I, 98. She stated there were about six hours of recordings each day and that the bus ride was about twenty minutes long. On those days, her son got home about 3:08pm. Since she thinks the students are supposed to get out of school at 3:00pm, they may have gotten out earlier those days. She stated that as far as she knew the student's lunch was from 12:00 to 12:30pm, but that the time could vary. She also said that her son was not always taken into the lunch room, so his wheelchair—and tape recorder—may not have been in the lunch room on one of the days. However, Mother 1 said that on the second day of the recording, she heard noises that sounded like the recorder was in the lunch room (i.e. there was echoing and a lot of noise). Tr. Vol. I, 104-105.

18. Mother 1 stated that she had listened to all of the recordings. Tr. Vol. I, 44. When asked to identify voices from particular sections of the recordings, she testified that she recognized the voices of the Student, Karen Shepherd, the classroom teacher, Lynn Suiter, the physical therapist, the nurse, the occupational therapist, and the school principal. She based her recognition of the voices from her previous interactions with the school personnel. Tr. Vol. I, 47, 54-58; Tr. Vol. I, 96. She also stated that the Student had been friends with her son for five years. Tr. Vol. I, 51.

19. Mother 1 testified that no one communicated with the Student or the other children in the room for a very long time. Tr. Vol. I, 44.

20. Mother 1 testified from memory about the physical layout of the Student's classroom, describing the furniture, Tr. Vol. I, 106, and the size of the room. Tr. Vol. I, 112.

21. Mother 1 was asked to listen to PEX 1A from three hours and fifty-five minutes until four hours and nine minutes and explain what she heard. This section of the audio was then played as part of the hearing. (This section of the audio will hereinafter be referred to as "Segment I"). Tr. Vol. I, 46-47.

22. Based on her prior knowledge of the students' voices, Mother 1 testified that she heard the Student repeatedly ask for another student. She interpreted this as his attempt to engage with someone. He was told by staff that the other student was not there. Mother 1 also said the Student was saying the word "bubbles." Tr. Vol. I, 48-49.

23. Mother 1 testified to hearing several voices, including those of the Student, "Ann the O.T." and Louis Jeffries. Tr. Vol. I, 47-48.

24. Mother 1 testified that she heard the staff on the tape talk about the Student's Mother. Tr. Vol. I, 48.

25. The voices on the tape appear to be two school staff members talking about personal events (e.g. they talked about someone moving and someone dying), gossiping about other staff at the school, and talking about the students. If Mother 1 correctly identified the voices, they would be Ann, the O.T, and Louise Jeffries. At one point, the voice

previously identified as Louise Jeffries said the Student's Mother is a nice lady but a "scatterbrain." The voice identified as Louise Jeffries uses obscenities on multiple occasions throughout the conversation. At the same time, as the two women are talking, you can also hear them occasionally talking to students. Based on the recording it is mostly the voice of Ann that interacts with the students. She says things like "push" and "it comes on when you push," and both ladies use the word "bubbles." Children's music is playing in the background. The women specifically refer to blowing bubbles and that one of the students likes bubbles, but that they aren't sure if he can blow them. At one point they tell one of the students "you're done." Ex. 1.

26. Mother 1 testified that she didn't hear anyone implementing any of the Student's five IEP goals in this segment or anywhere else on the recording. Tr. Vol. I, 50.

27. Petitioners then played audio from PEX 1A beginning at four hours and twenty eight minutes and lasting for about a minute and a half (this section will be referred to hereinafter as "Segment II."). Mother 1 identified the voices of Louise Jeffries, the Student, and Karen Shepherd. Tr. Vol. I, 54.

28. She identified what she heard as Louise Jeffries placing the Student on the toilet. Tr. Vol. I, 54.

29. Segment II was played for the panel, and it clearly sounds like the Student was placed on a toilet. He was asked if he had to go to the bathroom and then the conversation sounded as if they were placing him on the toilet.

30. After Segment II on Exhibit 1A, but before Segment III on the audio, you hear background noise that sounds like it could be running water. You also hear the Student being spoken to on several occasions. For example, he is told to "stop pulling on that you are going to break it" at about 4:40 to 4:41 and at 4:29 you hear a voice telling the Student to look up. This portion was not played at the hearing.

31. Petitioners played the audio on Exhibit 1A which was introduced as 4:46 to 5:15 (hereinafter "Segment III") and asked Mother 1 what she heard. Mother 1 testified that she heard conversation among school personnel whom she identified as Karen Shepherd, Sally Zhang, Mary Schilling, and the "speech therapist." Mother 1 testified to hearing them listen to instructional recordings about getting children to speak at home and about seizures. Tr. Vol. I, 57-58.

32. During Segment III of the audio, you can hear staff talking about issues at the school and other staff talking about the needs of the students and what the students are doing. You can briefly hear the sound of what is an instructional tape on seizures. After 5:15, you can hear the sound of an audio recording about getting children to speak.

33. Mother 1 testified to hearing the Student say "um, um" on several occasions. She said he was trying to get someone to acknowledge him, and that it was her understanding that

he was on the toilet the entire time. Tr. Vol. I, 58. The child saying “um” on Exhibit A, Segment III was heard by the panel.

34. Mother 1 testified that she heard on PEX 1A, Segment II, that the classroom was not staffed properly. She testified that she heard Karen Shepherd, the classroom teacher, say they were shorthanded and Sally Zhang, the school nurse, say not to tell the parents. Exhibit 1A, Segment II contains conversation regarding staffing concerns. Exhibit 1A, Segment III, contains those comments being made by female voices. Tr. Vol. I, 61.

35. Mother 1 testified that she saw only one teacher or aid in the room, and that she was previously told there was to be one teacher and at least two aids in the classroom. Tr. Vol. I, 62.

36. Petitioners then played a recording from PEX 1A, 5:44 to 5:46 (hereinafter “Segment IV”). Mother 1 believed that during this part of the tape, the Student was taken off of the toilet. She made this assumption because she heard the sound of water running and believed was evidence of the Student’s hands being washed. Also, before that time she didn’t hear anyone speaking to the Student or any sounds of water. Mother 1 said she heard the voices of Louis Jeffries, Karen Shepherd, the Student and her own son. Tr. Vol. I, 65-66.

37. The panel heard the sound of the water in PEX 1A, Segment IV, and what sounded like the voices of personnel and students in the classroom. The sound of running water is clear. Those on the tape are talking to a student about washing hands. At one point you can hear a staff person say “stop yelling” to a student, but by just listening to the audio, there is no sound of a male voice yelling or any other voice yelling.

38. Mother 1 said that the bathroom was in the left corner of the room, and that door was usually left open when children were using the bathroom or being changed. She said the changing station was in the bathroom and the sink was outside of that. Tr. Vol. I, 112-113.

39. Petitioners then played PEX 1B from 3:34 to 3:35 (hereinafter “Segment V”). Mother 1 said she heard several voices including those of the Student, Louise Jeffries, Lynn Suiter (the PT), the nurse, and Karen Shepherd. She said that in reference to the Student it is just Karen Shepherd and Louise Jeffries talking to him. She did not testify as to what she heard when the audio is first played. Tr. Vol. I, 68. Later she says that hears Lynn Suiter saying “he doesn’t stand a chance.”

40. On PEX 1A, Segment V, someone can be heard telling a boy student to open and close a door, and then to open and close another door. Then you hear a woman’s voice saying that he can’t follow instructions and it’s ridiculous, and then you hear the other women’s voice saying “he doesn’t have” and then there is a muffled word that could be “chance” but could be something else.

41. Petitioners then played PEX 1B from 4:14 to 4:21 (hereinafter “Segment VI”). Mother 1 testified that the voices on Segment VI were those of the Student, her son, and Louise Jeffries. Tr. Vol. I, 69.

42 Assuming the voices have been accurately identified, Segment VI can be heard as the Student saying a boy student’s name and music playing in the background. There are also many places where you hear no voices. Then you continue to here the same child say the name of the boy student. Then you hear the voice that has been identified as Louise Jeffries saying “shut up” to the Student, and then you hear the words “go ahead” and then a hitting type sound, then there is a pause and then there is a woman’s voice that says stop it, pause, and then something like “get down” or giving some type of instruction. Next, there is several seconds and then crying, then you hear the voice woman’ of what has been identified as Louise Jeffries say “knock it off” to the Student and then asking the Student if he is wet or dry. The Student says no and then stops crying. The crying lasted about ten seconds.

43. Mother 1 testified that she met with Clark Powell, the Area Three Superintendent, and Angie Mill Hayes, the Home School Supervisor. Tr. Vol. I, 69-71. Mother 1 reported that Mr. Powell said that her concerns were understandable, and that he would look into the staff people in question—Louise Jeffries, Denise Dunn and Karen Shepherd. Mr. Powell said he would conduct an investigation to determine what was happening in the classroom. Mother 1 said Mr. Powell asked if she had brought this up to any other staff people, and that she said she brought it up to Karen Shepherd and Angela-Hills Mays. Tr. Vol. I, 70-71.

44. Mother 1 said she also told Mr. Powell about the lack of communication between students, teachers, and aids and about the problems with hygienic maintenance. She also told him how students were not being moved out of bean bags and chairs and of possible physical and verbal abuse. Tr. Vol. I, 70-71.

45. On cross-examination, Mother 1 testified that her son was not to be in his wheelchair all day (where she had placed the recording device), but that he was also to be placed in a stander. She also testified that during the day he was sometimes left in what she identified as a bean bag chair. She acknowledged that the wheelchair was not always in the same room as her son. Tr. Vol. I, 83.

46. When asked if she had knowledge of where her son’s chair was during the audio tape, Mother 1 said ‘visually no.’ She said she wasn’t in the classroom when the tape was being made. Tr. Vol. I, 83.

47. Referring to PEX 1A, Mother 1 was asked whether or not the staff was engaged in an activity with bubbles; she said they were not, but were instead talking about her son blowing bubbles with his mouth. Tr. Vol. I, 84–85.

48. When asked if the staff was playing Legos with the children, Mother 1 said she heard the sounds of different toys, but that she didn’t hear Legos. She later said they may have

been Legos. She did hear the sound of her son's adaptive equipment being played, and she said that it his adaptive equipment and that it just should be used by him. She also says she heard the toy being used by another child and the speech therapist saying "push it." Tr. Vol. I, 85-86.

49. When asked about PEX 1B, Mother 1 said she heard the voice of Lynn Suiter in the room. She says that she heard Lynn Suiter talking to Karen about the Student and believes Lynn Suiter says he doesn't stand a chance and is laughing about it. Tr. Vol. I, 89.

50. Mother 1 testified that after her personal meeting with Clark Powell, there was also a parent meeting with him on or about March 4, 2008, but that she had not written a letter to Mr. Powell. Tr. Vol. I, 93.

51. Mother 1 testified that after both January 28, 2008 and February 20, 2008 when PEX 1A and 1B were recorded, she drove directly to Mother 2's house. Mother 2 is the owner of the recorder, and the mother of a child in another classroom. Once at the house, the women downloaded the recordings to Mother 2's computer. Mother 1 said she did not tamper with the recordings. The recordings stayed at Mother 2's house after that. Tr. Vol. I, 94.

52. Mother 2 testified that she heard one of her son's goals being worked on during the first day of the recordings (PEX 1A) and two of the goals on the second day (PEX 1B). Tr. Vol. I. 99-100. She said that the Ann worked with another child with her child's switch device. Tr. Vol. 1, 86.

53. Mother 2 also testified to having recorded on four days: January 22, 23, 24, and 25. She said she used the same Olympus Recording Device that Mother 1 used and that she had lent to Mother 1. Mother 2 said she downloaded the recordings onto her home computer. She gave a copy to the State, the DRA, and Jefferson County. She said the copy that was given to Mr. Kuhlman, counsel for the Petitioners, that it was a true and accurate copy of the recording, and that she did not copy it in any way. Tr. Vol. I, 123.

54. Mother 2 said her son was eleven years old and had started attending the Mapaville State School in 2005. She testified that she worked as an aid at the school during the summer of 2006 and was hired as a substitute aid in May 2007. She worked the summer of 2007 and continued working as an aid in the fall of that year. Tr. Vol. I, 124.

55. Mother 2 said that she did not receive any training from the school before starting or while working at the school. Due to changes in personnel she also worked under a number of different teachers and long-term substitute teachers. Tr. Vol. I, 125-127.

56. Mother 2 testified that she did not receive any instruction on the implementation of IEP goals. She testified that she did not know the IEP goals of the students in her classroom, and that they did not work on goals of the students until mid-October. She

testified that they would spend quite a bit of time changing the students and getting them in and out of their standers. Tr. Vol. I, 129-131.

57. Mother 2 testified that IEP goals started being implemented after Dawn Ortega, a new teacher, was hired. She reported having discussions with both Mary Schilling, the school principal, and Dawn Ortega about the school's failure to implement IEP goals. Mother 2 testified that she made a rotation schedule for the classroom, and that Mary Schilling approved it. Tr. Vol. I, 131.

58. Mother 2 testified that she "floated" into Karen Shepherd's classroom two times in order to help out. On one occasion in the fall of 2007, Denise Dunn was in there alone. She helped Denise Dunn change the students and get them in out of their standers. She got all the kids in a circle and did circle time. There was one other time that Mother 2 reported being in the classroom for an hour and a half. Tr. Vol. I, 135.

59. Mother 2 testified that Peggy Heileman, a substitute teacher (who is currently the gym teacher), had told her that the Student was not as happy this year and seemed withdrawn and "trembly" Tr. Vol. I, 138.

60. Mother 2 testified that she saw the Student in the lunchroom with other students on two occasions. She reported that she saw Louise Jeffries seem impatient, frustrated, and that Ms. Jeffries used harsh tones with the Student. Mother 2 said Ms. Jeffries grabbed the Student by the back of the neck and shoved his cup or spoon into his mouth. She testified that she also saw Ms. Jeffries treat another child this way in the lunchroom. Tr. Vol. I, 139.

61. Mother 2 testified that she was not a certified therapist or teacher. Tr. Vol. I, 143.

62. Mother 2 testified that she reported her concerns about why this behavior was allowed to go on to Mary Schilling, the building principal. She reported having several meetings with Ms. Schilling, which each lasted up to two hours. However she testified that she did not report the concerns to Clark Powell. Tr. Vol. I, 144. Mother 2 testified that she thought Mary Schilling did not act on her reports. Mother 2 thought that, in general, Mary Schilling's "hands were tied," and that "she was up against a brick wall." Mother 2 believed that because there were no consequences for staff actions the problems escalated. Tr. Vol. I, 145, 157. Mother 2 did not know if Mary Schilling relayed her concerns to anyone else. Tr. Vol. I, 159.

63. Mother 2 said she worked at the school so she could be there for her son. Tr. Vol. I, 146. She said she quit on January 18, 2009 because she was having trouble with her own son's IEP being met and could not advocate for him as an employee. Tr. Vol. I, 146, 152. She witnessed a particular incident which led her to quit. On January 16, 2008, at the end of the school day her son was brought to her soaked with urine. She said she had already had asked Mary Schilling to talk to the teacher in her son's classroom before this and was through waiting. She said that she and another school aid, who worked next door to her

son's classroom, suggested that she needed to bring a "nanny cam" to the classroom. She didn't have a nanny cam so instead she bought the recorder. Tr. Vol. I, 152.

64. Mother 2 testified that she took her child out of school after January 16, 2008 and received homebound instruction. Tr. Vol. I, 153.

65. The Student's Mother testified that she is the mother of the Student. She said the Student, who is now nine years old, was initially enrolled in the school in 2003 or 2004. She testified that the Student's first teacher was Debbie Sanderson, and that her son did "great" in that class. Tr. Vol. I, 162. She said that in Ms. Sanderson's class she got the Student to walk using a makeshift walker and then got him to walk independently. The Student's Mother said the Student was in that class for three years during which time his vocabulary grew and he learned the pledge of allegiance. Tr. Vol. I, 163.

66. The Student's Mother identified Karen Shepherd as the Student's current teacher. Tr. Vol. I, 163. The Student's Mother said that this school year the Student was no longer walking and that he was shakier. She said his apparent regression could be related to his medication, and/or that his hips were not strong. In addition, the Student's Mother said the Student could have some visual problems. Tr. Vol. I, 163.

67. The Student's Mother said that currently the Student won't walk unless he has help. She said that when she had the IEP meeting she asked that he have his hand held at all times, but the request didn't get put into his IEP. Tr. Vol. I, 164-165.

68. The Student's Mother said that the Student began having trouble with seizures between June and July, 2007. The doctor thought it was possible that he was not getting enough medication because he was getting bigger. She also said that you could see by looking at his hands that he was shaky. Tr. Vol. I, 164-165. He was trembling noticeably. Tr. Vol. I, 166.

69. The Student's Mother stated that the changes in medication included increasing his dosage of Lamictal. In December, 2007, he began taking Topomax, which has since been replaced with Keppra. Tr. Vol. I, 191.

70. The Student's Mother testified that the Student fell at school on August 27, 2007. She explained that she was told that he was walking from the building to the playground and that "Louise was supposed to be holding his hand . . ." She said she thought she was told by the school nurse, Sally Zhang, that Louise was the one attending to him. Tr. Vol. I, 166.

71. The Student's Mother said that she had asked the Ms. Zhang to have someone hold the Student's hand at all times and Ms. Zhang had agreed. She did not testify as to the date, but said that it was around the time he was having medication and seizure problems. Tr. Vol. I, 166.

72. The Student's Mother said she did not agree with the statement from the March 2008 IEP which said that the Student was walking around the house independently; nor did she agree with the statement in his March 2008 IEP that the Student could walk around the school environment independently and find his way to the classroom and lunchroom. She said she had asked them to make corrections to the IEP. Tr. Vol. I, 167.

73. The Student's Mother said she had asked for homebound at the March 2008 IEP, but it was denied because it was not medically necessary. Tr. Vol. I, 169.

74. The Student's Mother testified that her major goal for the Student was that he pick up crayons or any writing instrument and color, or that he hold things in his hands. Tr. Vol. I, 168.

75. When the Student's Mother was asked about the Student's progress in 2007-2008 she said he had not progressed but had regressed. Tr. Vol. I, 199. She said he wasn't walking like he used to. When asked about his demeanor, the Student's Mother said that the Student didn't want to get on the bus in the morning. He told her he wanted to go home when he got on the bus, and he consistently didn't want to go to school. She couldn't exactly tell when this started, but said it was in the past year. Tr. Vol. I, 177.

76. When asked to be more specific about his lack of progress, the Student's Mother said the Student was no longer saying the pledge of allegiance or walking, and that he did not want to get on the bus and was saying he wanted to go home. Tr. Vol. I, 199-200.

77. The Student's Mother said that the Student had always done things like pull her hair or bite her when she hugged him, but that his level of aggression had increased during the last school year. She said that she had gotten notes from the school regarding the Student's aggressiveness, but believed the notes to be vague. Tr. Vol. I, 178. With regard to her observations at home, the Student's Mother said the Student did kick in bed and pull her head, but it said it only happened sporadically and when he was having a seizure. Tr. Vol. I, 193. She also said that like a "typical kid" he would bite her sometimes when he got mad after he was told to do something that he didn't want to do. Tr. Vol. I, 194.

78. The Student's Mother said she that she did receive a phone call from Clark Powell and that he called her to invite her to a meeting on March 4, 2008. She said she attended the meeting with her husband. Tr. Vol. I, 196. She testified that at the meeting, Clark Powell said that there was a problem and that he would try to do everything he could to fix it. Tr. Vol. I, 207-208.

79. The Student's Mother also said that at the March 14, 2008 IEP meeting, she told Mr. Powell that she did not want the Student to go back to school if Louise Jeffries, Denise Dunn, or Karen Shepherd were going to be there because their behavior from the tape wouldn't be acceptable in a public setting. Tr. Vol. I, 197.

80. The Student's Mother expressed frustration that she had seen the Student's eating skills improve while he was in Debbie Sanderson's class, but that the progress had not continued. She thought that was a goal on his IEP. Tr. Vol. I, 179.

81. In regard to the March 2008 IEP meeting, the Student's Mother testified that she asked for some type of discipline plan. She wanted to get more specific information about what happened during the day, and she also said she didn't want the Student left on the toilet unattended. She also did not like staff gossiping in front of him during the day. Tr. Vol. I, 187.

82. The Student's Mother said she listened to the tape from February 20, 2008, Exhibit 1B, but not to the other day, Exhibit 1A. Tr. Vol. I, 181. She was able to recognize her son's voice on the tape. Tr. Vol. I, 182. She pulled him out of school based on what she heard on the tape. Tr. Vol. I, 188.

83. The Student's Mother said that her husband picked up the tape on Thursday evening after he got off work, but that before he got the tape, Mother 1 played the portion of the tape over the phone "where it sounds like he is getting slapped, and then the chair falls, and then he cries." Tr. Vol. I, 214. She also said that she had requested discipline in the 2008 IEP because she understood that Louise Jeffries said the Student had hit her. She believed the Student needed to be instructed so that he knew he shouldn't hit people. Tr. Vol. I, 207.

84. The Student's Mother said she found out about the tapes on February 21, 2008 at 10:30am from Mother 1. She said that that day and the next day were snow days. Tr. Vol. I, 189. The Student's Mother called the Division of Family Services and reported possible abuse and neglect. The Division of Family Services did not substantiate a finding of abuse or neglect. Tr. Vol. I, 203, PEX. 10.

85. The Student's Mother thought the Student cried on the tape because the chair fell. There were two slaps and the chair fell. She thought someone either jerked him out of the chair and it fell, or someone grabbed his arm and the sudden movement upset him. She said he did not cry often and that when he cried there was usually a reason. Tr. Vol. I, 222.

86. There was documentation in the evaluation DEX. 16 on page 9 that the Student would cry when he was asked to do something he didn't want to do.

87. The Student's Mother testified that she did not think it was common for the Student, to hit, and that it would usually occur with him making some kind of vocalization. However, she could not say he never hit without making a vocalization. She said with his sister he was more likely to push or pull and scream. Tr. Vol. I, 220. She also said he slams doors some. She thought it was possible he had the upper body strength to hit someone, but was not sure. Tr. Vol. I, 218.

88. Mr. Craig Henning testified that he was the Executive Director and Chief Operating Executive of Disabilities Resources Association in Jefferson County. He taught from 1986 to 1989 on provisional status in a development preschool and worked from 1989 to 2003 in an every other Saturday respite program. By completing a two year program, he became certified as a development disabilities specialist. He completed a teaching practicum at Mapaville State School. He has worked on over 150 IEPs in the last ten years. He testified to having worked with kids who were echolalic. He was qualified as an expert regarding his knowledge of working with the kids with disabilities. Tr. Vol. II, 254-257.

89. Mr. Henning also testified that he had five or six IEP meetings involving three kids at the Mapaville State School. He also testified to that he attended nine resolution meetings at the State School. He stated that he attended the resolution meeting involving the Student, and that there had been a discussion with Mary Schilling, the Principal, about staff manhandling the Student and about slapping the Student's hands when he struck other children. Mr. Henning said Ms. Schilling did not deny these allegations at the meeting. Tr. Vol. II, 262.

90. Mr. Henning testified that if a child repeated curse words over and over again, it could be harmful to the other students. Tr. Vol. II, 267-270. He testified that sitting on the toilet for a prolonged time or having to respond to a child's behavior problems can take away from working on the IEP. Tr. Vol. II, 272.

91. Mr. Henning testified that based on the meetings he had attended over the past few years, involving at least eight kids, he had concerns with charting not being done on a daily basis. He also said that equipment, which was to be used for IEP goals, got ordered late so the goals could not be worked on. He said that Mary Schilling said in a meeting that the charting needed to be done twice a week. From his work at the State School, he said it was his opinion that IEPs were not being implemented. Tr. Vol. II, 275-276.

92. On cross-examination, Mr. Henning verified that he was not a certified teacher or building administrator. He had not personally observed any classroom teaching in two years, nor had he personally worked with the Student on his IEP. Tr. Vol. II, 278-281.

93. Clark Powell was called by the Petitioners as an adverse party. Clark Powell is the Area Three Regional Director for the State Schools for the Severely Handicapped under the Department of Secondary and Elementary Education. He supervised eleven states schools in the St. Louis, Southeast area, including Mapaville State School. He has been at his position for two years and previously worked in the St. Louis City School District. Tr. Vol. II, 308.

94. Mr. Powell testified that Student Handbooks were created by each school, but were basically the same everywhere. The witness read from Exhibit 9 page 19 of the handbook—which states that “the State Schools do not use corporal punishment and that derogatory comments about students or made to the student are not tolerated.” Tr. Vol. II, 312. He also acknowledged that the handbook stated students and parents should be

treated with respect. Ex. 9. He acknowledged that telling a student to “shut up” would be derogatory. Tr. Vol. II, 312.

95. Mr. Powell acknowledged that he previously gave merit to other people’s concerns that Mapaville lacked supervision. Tr. Vol. II, 316-317. While Mr. Powell refuted the assertion that he had said there were not enough supervisors for the State Schools, he did say that he would like to see more supervisors. He said there had been some problems with recruitment. Tr. Vol. II, 117. Mr. Powell testified that additional supervisors had now been hired and one of the supervisors would probably be domiciled at Mapaville, while also overseeing another school. Tr. Vol. II, 321-323.

96. Mr. Powell said he only listened to about 10 or 15 minutes of the tapes, but that he did not have his own copy and had originally asked the parents for the tape. Tr. Vol. II, 318-321.

97. Mr. Powell testified that he was not presently making personnel decisions, but that he was doing so before the March 4, 2008 meeting with the Parents. He said that as the situation grew in proportion, it started to get handled at the central level. Tr. Vol. II, 324.

98. Mr. Powell identified Charles Taylor as being the superintendent of State Schools and Archie Derboven as the Assistant Superintendent. Tr. Vol. II, 326.

99. Mr. Powell testified that he met with the Parents to discuss their concerns and that he invited the Student’s Mother to the meeting. He said he followed up with a letter to the Parents to thank them and to tell them that he would look into the accusations. He told them that a separate investigation was being conducted. Tr. Vol. II, 327. He also explained that there normally would have been a process involving the central office and that he would not make a unilateral decision. Tr. Vol. II, 327.

100. Mr. Powell testified that Archie Derboven listened to 40 min of the tapes, which he believed to be the entire recordings. Tr. Vol. II, 330.

101. Mr. Powell testified that the new supervisors of instruction would oversee activities related to No Child Left Behind, including preparations for Map A. He also said that the Supervisors would help implement more authentic instruction and work closely with the teachers on behavioral support. He said that the Supervisors would conduct most of the instruction, but might also be able to utilize outside consultants. There would now be three supervisors for eleven schools instead of two. Tr. Vol. II, 334-336.

102. Mr. Powell said there had been additional training since Mapaville had received publicity over the recordings. Tr. Vol. II, 337.

103. Mr. Powell testified that he thought the teacher-student ratio was one to six and the student-staff ratio was about one to two.

104. When asked if there was mandated training, Mr. Powell said that the teachers institute and the support staff institute are required. Tr. Vol. II, 354. He also said that the responsibility for training was collaborative and would include the teachers themselves, the Building administrators, and the central office. Tr. Vol. II, 351.

105. Mr. Powell explained that DESE require staff chart IEP goals every time they are worked on. Tr. Vol. II, 355. He also said that progress reports were sent to parents every six weeks. Tr. Vol. II, 355. He later said that the teacher herself may maintain specific daily progress notes, but it is not required that the teacher enter the data every day. Tr. Vol. II, 356.

106. Mary Schilling, the School Principal and Building Administrator, was called as an adverse witness by Petitioners. As noted above, Mary Shilling testified after the Respondent presented its case. The testimony was videotaped and also transcribed by a court reporter, and the circumstances are described more fully in the Procedural Overview section above.

107. Ms. Schilling testified that she had been the Building Administrator at Mapaville for ten years, but that she was currently assigned as a teacher at another State School. Tr. Vol. IV, 541-542. She had read the due process complaint but had not listened to any of the audio tapes. Tr. Vol. IV, 542-543. She testified that she had taken pain medication, but that it did not impact her cognitive abilities. Tr. Vol. IV, 556.

108. Ms. Schilling said she believed that she provided adequate oversight at Mapaville State School. She said she would periodically check the progress charts the teachers completed on each goals. She tried to check them quarterly for each student. She testified that she would do rounds for each classroom in the morning and in the afternoon. Tr. Vol. IV, 544. She also said that the supervisor of instruction, Janelle Birch, would also periodically come to the school and round on the classrooms, but she was not sure how many times Ms. Birch had sat-in on Karen Shepherd's classroom.

109. Ms. Schilling said that mandatory training of staff included CPR, lifting, infection control, sexual harassment, diversity, and medication administration. She said that all the aids received the training. When asked why Mother 2 had not received the training, Ms. Schilling said it was because Mother 2 had started at the end of the school year when all the training was over. Tr. Vol. IV, 546.

110. Ms. Schilling also said that over the course of the last year teachers had received training in Map A and authentic instruction because that was their instructional focus. Tr. Vol. IV, 547.

111. Ms. Schilling testified that she had received a complaint from Christa Green, the O.T., about IEP implementation involving the son of Mother 2. Ms. Green expressed concern that goals involving the gate trainer and the computer were not being worked on. Mrs. Schilling said that she looked over the charts and asked the teacher about those goals, and the teacher admitted that the goals were not worked on. Tr. Vol. IV, 549.

112. Ms. Schilling testified that she expected the teachers to be honest about what was on the charts. Tr. Vol. IV, 549. She said that most of the teachers do the charts in front of them as they do instructions or they have an aid check the charts as they teach the group. Ms. Schilling was further questioned about whether it would be okay for teachers to complete the charts the next day. She said the teacher could enter the information “whenever.” She said that some people put it on a sticky and attach it to their shirt until they get a chance to write in on the chart. Tr. Vol. IV, 519.

113. When asked if she remembered 36 different goals for a total of six students to enter the date accurately the next morning, she said she thought it was possible. Tr. Vol. IV, 550. She said that requirements for teacher chart goals were established in the administration instruction guidebook. She said that teachers used to be required to chart goals every week, but now they could do it twice a month. Tr. Vol. IV, 551.

114. Ms. Schilling said that over the last two years she had never received a complaint concerning Denise Dunn, Louise Jeffries, or Karen Shepherd. She said she had received complaints about Sherry Crow. She said that one student’s parents complained that Sherry Crow had been accused of pulling a student in a way that caused the child to receive rug burns. She also said she made a report to the Division of Family Services about this incident. Tr. Vol. IV, 554-556. Ms. Schilling said she was not afraid of being harassed by Sherry Crow when she took action against her. However, Ms. Schilling may have felt on one or two occasions that Sherry Crow was harassing her. Tr. Vol. IV, 558-559.

115. Ms. Schilling testified that she remembered on January 20, 2008 that the staff was short-handed. She said that they usually used a floater aid and they moved people around, but that on some days more people are absent and you can’t get a sub to come in. Tr. Vol. IV, 563.

116. Ms. Schilling testified that due to illness she had used up all her leave time (about six weeks) and she went to leave without pay. She was not sure of the total amount of time that she missed, but said it was probably at least two months. She said that she missed days in December because she wasn’t feeling well. She had multiple doctor appointments, but she wouldn’t miss the full day. She was diagnosed with uterine cancer on February 8, 2008 and then had a total hysterectomy on February 15, 2009. Tr. Vol. IV, 563, 577. While she was out, Debbie Sanderson, who was also a full time teacher, acted in her place while also continuing to teach class. Tr. Vol. IV, 578.

117. Ms. Schilling did not think it was appropriate for staff to tell students to shut up or curse. She said that a student should not be left on the toilet for longer the five to ten minutes, unless there was a problem like a student having diarrhea; in that case, a staff member would attend to the student. Tr. Vol. IV, 564- 565.

118. When asked if she talked about the resolution conferences with any staff, Ms. Schilling said the only person she had talked to about them was Sally Zhang, the school

nurse; she said she thought they were long and difficult. Ms. Schilling then said that at a meeting she never discussed a specific complaint about picking up a student and setting him on her wheelchair. She said she only had a meeting to discuss that there would be various people coming in and out of the school building. Tr. Vol. IV, 566.

119. Ms. Schilling testified that she had seen the Student behave aggressively at lunch. She said he would bat away the hands of staff when they first tried to get him to eat, and that he would throw his spoon or fork. She said that once he would get started eating he would stop flailing his arms. She said that she hadn't made a statement saying that staff hit the Student, but that when the Student would try to hit staff members, they would hold up their hands so that he couldn't hit them. Tr. Vol. IV, 567-578.

120. Ms. Schilling first testified that she did not remember if she was present at the Student's 2008 IEP meeting because she had attended so many IEP meetings, but when she was reminded that it was around the time the allegations surfaced, she said that she remembered being at the meeting. Tr. Vol. IV, 568.

121. Ms. Schilling testified that she was not under the influence of medication at that meeting. She said she remembered discussing the Student's behavior and that the Student's Mother wanted some type of discipline to take place if the Student hit another student. Ms. Schilling said the teacher didn't put the instruction in the plan because she thought she could deal with such behavior by redirecting the Student. Tr. Vol. IV, 569.

122. Ms. Schilling said that she had knowledge of the Student's shoes being thrown away, but she did not know that it was Louise Jeffries who threw them away. She learned about it because someone said that these comments were on the tapes. Tr. Vol. IV, 571. She later said that she asked Louise Jeffries why she had thrown the Student's shoes away and that if something was inappropriate the staff should send it home with a note to the parents and not throw away personal property. Tr. Vol. IV, 576.

123. Ms. Schilling said that Mother 2, who was also a classroom aid, came to her about her son's IEP goals and also complained about a particular teacher in the classroom who was later let go. She also said that Mother 2 had made up a schedule for the teachers to use in implementing IEP goals in that classroom. She explained that she had also made up a schedule, which included IEP goals, but that it was more general than Mother 2's. She also said when she observed the classroom she saw that two staff people could not implement the schedule. She said that she did not remember Mother 2 saying that IEP goals were not implemented, but that the mother had said told her about "things not happening." Ms. Schilling then said that one of the "things not happening" were the IEP goals not being implemented. Tr. Vol. IV, 576.

124. Ms. Schilling read from an incident report signed by Louise Jeffries. The incident report included the statement from Louise Jeffries that she and the Student were both walking across the playground when the Student, who was in front of her, just fell down. The statement said that Ms. Jeffries tried to catch him, and that she brought him inside and called the nurse. Tr. Vol. IV, 579; PEX13.

125. Ms. Schilling said that they were trying to get the Student to walk independently on different surfaces, which was one of his goals. She said he was able to go to the school bus all the way back to the door. She said sometimes they would hold his hand; they would do this if his mother had reported that he had had a seizure or something. She did not remember having a requirement that someone hold his hand at all times or for him to be holding his walker.

126. Ms. Schilling said that substitute personnel would not be included in training activities. Tr. Vol. IV, 587.

127. Ms. Schilling said that she did not think her medical condition had impacted her ability to serve as principal even considering the time she had to take off. Tr. Vol. IV, 591.

128. Petitioners rested their case after the testimony of Mary Schilling.

129. Respondent had two witnesses testify in its defense, Debra Sanderson and Karen Shepherd.

130. Debra Sanderson testified that she was employed at the Mapaville State School as a teacher. She has a Bachelors degree in Elementary Education and a Bachelor of Science degree in Special Education and Secondary Education from the State of Illinois. She was also certified by the State of Missouri to teach the trainably mentally retarded and educably mentally retarded. Tr. Vol. IV, 361-362.

131. Ms. Sanderson said she was the Student's teacher when the March 2007 IEP was developed, and that she was his special education teacher at that time. She testified that she implanted his IEP during the spring 2007 term, but not for the extended school year. She explained she was not his teacher in the fall of 2007. Tr. Vol. IV, 363-364.

132. Ms. Sanderson explained that the Student had a cortical vision problem, which was more of a neurological problem than an eye problem, and that how he would see on any given day depended on his neurological system. She said she was told that his vision problem was kind of like looking through Swiss cheese and that sometimes it would seem like he could see better out of his peripheral vision and sometimes he could see better straight on. Tr. Vol. IV, 364.

133. Ms. Sanderson testified that the Student did not like working with his hands and said that when they tried to get him to use his hands he would often pull them back. The staff tried working with him with some "hand over hand" assistance. He liked to use his hands to play with his toys, so sometimes the staff would start with playing with toys and then try to lead up to using his hands for something else. Tr. Vol. IV, 365.

134. Ms. Sanderson identified the March 2007 IEP. Tr. Vol. II, 363; DEX 7. She identified a Notice of Action that the Student's Mother had signed that reduced the time

the Student would spend in PT from 60 to 30 min. in order to increase the time the Student was getting in O.T. Ms. Sanderson explained that the purpose of increasing time in O.T. was to give the Student more time to participate in activities using his hands. Tr. Vol. II, 366; DEX 8.

135. Ms. Sanderson identified the reports of the student's progress for the 2007-2008 school year. Tr. Vol. II, 367; DEX 4. She testified that the goals on the IEP matched the Report of Student Progress. Tr. Vol. II, 367-370; DEX 4, 7. She identified DEX 5 as being the data charts corresponding to the IEP. She explained that the symbol "BM" was used for benchmarks and how the benchmarks also related to a specific IEP goal. Ms. Sanderson also explained that the step level was related to what level the student was performing the skill. Level three meant he was performing it independently. She explained the use of an X as it related to minutes a child would do something. She reviewed the data entry for the IEP goals that occurred during the second semester of the 2007 school year. Tr. Vol. II, 381-394; DEX 4, 5.

136. Ms. Sanderson testified that the building administrator had instructed that charting on a daily basis was not required. Tr. Vol. II, 375.

137. Ms. Sanderson testified that she would sometimes see the Student walk independently, but with supervision, when he was getting off the bus and see him walk in the hallway during the 2007-2008 school year. She also testified that the Student's Mother would sometimes come into the classroom and pick the Student up, and that they would remind her that someday he might get too big for her to do that. Tr. Vol. II, 397.

138. Ms. Sanderson testified that Mother 1's son did not have "one-on-one" written on his IEP, and that he sometimes used other switch toys and not just the toy he brought in. She also said that she had never seen Louise Jeffries "manhandle" a child. Tr. Vol. II, 398.

139. On cross-examination by Petitioners, Ms. Sanderson testified that the data entry stopped in June of 2007. She was asked to look at DEX 4 at 180. where Karen Shepherd's entries start. She testified that progress reports were done quarterly. While looking at Exhibit 4, Ms. Sanderson was asked whether or not there should have been data entry from January 7, 2008 to March 7, 2008. She said, "If it had been mine there would be something written there." Tr. Vol. II, 402-404.

140. The Student was not enrolled in school on March 7, 2008.

141. Ms. Sanderson testified that on November 21, 2008 on goal five, the Student's score goes down, but that you then also have to look at the step he is on. She explained that when the step requires him to do something independently the score is expected to go down. Tr. Vol. II, 406-407; DEX 4.

142. Ms. Sanderson testified that she had not listened to the audio. Tr. Vol. II, 408.

143. Ms. Sanderson had not visited Karen Shepherd's class this year. She testified that she had her own classroom but that when the principal was out and she was "teacher in charge." She said that as teacher in charge, she would be called from her classroom to the office to handle matters such as calls from parents. She said she did not go into Karen Shepherd's classroom as teacher in charge. Tr. Vol. II, 409.

144. Ms. Sanderson testified that she had not had time to observe the Student very much this year so she could not report on his demeanor. Tr. Vol. II, 411.

145. Ms. Sanderson said that when the Student was in her classroom he would sometimes slap at the staff when he was upset or didn't want to do something. Sometimes the Student might vocalize or say something before he slapped, but sometimes he would not. She also said that he would cry occasionally, but that it was not common. Tr. Vol. II, 420.

146. The Student would understand a command to tell him to not do something. Tr. Vol. II, 421.

147. Karen Shepherd testified on behalf of the State Schools for the Severely Handicapped. Ms. Shepherd has a Bachelors of Science in Education from Northeast University, now called Truman State. She had been a teacher at the Mapaville State School for 20 years. She was the teacher in the Students classroom for the 2007-2008 school year. Tr. Vol. II, 423-424.

148. The witness testified that she had resigned "when all of this came about" because she was very stressed out and it was hard for her to go to school. She took a leave of absence before she resigned and was not planning on going back. Tr. Vol. II, 424, 492.

149. Ms. Shepherd identified the IEP that was used in her classroom, and that it was initiated under Debbie Sanderson. She testified that she worked on the IEP in her classroom. Tr. Vol. II, 425; Ex. 7. She verified that the goals on the reports matched the IEP, and she matched the goals on the IEP to the date charts. Tr. Vol. II, 429-430; DEX 5.

150. The data charts were made as a part of the regular course of business, were completed at or near the time of events, and were verified to be true and accurate copies. Tr. V.II, 429. DEX5.

151. Ms. Shepherd explained how she documented the Student's progress on the March 2007 IEP in the data charts and Reports of Student Progress. For some of the goals, Ms. Shepherd gave specific examples of how they were implemented. She explained how the Student was taught to recognize cause and effect by using a switch to turn on a computer, and how they worked with him on using a stamp. She said there would be days when he would resist, but that most days he would be cooperative. Tr. Vol. II, 443-444.

152. Ms. Shepherd verified that some benchmarks under the goals had been accomplished. Tr. Vol. II, 441, 446, 448; DEX 5.

153. Ms. Shepherd explained the “authentic teaching” strategy as one that incorporated benchmarks and goals into normal daily activities. Tr. Vol. II, 450. Authentic teaching is used in the state school system. Tr. Vol. II, 477.

154. Ms. Shepherd verified that she took photos at the school for use in places like the school yearbook and newsletter. The photos were taken with her camera. DEX 27, 1-26. The photos showed the Student engaging with staff in various activities at school and sometimes outside the school such as at the Pasta House and the bowling alley. The Student is identified as engaging in activities that are sometimes described by the witness as either directly reflecting a goal or a benchmark on his IEP and/or sometimes engaged in an activity where a goal or a benchmark is described as embedded into the activity. Tr. Vol. II, 461- 466. Ms. Shepherd did not take all the photos, but thought she took the majority of them. Tr. Vol. II, 473.

155. Ms. Shepherd identified a video, DEX 27. She said the video was the Student walking with Louise Jeffries. She explained that the video was taken in August or September of 2007. She said she took the video at the request of the Student’s Mother so that the doctor would understand the Student’s shakiness. Tr. Vol. II, 468.

156. Ms. Shepherd explained that the Student’s Mother told her about the Student’s medications changes at several points during the year. Ms. Shepherd said that there seemed to be differences in his shakiness and behavior based on the medication, but that after a few changes he seemed to become more stable on his feet and his behavior improved. She also said she thought the improvement had occurred by January, 2008. Tr. Vol. II, 469, 484.

157. Ms. Shepherd reported that she did not see the Student fall the day he got stitches, and that she had been called into the office that day. She said that two members of the staff, Denise Dunn and Louise Jeffries, were with the Student. She said that from what she understood they were lining up to come back to the room and that Louise Jeffries took her hands off him “for a second for somebody else” and then he tripped. Tr. Vol. II, 479.

158. Ms. Shepherd said that somebody should have had their hands on him at all times. Tr. Vol. II, 481. She also said that in the play area outside there was foam that he could play on, but that there was an area between the play area and the school that was concrete. She described the area as four picnic tables and a square. Tr. Vol. II, 482. She said that there were times when a staff person might be there in the room by themselves. Tr. Vol. II, 485.

159. Ms. Shepherd said she had heard the part of the audio when there was a noise that sounded like a slap. She said she only heard the voice of Louise Jeffries and the Student on the audio. Tr. Vol. II, 485. She also said that she had seen the Student slap Louise Jeffries pretty hard—hard enough to make a mark. Tr. Vol. II, 486.

160. Ms. Shepherd said that they normally the Student on the toilet for no more than 15 to 20 minutes, and that they would only leave him there that long so he would be able to relax and go. Tr. Vol. II, 487.

161. Ms. Shepherd said they tried to work on IEP goals unless there was something special going on in which case they tried to embed the goals into certain activities. Tr. Vol. II, 489. She first said she entered data on goals at lunch or after school, but then later said she might also enter them the next morning before school. TR. Vol. II, 489, 508.

162. The witness was asked about the Student's progress on goal one, benchmark one, which involved using computers as part of a leisure activity. The witness said there was probably a decrease in this benchmark because they got new computers and had problems using the software with the new computers. Tr. Vol. II, 491; DEX 5 at 281.

163. There was a slight digression on goal two benchmark one involving attending to reading. DEX 5 at 283; Tr. Vol. II, 492.

164. Ms. Shepherd testified that every morning the staff had to get two students into their standers; this often took two people. The staff also had to get every student in and out of the bathroom. She thought that might explain why there were periods on the tape when it sounded like IEP goals were not being worked on. Tr. Vol. II, 510. She also said that the Student would periodically cry and would sometimes hit someone without much warning. Tr. Vol. II, 514.

165. Ms. Shepherd said she tried to enter the data honestly and accurately, and that she thought she worked on IEP goals for about five hours during each school day. Tr. Vol. II, 509.

B. Summary of Evidence and Conclusions of Fact

Petitioners were given a great deal of leeway in presenting their case (see the procedural overview section above). They were allowed to introduce the audio recordings into evidence (PEX 1A and PEX 1B). They were also permitted to introduce evidence relating to their theory that there was systemic failure at the school that resulted in prohibiting the Student from receiving a free appropriate public education (FAPE). After carefully reviewing the evidence outlined above, the panel found the Petitioners failed to meet its burden of persuasion on any of the three issues reviewed by the panel.

The audio recordings were confusing, often unclear, and as presented only provided minimal evidence about whether the Student received a FAPE during the 2007-2008 school year. Mother 1 did give some context to the recordings; she described how they were made, gave a very general description of the device, and recognized the voices on the tape and layout of the room. She was also familiar with the Student and her own son, and she could identify some objects in the room. The tape recorder used for the audio recordings was in the headrest of Mother 1's son's wheelchair. No evidence demonstrated the distance the tape recorder could pick up sound. No evidence provided insight into what part of the room the wheelchair was in, nor was there a way for Mother 1 to know with any certainty where the wheelchair was at any point in time. There was also evidence that Mother 1's son was removed from his wheelchair at certain times during the day; this means the wheelchair could have been pushed aside from the main activity in the room. Further, the audio recording is filled with sections of random sounds and unidentifiable conversation and activity. (Paras.11, 12, 15, 16, 37, 45, 46).

Petitioners put a great deal of emphasis on their allegation that the Student was slapped and left on the toilet for over an hour. They based their claim on the audio recordings (PEX 1A and PEX 1B). However, even assuming Mother 1 could recognize the voices and knew the layout of the room, the actual recordings of Segments of III, IV, and VI do not prove that the Student was slapped or left on the toilet. Regarding the slap, the evidence only shows there was a hitting noise. (There are many random hitting noises on the 12 hours of audiotape provided.) There is no way to tell if the noise is even a person being hit and could be an object, such as a desk. The noise is not heard simultaneously with the Student crying. The crying attributed to the Student takes place

for a short period of time and occurs after what sounds like something falling. The Student's Mother even seemed to question in her own testimony about whether the sound was the Student being hit or the Student hitting someone else. (Paras. 42, 83, 85, 86, 87). There was testimony from several sources that the Student would sometimes hit others and that he could hit fairly hard. (Paras. 159, 145).

The testimony regarding whether the Student was left on the toilet for over an hour was simply speculation. Considering all of the evidence presented, including what was heard on the audio and Mother 1's testimony, it would not be reasonable to conclude with any certainty that the Student was left on the toilet for that length of time.

Petitioners' entire theory is based on hearing the sound of running water an hour and fifteen minutes after hearing the staff talk about placing the child on the toilet. (Paras 29, 30, 33, 36, 37).

The actual audio recording and most of the testimony referring to it did show that during the school day staff in the Student's classroom gossiped and were often preoccupied with matters unrelated to work. One particular school aide, Louise Jeffries, cussed during her conversations with other staff and seemed to be involved in much of the gossip. At one point in the audio Louise Jeffries tells the Student to "shut up." In another segment of the tape you hear a staff person call the Student's Mother a "scatterbrain" and there is reference to throwing the Student's shoes away. The panel took these comments very seriously, but as discussed below, they did not constitute proof that the Student did not receive a FAPE during the 2007-2008 school year. The panel offers recommendations at the end of this decision in response to this and some of the other evidence of inappropriate behavior of the staff. (Paras. 25, 32).

The audio from PEX 1A and PEX 1B prompted the Student's Mother to ask for a due process hearing against the District. There was no evidence presented that the Student's Mother was unhappy with the School District before she heard the audio. She first learned about the audio when Mother 1 called her on the phone and played the part of the recording that Mother 1 claimed was the Student being slapped. (Paras. 83, 84).

There was also evidence presented that the Student fell at the beginning of the fall term of the 2007-2008 school year. The Student's Mother testified that she had given instructions to the school nurse that someone's hands be kept on the Student at all times, but it isn't clear exactly when she talked to the school nurse. Karen Shepherd also testified that she believed the instructions were for someone to keep a hand on the Student at all times and that from her understanding Louise Jeffries only took her hands off the Student for a moment. (Around the same time that the Student fell, Karen Shepherd had arranged to take a video of the Student walking independently in the hall to show to the Student's doctor.) There was an incident report that stated the Student fell straight down, but it was a very brief report.² (Paras. 66-69, 71, 124, 125, 157, 158).

Other than the audio, Petitioners offered little evidence to show that the Student was not receiving a FAPE and that his specific IEP was not being implemented. (Paras. 6-7). The evidence relied a great deal on the theory of systemic problems at the school in

² The incident report appeared to be subject to subpoena and was produced late by the Respondent after the hearing started. The Petitioners objected to the lateness of the production of the document and said that they thought the report would have changed the strategy of their case. The Petitioners did not want however, to reopen the hearing to recall witnesses or call other witnesses in light of the report. The Petitioners did ask to amend the complaint Nunc Pro Tunc to allege IDEA violations related to the document being received late. This request was denied because Petitioners did not want to reopen the hearing but wanted a finding that Respondent violated the Student's rights without further findings in fact. For the Petitioners to make a new allegation there would need to be a separate complaint. It was unclear to the Panel how the incident report would have had a significant outcome on the Petitioners' case, but there is also no way for the panel to know what the Petitioners' strategy may have been.

general, but it provided little insight regarding the actual implementation of the Student's IEP and whether he was receiving educational benefit from the Mapaville State School. Mother 1 testified that when she visited the school she saw the Student staring off into space and being ignored. However, in any one of Mother 1's approximately seven visits to the school, she only stayed for about ten minutes at the most. During those visits she would also visit with staff in the classroom about her own son. (Paras. 12-13).

Mother 2's testimony was based mainly on her experience with her own son, who was not even in the Student's classroom. She also testified to seeing an aid interact with the Student in an inappropriate manner at lunch. (Para 52-54).

Craig Henning, who was qualified as an expert witness, said that a student with echolalia could repeat inappropriate language he or she heard in the classroom. The Student had a disability that included echolalia. However, it was never established that the Student was repeating inappropriate language. Craig Henning also attended meetings at which he said the principal did not deny some of the claims. However, there was also no evidence that she admitted these claims and was just not listening to parent complaints. (Paras. 89-91).

The Student's Mother testified that she thought the Student did not make progress in the 2007-2008 school year. However, she only testified to a general dissatisfaction with his progress and presented almost no evidence that she was dissatisfied with how the Student was progressing on any of his IEP goals. There was no evidence that she had voiced any dissatisfaction with his lack of progress before she listened to the audio recordings. However, she did say that the Student's walking—a benchmark related to a goal on his IEP—had not improved. The benchmark specifically states “the student will

walk following a set route,” DEX 7 at 99, and is related to the goal of recognizing or demonstrating relative positions in space. The benchmark related to the goal is related to spatial awareness, and no evidence was presented to indicate that the Student’s spatial awareness had not improved. The Student’s Mother also repeatedly mentioned the Student’s lack of progress reciting the Pledge of Allegiance. She also said that he had not made progress holding his utensils while eating. (Para. 80). However, this was not a goal on his IEP and it was not alleged that the Parents disagreed with the 2007-2008 IEP or that there was any proof of procedural violations in developing the 2007-2008 IEP. (The Student’s Mother’s desire to have the Student’s eating skills worked on was included in the 2008-2009 IEP which was never implemented.) (Paras 6, 7, 8, 67-69, 75, 76, 80).

Petitioners raised some questions about whether the Mapaville State School was following policy with regard to the number of teachers and aids in each classroom and whether charting was done correctly. However, the only evidence Petitioners provided to prove policy was not followed in terms of student to staff ratio was based on what the Parents thought the policy should be and on a comment on the audio recording saying the staff thought they were shorthanded. Likewise, there were questions raised about charting but the Petitioners did not present evidence that any policy was not followed or even that the charting practices used by the State School were contrary to best practices according to an established authority.

The Principal’s testimony established that due to sickness she had been absent for a significant amount of time during the school year. However, neither party argued that her absence impacted the outcome of this case. (Paras. 563-564). While the Principal was gone, the person left in charge was Debbie Sanderson, and as explained below, the time

she had to supervise the school was limited. The Principal stated that a staff person had thrown the Student's shoes away. At first she said that she did not know who threw the shoes away but she later acknowledged it was Louise Jeffries. (Para. 122).

Debbie Sanderson's testimony provided background information regarding the IEP that was later used in Karen Shepherd's classroom during the 2007-2008 school year. The Parents agreed to the IEP and it was the operative IEP in place during the period the Parents claim the Student's IEP was not properly implemented. (Paras. 130-146).

Karen Shepherd reviewed the IEP goals, the reports of student progress, and the data entries she and other staff had made in regard to the goals. Most of her testimony was related to the data charts, but as she went through the charts she also provided her specific memories of what activities they were using to implement a particular goal and her memories of the Student's progress. She also identified the photos of the Student participating in a wide-variety of activities relating to his IEP. While the photos alone provided limited evidence of the Student's progress under his IEP, Ms. Shepherd's testimony on the whole provided evidence that the Student had received educational benefit and that his IEP was being implemented starting in the fall of the 2007 school year. Petitioners raised some questions in regard to the data charts which showed the Student had not progressed on some benchmarks of certain IEP goals during particular periods of time, but the evidence still leaned toward indicating the Student received educational benefit during the 2007-2008 school year. Petitioners did not impugn Ms. Shepherd's testimony in any significant way. Her testimony was deemed to be generally reliable by the panel. (Paras. 147-165).

II. CONCLUSIONS OF LAW

A. Burden of Proof

Following the Supreme Court's decision in *Schaffer v. Weast*, from the beginning of the hearing Petitioners had the burden of proof. 546 U.S. 49 (2005). After the hearing Petitioners argued that the holding in *Schaffer* was extremely narrow. In their Post-trial brief Petitioners distinguish a case involving implementation of an IEP, such as this one, from a case involving the content of an IEP. They contend that *Schaffer* is only applicable to the latter. Petitioners did not make this argument before or during the hearing and never objected to bearing the burden of proof. Even to the extent this argument has any merit, by not making a timely objection Petitioners waived their right to object to bearing the burden of proof. As explained in *McMillin v. Union Electric Co.*, “[i]f the objection is not made at the time of the incident giving rise to the objection, the objection may be deemed to be waived or abandoned.” 820 S.W.2d 352, 355 (Mo. Ct. App. W. Dist. 1991) (citing *Vermillion v. Burlington Northern R.R. Co.*, 813 S.W.2d 947, 950 (Mo. Ct. App. E. Dist. 1991)); *See also*, *Strucker v. Rose*, 949 S.W.2d 235 (Mo. Ct. App. S. Dist. 1997). Had the burden rested with the defense, Respondent may have changed its entire strategy. In addition, Respondent has never had the opportunity to brief or respond to this argument.

Since *Schaffer v. Weast*, courts have placed the burden of proof on the petitioners in a wide variety of cases. In cases like *Schaffer*, a challenge to the content of an IEP does not only depend on the IEP meetings, which both parties attend, but also to what is actually happening to the student during the school day. Furthermore, in *Stringer v. St. James R-1 School District*, the 8th Circuit also relied on *Schaffer v. Weast* in placing the

burden of proof on the Petitioner. 446 F. 3d 799 (8th Cir. 2006). In that case, the issue was whether the student had demonstrated that the alleged abuse occurring in the school constituted a denial of a free appropriate public education (FAPE). *Id.* Thus the petitioner still bore the burden of persuasion where the issue involved what was happening during the school day as opposed to the content of an IEP.³

In *Schaffer*, the Supreme Court held that, as with most other civil proceedings, in IDEA cases petitioner bears the burden of proof. The Court was silent as to whether a state could pass its own law under IDEA placing the burden of proof on a school district even when the district was a defendant. Regardless, in Missouri, there is no law which places the burden on school districts when they are defendants in a due process hearing.

B. Issue One

Issue I: Whether the Mapaville State School failed to appropriately implement the Student's 2007-2008 IEP starting in the fall of 2007?

Decision: For Respondent. The Petitioners did not prove that the Mapaville State School failed to appropriately implement the Student's 2007/2008 IEP.

At the hearing, the main issue addressed by Petitioners was whether the Student's IEP was implemented during the 2007-2008 school year. Part B of the Individuals with Disabilities in Education Act (IDEA) provides that all children are entitled to a free appropriate public education (FAPE) to meet the child's unique needs. 20 U.S.C. §1412. The child's "individual educational program" (IEP) is the primary way in which a child receives a FAPE. 20 U.S.C. §1414. To fulfill IDEA's mandate, each state has its own

³ Because this issue was brought up in a post-trial brief, and even there not developed fully, it is not deemed necessary by the Chairperson to thoroughly review the possibility that the burden of persuasion may possibly shift to the School District defendant in some circumstances.

legislation which further defines the rights and responsibilities of parents and public schools in that state. The state can mandate more than what is required under the federal law but not less. In Missouri, R.S. Mo. §162.670 et seq. implements IDEA. The Department of Elementary and Secondary Education (DESE) has adopted the *Missouri State Plan* for implementing Part B of IDEA.

In *Board of Education of Hendrick Hudson School District v. Rowley* the Supreme Court held that to comply with IDEA the school district did not have to offer the best possible education but rather a ‘basic floor of opportunity. . . designed to provide educational benefit to the handicapped child.’ 102 S. Ct. 3034, 3037 (1982). The Eighth Circuit has interpreted *Rowley* as not requiring a school district to achieve “outstanding results.” *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998).

In the case at hand, the first claim involving the IEP concerns the implementation of the Student’s IEP and not the actual content of it. The Eighth Circuit has noted that failure to implement an IEP is “slightly different in posture” from other substantive IEP claims. *Neosho R-V School District v. Clark*, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003). In *Neosho*, the Court cited the standard articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*, and explained it as follows: “to prevail on a claim under IDEA, the party challenging implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.” 200 F. 3d 341, 349 (5th Cir. 2000).

In *Van Duyn v. Baker Sch. District*, the Ninth Circuit explained that “[i]n accordance with the IDEA itself, the Court’s decision in *Rowley*, and the decision of our

sister circuits, we hold that a material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services the school a school provides to a disabled child and the services required by the Child's IEP." 502 F.3d 811 (9th Cir. 2007). In accordance with the aforementioned cases, this panel looked for whether Petitioners demonstrated a "material failure" and more than a *de minimus* failure to implement the Student's IEP.

The Chief Hearing Officer allowed Petitioners to introduce evidence to the panel that mistreatment of the Student amounted to a denial of a FAPE. This theory also fails under the principles applied to issue one because it still involves implementation of the IEP and not the content of the IEP itself. Although the evidence was admitted, the Chief Hearing Officer had previously ruled that tort claims were not justiciable at a due process hearing and that claims involving possible abuse or neglect were only being reviewed to determine if the allegations were related to the Student receiving a FAPE.

At the federal level there are only a handful of cases that allege abuse or neglect as part of IDEA claims; however the Eighth Circuit has indicated that a claim of abuse and neglect could be related to an IDEA claim. In *Stringer v. St. James R-1 School District*, the Court noted that "two circuits have ruled that harassment might be so severe and prolonged that it deprives the child of access to educational benefits." 446 F.3d 799, 803 (8th Cir. 2006). However, the Court went on to hold that in that case there was no claim that harassment deprived the student of educational benefit. *Id.*

Likewise, in *M.L. v. Federal Way*, the Ninth Circuit observed that a teacher's deliberate indifference to a child being teased at school could give rise to abuse so severe that the child would derive no benefit from the services offered by the District and thus

lead to a denial of FAPE. 394 F.3d 634, 650 (9th Cir. 2004). However, in that case the Court ultimately found that there was no evidence that the teasing had resulted in a denial of educational benefit. *Id.*

The previously mentioned cases can be distinguished from the present one because they involve student harassment of another student as opposed to the staff's treatment of a student. However, in *Charlie F. v. Board of Education of Skokie School District*, the issue involved an IDEA claim regarding an allegation that a teacher repeatedly urged students to complain about a particular student and encouraged them to harass the student. 98 F.3d 989 (7th Cir. 1996). In that case, the Seventh Circuit held that the student had to first exhaust administrative remedies under IDEA before pursuing a claim under another cause of action. In so holding, the Court recognized that claims concerning a teacher's behavior and his or her mistreatment of a student could be brought under IDEA.⁴

Considering the facts presented to the panel in this case and the applicable case law, Petitioners did not prove that the State Schools failed to implement the child's IEP during the 2007-2008 school year (beginning in the fall of 2007). Petitioners' evidence may have demonstrated problems in the school, problems in another classroom, and inappropriate behavior of staff; however, Petitioners failed to squarely address implementation of the Student's IEP. PEX 1A and PEX 1B. The IEP is the lynchpin in determining whether the student received a FAPE. Because this was an implementation case Petitioners needed to address the Student's specific IEP as opposed to making more general allegations against the Mapaville State School. The Parents had accepted the IEP

⁴ In *Dohmen v. Twin Rivers*, 207 F. Supp. 2d 972, 989 (US Dist. Ct. for Dist. Neb. 2002) did not agree with the reasoning of the *Charlie F.* Court on the exhaustion issue.

that was put in place under Debbie Sanderson during at the end of the 2006-2007 school year. This case did not involve allegations that the IEP developed at the end of the 2007 school year was contested in any way and there was no proof that there were any procedural defects that would invalidate that IEP. The Petitioners presented no evidence that the Student was not progressing under that IEP and the Respondent presented evidence that he was progressing.

The Petitioners also did not establish a “material failure” in implementing the IEP. The Petitioners’ evidence instead demonstrated some problems in the classroom and at the school. The panel also acknowledges the evidence concerning the Student falling on August 27, 2008. There was some evidence that someone was supposed to have their hands on him at all time, but at some point in late August or September, Karen Shepherd also videotaped the child walking independently at the request of the Student’s Mother. At the time of the fall, the child was experiencing medical problems and shakiness. This panel was not charged with determining if there was negligence under tort law related to the fall and offers no opinion on that matter. This panel was charged with determining if the Student’s IEP was implemented or namely, whether there was a *material* failure to implement his IEP.

The Petitioners’ theory was that the problems at the school were systemic and so severe that the Student’s IEP was not being implemented and the Student was not receiving educational benefit. However, the evidence, which clearly demonstrated inappropriate behavior by the staff, did not surmount to a finding that the school was in such a state of disarray that you can assume that the Student’s IEP was not being implemented and that the teacher’s testimony and notes were false. While the panel

strongly disapproved of some inappropriate behavior by staff that was presented by Petitioners (see recommendation below) the evidence presented did not prove that the Student's IEP was not being implemented during the 2007-2008 school year. In addition, some of the allegations made by Petitioners, namely the child being hit, or the child being left on the toilet for more than an hour, were speculation and the evidence simply did not back up these allegations.

C: Issues Two and Three

Issue 2: Whether “homebound” is the appropriate placement for implementing the Student's 2008-2009 IEP?

Decision: For Respondent. The Petitioners did not prove that “homebound” was the appropriate placement during the 2008-2009 school year.

Issue 3: Whether audio surveillance or some other type of independent observation should be built into the Student's 2008-2009 IEP?

Decision: For Respondent. The Petitioners did not prove that audio surveillance or some type of independent observation should be built into the Student's 2008-2009 IEP.

While both issues two and three were alleged in the First Amended Complaint as separate issues, they were also the stated resolutions that Petitioners sought related to issue one (the failure to implement the Student's IEP during the 2007-2008 school year). There was minimal evidence provided relating to either homebound placement or audio surveillance other than Petitioners claiming both were needed because of the events leading up to the Student's withdrawal from school.⁵

⁵ Assuming that the Petitioners may have argued that even if they did not prove the 2007/2008 IEP was not implemented, the Petitioners still had reason to withdraw the student from the school and ask for homebound. However, the Petitioners never made this argument in any clear way, and the only evidence that was presented to the panel was that after the Student was withdrawn from the school the State School made immediate attempts to address the situation.

Because Petitioners failed to prove the first allegation and there was no other evidence provided as to why homebound or the audio surveillance was needed in the 2008-2009 IEP, Petitioners did not meet their burden of proof to show either that the 2008-2009 IEP should have provided for homebound placement or for audio/visual surveillance.

Recommendation Section

Although Petitioners' evidence failed to establish that the State School at Mapaville violated the Student's rights or those of his parents under the IDEA with respect to either of the issues before this panel, it did become apparent to the panel that problems did exist in the Student's classroom, at least during the months of January and February in 2008. The panel also acknowledges that it is the responsibility of the SEA, and not of this panel, to ensure that special education teachers and related services personnel and paraprofessionals "are appropriately and adequately prepared and trained . . . including that those personnel have the content knowledge and skills to serve children with disabilities." (300.156). However, we respectfully suggest that the Missouri Department of Elementary and Secondary Education consider strategies to improve the trust and rapport between school personnel and the parents of the students they serve, such as disability sensitivity and respect training (including respect for student personal property) for all staff in the Student's 2007-2008 classroom (and other staff as determined needed) and increased frequency of school-parent meetings. We also respectfully request that DESE review staffing needs at the Mapaville State Schools and its policy of maintaining adequate supervision at the administrative level in light of some of the

problems experienced in the Student's classroom during the 2007-2008 school year. Finally, although there was no finding of any procedural violations by the Mapaville State School in regard to the development of the Student's IEP, there appeared to be ongoing misunderstandings regarding the content of the Student's IEP. We therefore recommend that the parents consider asking to reconvene the IEP team to address any remaining concerns about the 2008-2009 IEP.

Appeal Procedure

NOTICE: This is the final decision of the Department of Secondary and Elementary Education in this matter. A party has the right to request a review of this decision pursuant to the Missouri Administrative Procedures Act, Mo. Rev. Stat. §§536.010 *et seq.* A party also has a right to challenge this decision by filing a civil action in federal or state court pursuant to the IDEA, 20 U.S.C. §1415(i). A party must appeal within 45 days of receiving of receiving this decision.

Date of decision: August 29, 2008

All panel members concur with this decision.

S/Samara N. Klein

Samara N. Klein

S/ Pamela Walls

Pamela Walls.

S/George Wilson

George Wilson

Certificate of Service

This Order was sent by electronic mail to the parties and to DESE on August 29, 2008 and sent by first class mail. All hearing panel members will also receive a copy by first class mail.

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