BEFORE THE HEARING PANEL
EMPOWERED BY THE
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION

	)
	)
Petitioner/Student	)
v.	)
	)
State Schools For Severely Handicapped (SSSH),	)
	)
Respondent	)
	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

The Hearing Panel, after conducting the due process hearing in this matter on June 25-27, 2008, issues the following Findings of Fact, Conclusions of Law, Decision and Order:

I. FINDINGS OF FACT

The Hearing Panel makes the following Findings of Fact:

A. The Parties

1. At all times material to this due process proceeding, the Student resided with the Parent within the boundaries of the Festus R-VI School District ("District") and attended Mapaville State School for the Severely Handicapped in Mapaville, Missouri ("SSSH").

2. The District is located in Jefferson County, Missouri, and has an enrollment of approximately 3,100 students. The District is not a party to this due process proceeding. However, since the Student and his Parent reside in the District, the District is responsible for providing some special education services, notably a periodic educational evaluation of the Student. The District is a member of the Special Services Cooperative of Jefferson County, Missouri ("Cooperative"), which has performed the relevant educational evaluations of the Student.

3. The Mapaville State School for the Severely Handicapped is one of seventy-five (75) state schools for the severely handicapped operated by the Missouri Department of Elementary and Secondary Education ("DESE"). The Mapaville facility is one of eleven (11) State Schools

for the Severely Handicapped which is in DESE's Region III. (*State Plan*, Regulation X, p. 144). During all times material to this proceeding the Director of Region III has been Clark Powell.

4. During this proceeding, the Student and Parent were represented by Andrew W. Kuhlmann, The Law Offices of Jonathan P. Beck, L.L.C., 3206 Shenandoah Avenue, St. Louis, MO, 63101.

5. During this proceeding SSSH was represented by Denise Thomas, Assistant Attorney General, Office of the Missouri Attorney General, Suite 200, 815 Olive Street, St. Louis, MO, 63101.

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

Ransom A Ellis, III	Hearing Chairperson
Dr. Kim Ratcliffe	Panel Member
Fred Davis	Panel Member

7. During all times relevant to this proceeding the following persons were employed by SSSH, contracted with SSSH, or were employed by the District or the Cooperative and have provided educational services to the Student:

Mary Schilling	Principal
Darin Siefert	Principal (District)
Debbie Sanderson	Mapaville Representative
Melissa Lane	Representative of LEA (District)
Joyce Courtois	Representative of LEA (District)
John Bevel	SPED Classroom Teacher
David Carafiol	SPED Classroom Teacher
Peggy Heilemann	SPED Classroom Teacher/P.E. Teacher
Rebekah Flowers	SPED Classroom Teacher
Brenda Habsieger	SPED Classroom Teacher
Lisa Arl	SPED Classroom Teacher
Dawn Ortega	SPED Classroom Teacher
Lynn Suiter	Physical Therapist (Contractor)
Cindy Riley	Physical Therapist (District/Cooperative)
Pam Lapping	Speech-Language Pathologist
Linda Haislup	Speech-Language Pathologist
Debbie Lever	Speech-Language Pathologist (District/Cooperative)
Laurie Bohn	Occupational Therapist
Krista Green	Occupational Therapist (Contractor)
Jacqui Kremer	Occupational Therapist (District/Cooperative)
Joe Dandridge	P.E. Teacher
Sherri Crowe	SPED Classroom Aide

Marsha Adams	SPED Classroom Aide
Angie Ames	SPED Classroom Aide
Sheila Scott	SPED Classroom Aide
Barbara Poposky	SPED Classroom Aide
Sally Forchee-Zhang	Nurse
Nancy Simpson	Home School Coordinator
Angela Hill-Mayes	Home School Coordinator
Jane Dycus	Evaluator (District/Cooperative)
Pamela Howard	Educational Diagnostician (Cooperative)

B. Procedural Background

8. The Parent filed the due process complaint with the Department of Elementary and Secondary Education ("DESE") on March 20, 2008. (HP Exhs 1-3).

9. On March 20, 2008, Ms. Margaret Strecker notified the Hearing Chairperson (HP Exh 3), and on March 27, 2008, notified the Hearing Panel Members (HP Exh 6) that they had been selected to serve on the hearing panel for the request for due process filed by the Parent.

10. On March 28, 2008, SSSH filed a motion requesting that the Hearing Chairperson determine that the due process complaint be deemed to be insufficient. (HP Exh 7). On March 31, 2008, the Hearing Chairperson issued an Order directing the Petitioner to file an amended due process complaint. (HP Exh 9).

11. On April 4, 2008, SSSH filed a Motion To Dismiss and In Limine of State School For the Severely Handicapped which requested that certain allegations of Petitioner's Complaint be dismissed or that Petitioner be barred from presenting certain information at the hearing. (HP Exh 10).

12. On April 7, 2008, Petitioner filed her First Amended Due Process Complaint with the Hearing Chairperson. (HP Exh 11). On April 8, 2008, the Hearing Chairperson issued an Order regarding SSSH's Motion to Dismiss and In Limine.

13. On April 14, 2008, SSSH filed a second motion which requested that the Hearing Chairperson determine that the First Amended Due Process Complaint be deemed to be insufficient. (HP Exh 15). On April 18, 2008, the Hearing Chairperson issued Order Number 3, which dealt with the motion made by SSSH regarding the sufficiency of the First Amended Complaint and Motion to Dismiss. (HP Exh 16). On April 23, 2008, Petitioner filed a Motion for Reconsideration and Opposition to Respondent's Second Motion to Dismiss and In Limine. (HP Exh 17). On April 25, 2008, the Hearing Chairperson issued Order Number 4, regarding Petitioner's Motion for Reconsideration. (HP Exh 18).

14. On April 29, 2008, the Hearing Chairperson issued Order Number 5 setting a Pre-Hearing Conference for April 30, 2008. (HP Exh 19). On May 2, 2008, the Hearing Chairperson issued Order Number 6, setting forth the decisions made at the Pre-Hearing Conference, including the statement of issues that the parties agreed should be submitted to the Hearing Panel. (HP Exh 20).

15. On May 2, 2008, the Hearing Chairperson issued a Notice of Hearing which set the due process hearing for June 25 through 27, 2008. (HP Exh 21).

16. On May 5, 2008, the SSSH requested an extension of the time lines through September 30, 2008. (HP Exh 22). The Hearing Chairperson extended the time lines to September 30, 2008, by letter dated May 5, 2008. (HP Exh 23).

17. On June 11, 2008, the Petitioner filed a Motion to file a Second Amended Complaint and a Request for Continuance of the June 25, 2008, due process hearing. (HP Exh 24). On June 12, 2008, SSSH filed an Objection To Second Amended Complaint with the Hearing Chairperson. (HP Exh 25). On June 13, 2008, the Hearing Chairperson issued Order Number 7, which denied Petitioner's Motion to File Second Amended Complaint and denied Petitioner's Request for a Continuance of the June 25-27, 2008 due process hearing. (HP Exh 26).

18. On June 16, 2008, the Petitioner filed a Second Request for an Continuance of the June 25, 2008, due process hearing. (HP Exh 28). On June 17, 2008, the Hearing Chairperson issued Order Number 8, which denied Petitioner's Second Request for a Continuance. (HP Exh 29).

19. On June 25 through June 27, 2008, a due process hearing in this matter was held in Festus, Missouri, with all parties in attendance.

20. Petitioner and SSSH exchanged exhibits prior to the hearing in compliance with the IDEA Regulations, 34 C.F.R. § 300.512. Formal exhibits were prepared by the Hearing Chairperson and presented to the parties at the due process hearing. During the due process hearing, the following exhibits were received into evidence: Petitioner's Exhibits ("PEX") 1-9, 12, 14-15, 17-19, 22 (Tr. pp. 36, 157-161, 234, 302); SSSH Exhibits ("REX") 1, 4-9, 12, 14-15, 17-18, 23-24, 26, 32 (Tr. pp. 96, 188-191, 200, 341, 346, 483, 509); and, Hearing Panel Formal Exhibits ("HP Exh") 1 through 30, (Tr. p. 14).

21. At the conclusion of the hearing on June 27, 2008, the record was left open for receipt of the depositions of two physicians. Subsequently, the parties informed the Hearing Chairperson that they had decided not to take or submit the depositions. The record was closed on July 22, 2008.

C. Time Line Information

22. The original due process complaint was filed with DESE on March 20, 2008. (HP Exhs 1-3).

23. On April 7, 2008, Petitioner filed her First Amended Due Process Complaint with the Hearing Chairperson. (HP Exh 11).

24. The parties held the resolution meeting on April 2, 2008, and again on April 24, 2008, after the First Amended Due Process Complaint was filed. The resolution period ended on April 19, 2008 and the forty-five (45) day period for conducting the due process hearing was set at June 3, 2008.

25. On May 5, 2008, the SSSH requested an extension of the time lines through September 30, 2008. (HP Exh 22). The Hearing Chairperson extended the time lines to September 30, 2008, by letter dated May 5, 2008. (HP Exh 23).

D. The Issues and Proposed Remedy

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

Issue No. 1 -- Whether the Student has received a free, appropriate public education since March 20, 2006 at the Mapaville School for the Severely Handicapped?

Issue No. 2 -- Whether the Student's February 14, 2008 individualized education program is reasonably calculated to provide him with a free, appropriate public education?

27. The Parent proposed the following remedy:

A. To provide the Student with compensatory physical therapy, occupational therapy and speech/language services for two years. The Parent indicated that she wanted weekly compensatory physical therapy and occupational therapy services for ninety minutes per week for two years to be provided at Jefferson Memorial Hospital. (Tr. pp. 253-255).

B. To provide the Parent with a video/audio surveillance system in the Mapaville facility with web access for the Parent which will allow the Parent to independently view the activities in the Mapaville school building related to the Student. (Tr. pp. 255-257).

C. In the alternative, to provide an independent third party to monitor the Mapaville school facility on a daily basis to insure that the services provided in the Student's IEP are provided.

D. To develop a new IEP for the Student which would include the compensatory related services minutes for physical therapy, occupational therapy and speech/language services and the web monitoring system or independent monitor. (Tr. pp. 162-166).

E. Background Facts

28. The Student has been enrolled as a full-time Student in the State School for the Severely Handicapped at Mapaville, Missouri, since 1996.

29. On March 3, 2005, the Special Services Cooperative of Jefferson County ("Cooperative") performed an educational re-evaluation of the Student by reviewing his existing data. Based upon that review, the Student's IEP Team, including the Student's Mother, determined that the Student continued to demonstrate the educational disability of "mentally retarded." (PEX 8).

30. On February 5, 2008, the Student was educationally re-evaluated by the Cooperative and diagnosed as a student with an "intellectual disability." (PEX 9).[1] The most recent re-evaluation describes the Student's evaluation history as follows:

> "[The Student] had been receiving services [from] Early Childhood Special Education and needed [to be] evaluated for a categorical diagnosis. Results of that evaluation revealed that [the Student] was functioning within the severe/profound range of mental retardation. He also demonstrated severe delays in the areas of speech/language, adaptive behavior, fine/gross motor skills, and preacademic skills. He met the eligibility criteria to be educationally diagnosed as a mentally retarded student. All subsequent reevaluations were conducted by review of records with no further information needed."

The Student has also been medically diagnosed as having reflux, thyroid problems, asthma, allergies, seizures, partial trisomy 15 and 18 and hydrocephalus/holoprocencephaly. (PEX 9). The Student's most recent evaluation states that the Student is functioning at approximately the six month age level with an estimated intelligence quotient of less than 20. (PEX 9).

31. During the time period between March 20, 2006, and March 20, 2008, the Student had the following Special Education teachers and aides:

John Bevel	SPED Classroom Teacher – School Year 2005-06.
Dave Carafiol	SPED Classroom Teacher – August, 2006, through May 4, 2007.

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[1] This new educational diagnosis did not indicate a change in the Student's capabilities, but rather, merely represented a change in terminology from "mental retardation" to "intellectual disability" in the Missouri State Plan for Special Education.

Peggy Heilemann	SPED Classroom Teacher – May 7, 2007, through June, 2007, and one week in August, 2007.
Lisa Arl	SPED Classroom Teacher – August, 2007, through September, 2007.
Dawn Ortega	SPED Classroom Teacher – September, 2007, through November/December, 2007.
Rebekah Flowers	SPED Classroom Teacher – November/December, 2007, through the date of the hearing.
Sherri Crowe	SPED Classroom Aide – With teachers Bevel, Carafiol, Heilemann, Arl, Ortega and Flowers.
Marsha Adams	SPED Classroom Aide – With Dave Carafiol.
Angie Ames	SPED Classroom Aide – With Dave Carafiol.
Sheila Scott	SPED Classroom Aide – With teachers Heilemann, Arl, Ortega and Flowers.
Barbara Poposky	SPED Classroom Aide – With Rebekah Flowers.

32. On or about February 10, 2006, the Student's IEP Team met for the annual review of his IEP. (PEX 2). Present at this meeting were: The Student's Mother, John Bevel, Mary Schilling, Melissa Lane, Lynn Suiter, Krista Green, Nancy Simpson and Mardel Skaggs, the Student's DMH Case Manager. The Student's IEP Team developed nine (9) Goals for the Student covering general areas such as choice making, ambulation, muscle control, refraining from placing hands in his mouth, fine motor movements and reduction of inappropriate vocalizations. The Goals and Benchmarks were as follows:

Goal 1 -- The Student will make a choice when presented with two (2) items for 75% of the opportunities.

Benchmark 1.1 -- The Student will make a choice when presented with two (2) items for 50% of the opportunities.

Goal 2 -- The Student will walk 150 feet in the gait trainer.

Benchmark 2.1 -- The Student will walk 100 feet in the gait trainer.

Goal 3 -- The Student will hold head/trunk erect for five minutes.

Benchmark 3.1 -- The Student will maintain holding head/trunk erect on a variety of equipment.

Goal 4 -- The Student will stand in the stander for 45 minutes.

Benchmark 4.1 -- The Student will stand in the stander for 30 minutes.

Goal 5 -- The Student will throw trash into the trash can at lunch time on the second attempt.

Benchmark 5.1 -- The Student will throw trash into the trash can at lunch time on the third attempt.

Goal 6 -- The Student will open doors with electronic switches for 60% opportunities.

Benchmark 6.1 -- The Student will open doors with electronic switches for 50% of opportunities.

Goal 7 -- The Student will put objects through a small opening with 75% accuracy.

Benchmark 7.1 -- The Student will put objects through a small opening with 50% accuracy.

Goal 8 -- The Student will refrain from putting hands in mouth for five minutes.

Benchmark 8.1 -- The Student will tolerate oral motor stimulation throughout the day for 2 minutes.

Goal 9 -- The Student will reduce incident of inappropriate vocalizations and grabbing objects at mealtime at school or in the community.

Benchmark 9.1 -- The Student will refrain from inappropriate vocalizations at meal time.

Benchmark 9.2 -- The Student will refrain from grabbing objects at meal time.

This IEP provided for 1800 minutes of Special Education Services per week and the following Related Services: Physical Therapy (60 minutes per week); Occupational Therapy (30 minutes per week) and Speech Therapy (30 minutes per week). The IEP also provided for Off Campus Instruction opportunities at CiCi's Pizza in Crystal City, Missouri for 1200 minutes per year. (PEX 2). The Student was also eligible for Extended School Year services ("ESY"), including

900 minutes per week of Special Education Services and the following Related Services: Physical Therapy (30 minutes per week); Occupational Therapy (15 minutes per week) and Speech Therapy (15 minutes per week).

33. The Student's Mother testified that although the Student was eligible for ESY services, she has never chosen to send him to Mapaville's Extended School Year program during the Summer (Tr. pp. 261-262) and the Student has not otherwise been provided with physical therapy or occupational therapy services from any other source. (Tr. p. 274).

34. The Student's February 10, 2006, IEP (REX 18) indicates that a number of the goals on the IEP were amended or mastered, including:

> Benchmark 1.1 -- The Student will make a choice when presented with two (2) items for 50% of the opportunities -- **Mastered 5/19/2006**
>
> Benchmark 2.1 -- The Student will walk 100 feet in the gait trainer -- **Discontinued to Revise Goal 2/13/2007**
>
> Benchmark 3.1 -- The Student will maintain holding head/trunk erect on a variety of equipment -- **Mastered 11/7/2006**
>
> Benchmark 4.1 -- The Student will stand in the stander for 30 minutes -- **Mastered 1/12/2007**
>
> Benchmark 5.1 -- The Student will throw trash into the trash can at lunch time on the third attempt -- **Mastered 11/3/2006**
>
> Benchmark 6.1 -- The Student will open doors with electronic switches for 50% of opportunities -- **Discontinued to Revise Goal 2/13/2007**
>
> Benchmark 7.1 -- The Student will put objects through a small opening with 50% accuracy -- **Discontinued to Revise Goal 2/13/2007**
>
> Benchmark 8.1 -- The Student will tolerate oral motor stimulation throughout the day for 2 minutes -- **Discontinued to Revise Goal 2/13/2007**
>
> Benchmark 9.1 -- The Student will refrain from inappropriate vocalizations at meal time -- **Mastered 11/3/2006**

35. On October 2, 2006, the Student's IEP Team met to review and revise the Student's IEP. Present at this meeting were the Student's Mother, David Carafiol, Mary Schilling, John Bevel and Brenda Habsieger. The Student's IEP Team amended his February 10, 2006, IEP by

changing the Off Campus Instruction opportunities to "local restaurants" for 240 minutes a year. (PEX 3; REX 19).

36. On February 15, 2007, the Student's IEP Team met to prepare his annual IEP. (REX 15). Present at this meeting were the Student's Mother, Dave Carafiol, Mary Schilling and Sally Zhang. During this meeting, the Student's IEP Team developed the following five (5) Goals for the Student covering general areas such as choice making, ambulation, fine motor control and muscle control. The Goals and Benchmarks were as follows: goals for the Student:

Goal 1 -- The Student will make a choice between 3 to 4 activities for 50% of opportunities.

Benchmark 1.1 -- The Student will select from a group of objects when asked to make a choice on the second attempt.

Goal 2 -- The Student will move gait trainer for 150 feet.

Benchmark 2.1 -- The Student will move gait trainer for 125 feet.

Benchmark 2.2 -- The Student will move gait trainer over different terrain.

Goal 3 -- The Student will use hands to operate a switch for 10 seconds.

Benchmark 3.1 -- The Student will maintain contact to switch to activate a leisure or functional activity for 10 seconds.

Benchmark 3.2 -- The Student will perform cause and effect activities within 30 seconds.

Benchmark 3.3 -- The Student will use switches to operate the computer within 30 seconds.

Goal 4 -- The Student will reach for an object, grasp and manipulate it with both hands through partial participation.

Benchmark 4.1 -- The Student will reach for and/or grasp objects without resisting.

Benchmark 4.2 -- The Student will use materials for intended purpose without resisting.

Benchmark 4.3 -- The Student will actively release an object without resisting.

Goal 5 -- The Student will exhibit head and trunk control in various positions for 10 minutes.

Benchmark 5.1 -- The Student will maintain head erect in a variety of positions in 2 of 3 opportunities.

This IEP provided for 1800 minutes of Special Education Services per week and the following Related Services: Physical Therapy (60 minutes per week); Occupational Therapy (30 minutes per week) and Speech Therapy (30 minutes per week). The Student was also eligible for Extended School Year services ("ESY"), including 900 minutes per week of Special Education Services and the following Related Services: Physical Therapy (30 minutes per week); Occupational Therapy (15 minutes per week) and Speech Therapy (15 minutes per week).[2]

37. On March 9, 2007, the Student's IEP Team met to review and revise the Student's IEP. Present at this meeting were the Student's Mother, David Carafiol, Mary Schilling and Mardel Skaggs, the Students DMH Casemanager. The Student's IEP Team amended his February 15, 2007, IEP by changing his Goals to the following six (6) Goals covering general areas such as choice making, ambulation, fine motor control, muscle control and refraining from placing hands in his mouth. The new Goals and Benchmarks were as follows::

Goal 1 -- The Student will make a choice for 50% of opportunities.

Benchmark 1.1 -- The Student will select from a group of objects when asked to make a choice on the second attempt.

Goal 2 -- The Student will walk for endurance and fitness for 150 feet.

Benchmark 2.1 -- The Student will walk 100 feet.

Benchmark 2.2 -- The Student will walk over different terrain.

Goal 3 -- The Student will use hands to operate a switch for 10 seconds.

Benchmark 3.1 -- The Student will maintain contact to switch to activate a leisure or functional activity for 10 seconds.

Benchmark 3.2 -- The Student will perform cause and effect activities within 30 seconds.

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[2] As noted above, the Student's Mother chose not to send the Student to Mapaville's Extended School Year program. (Tr. pp. 261-262).

Benchmark 3.3 -- The Student will use switches to operate the computer within 30 seconds.

Goal 4 -- The Student will reach for an object, grasp, and manipulate it with both hands through partial participation.

Benchmark 4.1 -- The Student will reach for and grasp objects without resisting.

Benchmark 4.2 -- The Student will use materials for intended purpose without resisting.

Benchmark 4.3 -- The Student will actively release an object without resisting.

Goal 5 -- The Student will exhibit head and trunk control in various positions for 10 minutes.

Benchmark 5.1 -- The Student will maintain head erect in a variety of positions for 2 of 3 opportunities.

Benchmark 5.2 -- The Student will perform stretching and upper body exercises without resisting.

Goal 6 -- The Student will refrain from putting hands or fingers in mouth for five minutes.

Benchmark 6.1 -- The Student will allow touching with moderate pressure to the teeth and gums and around exterior of mouth without evidence of discomfort or displeasure for 3 minutes.

The Student's IEP Team also amended his February 15, 2007, IEP by adding Off Campus Instruction -- "Stretching Skills" at the YMCA in Festus, Missouri for 480 minutes a year. (PEX 5; REX 12).

38. On December 7, 2007, the Student's IEP Team met to review and revise the Student's IEP. Present at this meeting were the Student's Mother, Rebekah Flowers, Mary Schilling, Pam Howard, Krista Green, Lynn Suiter, Peggy Heilmann and Craig Henning, a Disability Resource Association Advocate. (PEX 4; REX 7). The Student's IEP Team amended his February 15, 2007, IEP and the March 9, 2007 Amendment to that IEP, by changing his Goals to seven (7) Goals covering general areas such as choice making, ambulation, fine motor control, muscle control, refraining from placing hands in his mouth and self-feeding. These Goals and Benchmarks were as follows::

Goal 1 -- The Student will make a choice for 80% of opportunities.

Benchmark 1.1 -- The Student will make a choice 3 of 4 opportunities.

Goal 2 -- The Student will walk for endurance and fitness for 20 feet independently.

Benchmark 2.1 -- The Student will walk for endurance and fitness for 20 feet independently.

Goal 3 -- The Student will use hands to operate a switch for 10 seconds.

Benchmark 3.1 -- The Student will maintain contact to switch to activate a leisure or functional activity for 10 seconds.

Benchmark 3.2 -- The Student will perform cause and effect activities within 30 seconds.

Benchmark 3.3 -- The Student will use switches to operate the computer within 30 seconds.

Goal 4 -- The Student will reach for an object, grasp, and manipulate it with both hands through partial participation.

Benchmark 4.1 -- The Student will reach for and grasp objects without resisting.

Benchmark 4.2 -- The Student will use materials for intended purpose without resisting.

Benchmark 4.3 -- The Student will actively release an object without resisting.

Goal 5 -- The Student will exhibit head and trunk control in various positions for 20 minutes.

Benchmark 5.1 -- The Student will maintain head erect in a variety of positions for 15 minutes.

Benchmark 5.2 -- The Student will perform stretching and upper body exercises for 75% of opportunities.

Goal 6 -- The Student will refrain from putting hands or fingers in mouth for 20 minutes.

Benchmark 6.1 -- The Student will allow touching with moderate pressure to the teeth and gums and around exterior of mouth without evidence of discomfort or displeasure for 3 minutes.

Goal 7 -- The Student will show partial participation in self-feeding skills with 70% accuracy.

Benchmark 7.1 -- The Student will scoop food onto spoon 5 of 10 bites.

Benchmark 7.2 -- The Student will drink from a cup with no spills for 50% of opportunities.

The Student's IEP Team also amended his IEP to increase his Related Services to the following: (Physical Therapy (75 minutes per week); Occupational Therapy (60 minutes per week); and Speech Therapy (60 minutes per week).and amended his Physical Education Program. (PEX 4; REX 7).

39. During the December 7, 2007, IEP meeting the Student's IEP Team also discussed obtaining equipment to assist the Student in some of his Goals and Benchmarks. In particular, it was determined that SSSH would use a specialized therapeutic tricycle with by the Student to work on his muscle control goals. While a decision was made to incorporate that equipment into the Student's special education program, SSSH did not order the therapeutic tricycle until late March, 2008, and it was not received until April, 2008. According to Ms. Flowers, when the decision to use the therapeutic tricycle was made by the Student's IEP Team, there was a therapeutic tricycle at the Mapaville facility. (Tr. pp. 175-176). However, when the therapeutic tricycle was used with the Student, it proved not to have sufficient support so its use was discontinued and a new therapeutic tricycle was ordered. (Tr. pp. 175-176). During the time that the Student was without the use of the therapeutic tricycle, Ms. Flowers worked on the Student's muscle control Goals and Benchmarks in other ways such as while the Student was sitting in his chair, when he was in his stander, while the gait belt was being used or while the Student was using the bolster. (Tr. p. 211).

40. On February 14, 2008, the Student's IEP Team met to prepare his annual IEP. (PEX 6; REX 6). Present at this meeting were the Student's Mother, Rebekah Flowers, Debbie Sanderson, Krista Green and Peggy Heilmann. During this meeting, the Student's IEP Team developed five (5) Goals and Benchmarks for the Student covering general areas such as choice making, ambulation, muscle control, refraining from placing hands in his mouth and self-feeding. These Goals and Benchmarks were as follows:

Goal 1 -- The Student will make a choice for 100% of opportunities.

Benchmark 1.1 -- The Student will make a choice for 100% of opportunities.

Goal 2 -- The Student will walk for endurance and fitness for 50 feet independently.

Benchmark 2.1 -- The Student will walk for endurance and fitness for 40 feet independently.

Goal 3 -- The Student will exhibit head and trunk control in various positions for 30 minutes.

Benchmark 3.1 -- The Student will maintain head erect in a variety of positions for 30 minutes.

Benchmark 3.2 -- The Student will perform stretching and upper body exercises for 95% of opportunities.

Goal 4 -- The Student will refrain from putting hands or fingers in mouth for 30 minutes.

Benchmark 4.1 -- The Student will allow touching with moderate pressure to the teeth and gums and around exterior of mouth without evidence of discomfort or displeasure. The Student will reach for an object, grasp, and manipulate it with both hands for 10 minutes.

Goal 5 -- The Student will show partial participation in self-feeding skills for 95% accuracy.

Benchmark 5.1 -- The Student will scoop food onto spoon with 95% accuracy.

Benchmark 5.2 -- The Student will drink from a cup with no spills for 60% of opportunities.

The IEP provides for 1800 minutes of Special Education Services per week and the following Related Services: Physical Therapy (75 minutes per week); Occupational Therapy (60 minutes per week) and Speech Therapy (60 minutes per week). The Student was also eligible for Extended School Year services ("ESY"), including 900 minutes per week of Special Education Services and the following Related Services: Physical Therapy (35 minutes per week); Occupational Therapy (30 minutes per week) and Speech Therapy (15 minutes per week).

41. On February 29, 2008, the Student's IEP Team met to review and revise the Student's February 14, 2008, IEP. Present at this meeting were the Student's Mother, Rebekah Flowers, Debbie Sanderson, Joyce Courtois, Lynn Suiter, Pam Lapping, Krista Green, Peggy Heilmann, Angela Hill-Mayes and Craig Henning, the Student's Disability Resource Association Advocate. (PEX 7; REX 1). The Student's IEP Team amended his February 14, 2008, IEP by amending the present level of Academic Achievement and Functional Performance as follows:

"[The Student will make a choice between two items and will interact with his choice most of the time. He is able to hold his head and trunk erect for more than twenty (20) minutes. Josh will move his feet independently for an average of fourteen (14) feet. He will refrain from putting his hands in his mouth for twenty (20) minutes as long as he has a strap to hold onto. [The Student] needs minimal

physical assistance to scoop his food and maximum physical assistance to drink without spillage. . . .

Current intellectual testing using the Lexington Developmental Scales reveal that [the Student] is functioning at approximately the 6-month age level. His adaptive behavior (SIB-R) reveals that he is functioning at about the 7-month level. Results of [the Student's] overall language (Rosetti Infant Toddler Language Scale; AE = 6-9 months), fine motor, and gross motor assessment found these skills to be significantly delayed for his chronological age; however, commensurate with his age equivalent cognitive ability. Completion of a Sensory Profile indicated that [the Student] has sensitivities in the areas of oral sensory processing and touch processing."

The Student's IEP Team also amended his Annual Goals to make seven (7) Goals covering general areas such as choice making, ambulation, muscle control, refraining from placing hands in his mouth, self-feeding and increasing motor endurance. The revised Goals and Benchmarks were as follows:

Goal 1 -- The Student will make a choice for 100% of opportunities.

Benchmark 1.1 -- The Student will make a choice for 100% of opportunities for 100% of opportunities.

Goal 2 -- The Student will walk for endurance and fitness for 50 feet independently.

Benchmark 2.1 -- The Student will walk for endurance and fitness for 40 feet independently.

Goal 3 -- The Student will exhibit head and trunk control in various positions for the duration of the activity.

Benchmark 3.1 -- The Student will maintain head erect in a variety of positions for 30 minutes.

Benchmark 3.2 -- The Student will perform stretching and upper body exercises for 95% of opportunities.

Benchmark 3.3 -- The Student will reach for and/or grasp objects 2 of 3 opportunities.

Benchmark 3.4 -- The Student will maintain appropriate posture and balance to perform activities 3 of 4 opportunities.

Benchmark 3.5 -- The Student will maintain sitting balance on a stable surface for 3 of 4 opportunities.

Goal 4 -- The Student will refrain from putting hands or fingers in mouth for 30 minutes.

Benchmark 4.1 -- The Student will allow touching with moderate pressure to the teeth and gums and around exterior of mouth without evidence of discomfort or displeasure.

Goal 5 -- The Student will show partial participation in self-feeding skills with 95% accuracy.

Benchmark 5.1 -- The Student will scoop food onto spoon for 100% of opportunities.

Benchmark 5.2 -- The Student will drink from a cup with no spills for 60% of opportunities.

Benchmark 5.3 -- The Student will reach for and/or grasp objects on the second attempt.

Goal 6 -- The Student will communicate through eye gaze for 80% of opportunities.

Benchmark 6.1 -- The Student will make a choice for 80% of opportunities.

Benchmark 6.2 -- The Student will identify object from pictures with 60% accuracy.

Goal 7 -- The Student will perform activities to increase motor endurance for 75% of opportunities.

(PEX 7; REX 1). The Student's IEP Team also amended his IEP to add language related to Reporting Progress and Transition Services Plan. The IEP continued to include Related Services as follows: (Physical Therapy (75 minutes per week); Occupational Therapy (60 minutes per week); and Speech Therapy (30 minutes per week). (PEX 7; REX 1).

42. The February 29, 2008, IEP (PEX 7; REX 1) indicates that a number of the goals from the previous IEPs were amended, discontinued or added, including:

Goal 1 -- Discontinued To Revise Goal 2/29/2008

Benchmark 2.1 -- Discontinued To Revise Goal 2/29/2008

Benchmark 3.1 -- Discontinued To Revise Goal 2/29/2008

Benchmark 3.2 -- Discontinued To Revise Goal 2/29/2008

Benchmark 3.3 -- Benchmark Added 2/29/2008

Benchmark 3.4 -- Benchmark Added 2/29/2008

Benchmark 3.5 -- Benchmark Added 2/29/2008

Benchmark 5.2 -- Discontinued To Revise Goal 2/29/2008

Benchmark 5.3 -- Benchmark Added 2/29/2008

43. The Student's progress on his IEP Goals and Benchmarks was assessed by his classroom teachers, his physical therapist and his occupational therapist. At the hearing, the following testimony was received from these persons as follows:

A. Rebekah Flowers testified that she has been the Student's special education classroom teacher since late November, 2007. (Tr. p. 167). During the time from late November, 2007 through February 14, 2008, she worked with the Student, and his progress was as follows:

(1) Goal Number 1 -- The Student will make a choice for 80% of opportunities -- this Goal was changed at the December 7, 2007, IEP meeting. While the goal basically stayed the same, the method of measurement changed, so Ms. Flowers was unable to determine whether the Student had made progress on this goal or not. (Tr. pp. 215-216; REX. 8, p. 54).

(2) Goal Number 2 -- The Student will walk for endurance and fitness for 20 feet independently -- this Goal was changed at the December and February IEP meetings. The change was designed to measure the Student's ability to move his feet to walk with less assistance and, at the same time, not have to "carry" or "push" the weight of the gait trainer he used. (Tr. pp. 216-218; REX 8, p. 55). Because the goals had been recently changed, Ms. Flowers was unable to determine whether the Student had made progress on this goal.

(3) Goal Number 3 -- The Student will use hands to operate a switch for 10 seconds -- this Goal had been eliminated by the time Ms. Flowers began working with the Student. (Tr. p. 218; REX 8).

(4) Goal Number 4 -- The Student will reach for an object, grasp, and manipulate it with both hands through partial participation -- this Goal had been

eliminated by the time Ms. Flowers began working with the Student. (Tr. p. 218; REX 8).

(5) Goal Number 5 -- The Student will exhibit head and trunk control in various positions for 20 minutes -- Ms. Flowers was unable to determine whether the Student made progress on this goal because she was unable to determine the extent of the Student's stretching prior to the time she began working with him. (Tr. pp. 219-220; REX 8).

(6) Goal Number 6 -- The Student will refrain from putting hands or fingers in mouth for 20 minutes -- the Student made progress on this goal. (Tr. pp. 219-220; REX 8).

(7) Goal Number 7 -- The Student will show partial participation in self-feeding skills with 70% accuracy -- the Student made progress on this goal. (Tr. pp. 220-221; REX 8, p. 60).

B. Rebekah Flowers testified that she continued to work with the Student from February 14, 2007 through the end of the regular school year. (Tr. p. 221). During the time from late February 14, 2008, to the end of the school year she rated the Student's progress was as follows:

(1) Goal Number 1 -- The Student will make a choice for 80% of opportunities -- the Student made progress after Ms. Flowers began using pictures of human figures. (Tr. pp. 221-223).

(2) Goal Number 2 -- The Student will walk for endurance and fitness for 20 feet independently -- the Student made progress on this goal. (Tr. p. 222).

(3) Goal Number 5 -- The Student will exhibit head and trunk control in various positions for 20 minutes -- the Student made progress on this goal. (Tr. p. 223).

(4) Goal Number 6 -- The Student will refrain from putting hands or fingers in mouth for 20 minutes -- the Student initially made progress on this goal but regressed somewhat so Ms. Flowers was unable to say that he had made progress for the period between February 14, 2008, and the end of the regular school year. (Tr. pp. 223-224).

(5) Goal Number 7 -- The Student will show partial participation in self-feeding skills with 70% accuracy -- the made progress on this goal.[3] (Tr. pp. 224-225).

C. Lynn Suiter, the Student's Physical Therapist, has worked at the Mapaville facility for about twelve years (Tr. p. 320) and has worked with the Student since he enrolled in that school. (Tr. p. 321). During the relevant period, the last two years, Ms. Suiter has worked with the Student on three essential areas -- (1) ambulation, (2) head, neck and muscle control and (3) stretching. (Tr. p. 379). She rated the Student's progress in the last two years in those three areas as follows:

(1) Ambulation -- Ms. Suiter indicated that "some progress has been made" on the Student's ambulation goals in the last two years. (Tr. pp. 381-382).

(2) Head, Neck and Muscle Control -- Ms. Suiter testified that the Student has made "slow and steady progress" in this area.[4] (Tr. p. 383, lns. 15-20).

(3) Stretching -- Ms. Suiter was not able to say if the Student had made progress in this area.[5] (Tr. 384-385).

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3 Ms. Flowers testified that the Student made progress on this goal "because he went from minimum assistance to part independent to part minimum [and we] changed the cup that we were using to . . . a cup that [the Student] had to reach out and pick up . . ." (Tr. p. 224, lns. 16-20).

4 Ms. Suiter testified as follows with respect to the Student's ambulation goals:

"Well, he is really inconsistent, so that's really sort of a tough question. I think that he's doing it more consistently now that we've backed up and is doing it for a shorter distance. He seems like he's really doing it initially when we had longer distances. Sometimes we'd have to go in and encourage him to move . . . I've been known to get down on the floor on my hands and knees in front of him and find it helps him to do the steps and stuff through one day and the next week or so he might be doing it a little bit more independently. Where now we found that he's doing it more on a consistent basis. That we've backed down that he's doing it a little more independently." (Tr. p. 380, lns. 12-25).

"I would say some progress has been made. It's really hard with these children in general. Sometimes you don't see progress in leaps and bounds and sometimes it takes years to see some progress. I would say he's made some in that category. It's really hard with these children in general. Sometimes you don't see progress in leaps and bounds and sometimes it takes years to see some progress. I would say he's made some in that category." (Tr. p. 382, lns, 8-13).

5 Ms. Suiter testified about the Student's "stretching goals" as follows:

"Some days we get good stretching with [the Student] and some days he resists or wants to kind of curl up into that fetal position. In those times too I've told the staff . . . maybe we need to come back to him at a different time and let's . . . back off and maybe try it again. So it's inconsistent with that one probably above all. But I would say that he's . . . made some [progress] with sitting

D. Krista Green testified that she has worked as an Occupational Therapist at the Mapaville facility for about three years (Tr. pp. 429-430) and has worked with the Student during that time period. (Tr. p. 430). Ms. Green testified as follows with respect to the progress made by the Student during the past two years:

(1) Choice Making Goals -- Ms. Green stated that the Student has "definitely progressed" in the area of making a choice.[6] (Tr. pp. 490-491).

(2) Muscle Control Goals -- Goal 3.1 -- The Student will maintain head erect in a variety of positions for 30 minutes -- Ms. Green testified that the Student is progressing on this goal in that he is able to keep his head up and is not "stacking" his head as much.[7] (Tr. pp. 490-491).

(3) Stretching Goals -- Goal 3.2 -- The Student will perform stretching and upper body exercises for 95% of opportunities -- Ms. Green testified that the Student has been inconsistent on his progress on this goal.[8] (Tr. pp. 491-492).

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on the bolster and then the larger bolster. If you can do things with [the Student] that are more passively and set him up in different positions it's easier to get your stretch sometimes because he wants to pull away. So also to use the stander and bolster to help him stretch kind of helps as well." (Tr. p. 384, lns. 22-25; p. 385, lns. 1-10).

6 Ms. Green testified as follows about the progress made by the Student on making choices:

"As far as making a choice goes he definitely has progressed. If you hold up -- we don't give them too many more than two objects now. He is reaching out and touching the objects. Whereas in the past he would kind of just start throwing the objects and not really looking at what he was doing. So he is actually making choices now." (Tr. p. 490, lns 10-16).

7 Ms. Green stated the following regarding the Student's progress on Goal 3.1:

"I have noticed him holding his head better, in a better position while he's eating. As said before he used to stack his neck, which makes swallowing very difficult and opens up for aspiration. He's now keeping his head upright. He's actually using his muscles." (Tr. p. 491, lns. 1-6).

8 Ms. Green testified about the Student's progress on Goal 3.2 as follows:

"He's inconsistent. The more you try to provide the stretch for him, which means you're moving his arm for him, the more you do that the more he's going to resist. So I found if you set up his environment so where he wants to reach for an object then he will get an increased range of motion just by doing the passive range of motion for him." (Tr. p. 492, lns. 4-10)

(4) Goal 3.3 -- The Student will reach for and/or grasp objects 2 of 3 opportunities -- Ms. Green testified that the Student has been inconsistent on his progress on this goal.[9] (Tr. pp. 492-493).

(5) Keeping Hands Out Of Mouth Goal -- Goal 4.1 -- The Student will allow touching with moderate pressure to the teeth and gums and around exterior of mouth without evidence of discomfort or displeasure -- Ms. Green testified that the Student has progressed on this goal.[10] (Tr. pp. 493-494).

(6) Self Feeding Goals -- Goal 5.1 -- The Student will scoop food onto spoon for 100% of opportunities -- Ms. Green testified that the Student has progressed on this goal.[11] (Tr. pp. 494-495). With respect to Goals 5.2 and 5.3 -- The Student will drink from a cup with no spills for 60% of opportunities and the Student will reach for and/or grasp objects on the second attempt -- Ms. Green testified that the Student has also progressed on these goals. (Tr. pp. 494-495). More specifically, Ms. Green testified that the student ". . . has started reaching for his cup, and he's bringing it to his mouth with little assist." (Tr. p. 495, lns. 8-10).

44. The Parent testified that with respect to the stretching goals, she has "noticed a slight improvement in his abductors and a little on his hamstrings" since Rebekah Flowers started as the Student's teachers. (Tr. p. 241, ln. 25; p. 242, lns. 1-2).

45. The testimony of Rebekah Flowers, Lynn Suiter and Krista Green concerning the Student's special education and related services, and specifically, the progress (or lack thereof)

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9 Ms. Green testified about the Student's progress on Goal 3.3 as follows:

"Again, he's inconsistent. It depends on the interest in the objects you put in front of him. He does have a really strong grasp of preferred objects, and he will hold on to them for a long period of time. He is getting more tolerant of allowing you to do hand over hand for objects that may be more non preferred, which in the past was very difficult to get him to hold on to non preferred items." (Tr. p. 493, lns 5-13).

10 Ms. Green testified as following concerning the Student's progress on Goal 4.1:

"He is more tolerant to you providing stimulation to the outside of his mouth, and the ultimate goal that we're trying to achieve here is to keep his hands and fingers out of his mouth. He is doing that following stimulation. He's keeping his fingers out of his mouth for a longer period of time." (Tr. p. 494, lns. 9-14).

11 Ms. Green testified about the Student's progress on Goal 5.1 as follows:

"Well, when we first started this -- when we first started talking about this goal he was getting fed 100 percent of his meal. Now he feeds himself at least 75 percent of his meal." (Tr. p. 494, lns. 22-25).

made by the Student in the educational program at Mapaville is deemed by the Hearing Panel to be highly credible. Each of these witnesses presented straight-forward, specific testimony concerning the Student, the special education and related services he received and the progress he made while they were working with him. Their testimony is particularly credible because at times each of these witnesses admitted that the Student was not making progress or that his progress was inconsistent on particular goals or benchmarks. To the extent that the testimony of these witnesses is contrary to any other witness, the testimony of Ms. Flowers, Ms. Suiter and Ms. Green is credited.

46. As noted above, the Student's Goals and Benchmarks have been revised a number of times during the two year period prior to the filing of the due process complaint in this case. However, the Goals and Benchmarks have consistent themes embedded within them (i.e. making choices, ambulation, improvement of muscle control, stretching, no fingers in mouth and self feeding). The Hearing Panel finds that during the two year period prior to the filing of the due process complaint in this case, the Student's progress on these Goals was as follows:

A. Choice of Opportunities Goals -- The Student made progress on the "choice of opportunities" goals that have been in his IEPs during the past two years as testified to by Ms. Flowers (Tr. pp. 221-223) and Ms. Green (Tr. pp. 490-491). The Hearing Panel finds that the Student has made progress on these goals during the two year period.

B. Ambulation Goals -- The Student made has progress on his ambulation goals. His ambulation goal was recently changed and Ms. Flowers and Ms. Suiter have been working to "factor in" the impact of the Student's gait trainer on his ability to independently walk. Ms. Flowers who has worked with the Student for the shortest period of time (since late November, 2007) was unable to determine whether the Student had made progress on this goal, (Tr. pp. 216-218; REX 8, p. 55), but Ms. Suiter, who has been working with the Student for more than two years, testified that "some progress has been made" by the Student on his ambulation goals in the last two years. (Tr. pp. 381-382). The Hearing Panel finds that the Student has made progress on these goals during the two year period.

C. Muscle Control Goals -- Ms. Flowers testified that the Student made progress on these goals (Tr. p. 223), Ms. Suiter testified that the Student made "slow and steady progress" in this area. (Tr. p. 383, lns. 15-20) and Ms. Green testified that the Student is progressing on this goal in that he is able to keep his head up and is not "stacking" his head as much. (Tr. pp. 490-491). The Hearing Panel finds that the Student has made progress on these goals during the two year period.

D. Stretching Goals -- Neither Ms. Flowers (Tr. pp. 219-220; REX 8), Ms. Suiter (Tr. 384-385) nor Ms. Green (Tr. pp. 491-492) were able to say that progress had been made on these goals. The Student's Parent has, however noticed "slight" improvement in these areas since Ms. Flowers started as the Student's teacher. (Tr. p. 241, ln. 25; p. 242, lns. 1-

2). Nonetheless, the Hearing Panel finds that the Student has not made progress on these goals during the two year period.

E. No Fingers In The Mouth Goals -- Ms. Flowers was unable to say that the Student had made progress for the period between February 14, 2008, and the end of the regular school year (Tr. pp. 223-224), but Ms. Green testified that the Student has progressed on this goal. (Tr. pp. 493-494). The Hearing Panel finds that the Student has made progress on these goals during the two year period.

F. Self Feeding Goals -- Ms. Flowers (Tr. pp. 220-221; REX 8, p. 60) and Ms. Green (Tr. pp. 494-495) both testified that the Student has made progress on these goals. The Hearing Panel finds that the Student has made progress on these goals during the two year period.

II. CONCLUSIONS OF LAW

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

48. The Mapaville State School for the Severely Handicapped is a part of the State's system of day school services in separate school setting which is operated by DESE. (State Plan – Regulation X, p. 144).

49. The Student is now and has been a resident of District during all times relevant to this due process proceeding, as defined by Section 167.020 RSMo. The Student is now and has been during all times relevant to this proceeding, a "child with a disability" as that term is defined by the IDEA Regulations, 34 C.F.R. § 300.8 and Section 162.675 (1) RSMo and a "severely handicapped child" as defined by Section 162.675(3) RSMo.

50. The IDEA, its regulations and the *State Plan for Part B of the Individuals With Disabilities Education Act* (2007), ("State Plan") constitutes regulations of the State of Missouri which further define the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District and SSSH, in providing special education and related services to students with disabilities.

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

52. The IDEA requires that a disabled child be provided with access to a "free appropriate public education." ("FAPE") *Board of Education of the Hendrick Hudson Central School*

District, Board Of Education, Westchester County v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982). The term "free appropriate public education" is defined by 34 C.F.R. § 300.17 as follows:

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

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

53. The FAPE requirement is satisfied if the child with a disability is provided with "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Likewise, the educational program must be provided at public expense and in the least restrictive environment. *Rowley, supra.*, 458 U.S. 176 at 203-204, 102 S.Ct. 3034.

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

55. If parents believe that the educational program provided for their child fails to meet this standard, they may obtain a state administrative due process hearing. 34 C.F.R. § 300.506; *Thompson v. Board of the Special School District No. 1*, 144 F.3d 574, 578 (8th Cir. 1998); *Fort Zumwalt School District v. Clynes,* 119 F.3d 607, 610 (8th Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed 2d 1090 (1998).

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

57. The burden of proof in an administrative due process hearing pursuant to the IDEA is placed on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528 (2005). Here the Parent filed the due process complaint and she therefore bears the burden of proof.

58. To the extent that it is required by the facts in this case and the issues presented to the Hearing Panel, during all times relevant to this proceeding, the actions of SSSH with respect to the Student and his Parent have met the procedural requirements of the IDEA and State Plan. To the extent that a question arises with respect to any procedural due process requirement relevant to this proceeding, there is no competent evidence on the record that any such alleged procedural violation or inadequacy: (a) impeded the Student's right to FAPE; or, (b) significantly impeded the Parent's opportunity to participate in the decision-making process regarding the provision of FAPE for the Student; or, (c) caused a deprivation of an educational benefit for the Student. (See: 34 C.F.R. §300.513 and State Plan – Regulation V – Procedural Safeguards/Discipline, p. 68).

59. During the two year period of time from March 20, 2006, to the March 20, 2008, the relevant period, SSSH has provided the Student with a free appropriate public education in the least restrictive environment.

60. The Student's Individualized Education Plan dated February 14, 2008, and the IEP dated February 29, 2008, are reasonably calculated to provide the Student with a free appropriate public education.

61. SSSH's delay in ordering the therapeutic tricycle for the Student did not constitute a material failure to implement provisions of the Student's IEP in that at the time the Student's IEP discussed the use of the therapeutic tricycle for muscle control goals, a therapeutic tricycle was in existence at the Mapaville facility. While that tricycle later proved to be inadequate for use by the Student, that was not known at the time of the IEP meeting. When that problem was discovered, SSSH ordered a new therapeutic tricycle in a reasonably prompt time. Finally, the use of the therapeutic tricycle was not added to the Student's IEP until February 29, 2008, approximately three weeks prior to the date it was ordered and six weeks before the tricycle was received at

Mapaville from the supplier. During the intervening time period, the Student's classroom teacher, Physical Therapist and Occupational Therapist worked on the Student's muscle control goal using other means. "When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP." *Van Duyn ex rel. Van Duyn v. Baker School District.* 502 F.3d 811, 815 (9th Cir. 2007). Even if it took SSSH three months to obtain the therapeutic tricycle, there was no material failure to implement the Student's IEP and, for that matter, there was not even a minor discrepancy between the services provided to the Student and those required by his IEP because the Student's teacher, Physical Therapist and Occupational Therapist worked on the muscle control goals using other means and the Student exhibited progress on the goal.

62. The Petitioner has failed to carry her burden of proof to show that: (1) the Student has failed to receive a free, appropriate public education between March 20, 2006, and March 20, 2008 at the Mapaville School for the Severely Handicapped; and that, (2) the Student's February 14, 2008 individualized education program is not reasonably calculated to provide the Student with a free, appropriate public education.

III. DECISION

63. **Issue No. 1** -- Whether the Student has received a free, appropriate public education since March 20, 2006 at the Mapaville School for the Severely Handicapped?

The Student has profound physical and mental disabilities and has been determined to be a "severely handicapped child" as that term is defined in Section 162.675(3) RSMo., which by definition means that he is unable to benefit from or meaningfully participate in programs in the public schools for children with disabilities and therefore, he is eligible to attend the State Schools for the Severely Handicapped.

The program of special education and related services that has been provided to the Student from March 20, 2006 through March 20, 2008, consisted of Goals and Benchmarks that were in the general areas of choice making, ambulation, muscle control, refraining from placing hands in his mouth and self-feeding. During this period of time, the Student had six classroom teachers, but only had one Physical Therapist and one Occupational Therapist who worked with the teachers and classroom aides to provide consistency in programming for the Student. Due to the Student's profound educational disabilities, the Student's program can best be generally described as a very basic program of life skills to improve the quality of the Student's life.

The burden of proof in an administrative due process hearing pursuant to the IDEA is placed on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528 (2005). The Hearing Panel finds that the Petitioner has failed to carry her burden of proof to

show that the Student has failed to receive a free, appropriate public education between March 20, 2006 and March 20, 2008, at the Mapaville School for the Severely Handicapped.

The Hearing Panel further finds that during the period between March 20, 2006, and March 20, 2008, the Student was provided with a free, appropriate public education by SSSH for the following reasons:

A. During school years 2005-06 and 2006-2007 the Student mastered at least five (5) Benchmarks as follows:

Benchmark 1.1 -- The Student will make a choice when presented with two (2) items for 50% of the opportunities -- **Mastered 5/19/2006**

Benchmark 3.1 -- The Student will maintain holding head/trunk erect on a variety of equipment -- **Mastered 11/7/2006**

Benchmark 4.1 -- The Student will stand in the stander for 30 minutes -- **Mastered 1/12/2007**

Benchmark 5.1 -- The Student will throw trash into the trash can at lunch time on the third attempt -- **Mastered 11/3/2006**

Benchmark 9.1 -- The Student will refrain from inappropriate vocalizations at meal time -- **Mastered 11/3/2006**

B. There is clear, credible and convincing evidence that during the relevant two year period, the Student made progress on five (5) Goal areas – Choice of Opportunities, Ambulation, Muscle Control, No Fingers in the Mouth and Self Feeding, and did not make progress on only one (1) goal area – Stretching.

C. With respect to the delay in providing a therapeutic tricycle for the Student, there is insufficient evidence that the delay in providing a therapeutic tricycle for the Student constituted a material failure to implement the Student's IEP or that it was even a minor discrepancy between the services provided to the Student and those required by his IEP because the Student's teacher, Physical Therapist and Occupational Therapist worked on the muscle control goals using other means and the Student exhibited progress on the muscle control goals.

64. **Issue No. 2** -- Whether the Student's February 14, 2008, individualized education program is reasonably calculated to provide him with a free, appropriate public education?

The Student's February 14, 2008 and February 28, 2008, individualized education programs are an extension of the educational programming provided for the Student during the

previous two year period. These IEPs continue the life goals Choice of Opportunities, Ambulation, Muscle Control, No Fingers in the Mouth and Self Feeding on which the Student has made progress during the previous two years.

The thrust of the Petitioner's evidence was directed at the alleged failure of SSSH to implement the goals and benchmarks in the Student's IEP rather than the content of the goals and benchmarks. The Hearing Panel finds that the Petitioner has failed to carry her burden of proof to show that the Student's Individualized Education Plan dated February 14, 2008, and the IEP dated February 29, 2008, are not reasonably calculated to provide the Student with a free appropriate public education.

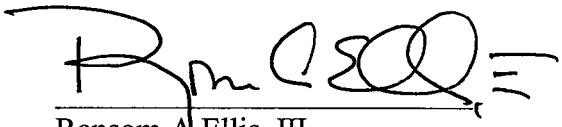
The Hearing Panel further finds that the Student's Individualized Education Plan dated February 14, 2008, and the IEP dated February 29, 2008, are reasonably calculated to provide the Student with a free appropriate public education for the reasons stated above.

IV. ORDER

65. The Petitioner's due process complaint dated March 20, 2008, is dismissed.

V. APPEAL PROCEDURE

PLEASE TAKE NOTICE that these Findings of Fact, Conclusions of Law, Decision and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter and you have a right to request review of this decision pursuant to Section 162.962 RSMo. Specifically, you may request review by filing a petition in a state or federal court of competent jurisdiction within forty-five days after the receipt of this final decision. Your right to appeal this final decision is also set forth in the Regulations to the IDEA, 34 C.F.R. §300.512, and in the Procedural Safeguards which were provided to you at the beginning of this matter.



Ransom A. Ellis, III
Hearing Chairperson

Dated: August 6, 2008

Dr. Kim Ratcliffe
Hearing Panel Member

Dated: August 6, 2008

Fred Davis
Hearing Panel Member

Dated: 7-28, 2008

CERTIFICATE OF SERVICE

This Order has been served by regular United States Mail, with courtesy copies sent by electronic mail and/or facsimile (where facsimile numbers were provided to the Hearing Chairperson) on the following persons on this 6th day of August, 2008:

Andrew W. Kuhlmann
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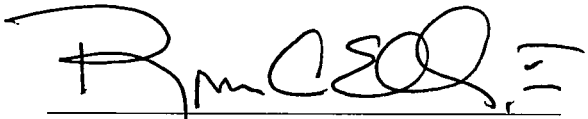

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