

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

PARENTS on behalf of STUDENT,            )  
  )  
      Petitioners,                                )        October 10, 2008  
vs.   )  
  )  
SCHOOL DISTRICT,                             )  
  )  
      Respondents.                             )

**COVER SHEET INFORMATION**

**The Parties**

- The Student is
- The Student’s date of birth is
- Students’ Parents are
- The Respondents are The Special School District of St. Louis County and Rockwood School District
- The Petitioners are represented by Thomas E. Kennedy, III, Esq., 230 S. Bemiston – Suite 800, St. Louis, Missouri 63105.
  
- The Special School District is represented by John F. Brink, Esq., Thomeczek Law Firm, LLC, 1120 Olivette Executive Pkwy.- Ste. 210, St. Louis, Missouri 63132 and the Rockwood School District is represented by Margaret M. Mooney, Esq., Lashly & Baer, P.C., 714 Locust Street, St. Louis, MO 63101.

**Hearing Officers**

- Dr. Margaret Gray
- Dr. Terry Allee
- Richard H. Ulrich, Esq.

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

- Initial request for due process hearing – December 26, 2007
- Dates of hearing: June 16, 17, 18 and 19, 2008
- Date of decision: September 26, 2008
  
- Explanation of deviation from 45 day time-line: Contained within the body of the Decision

## **Decision**

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

### **I. THE ISSUES**

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

**Issue Number 1.** Did Respondents, or either of them, deny the Student a free appropriate public education (FAPE) during the applicable statute of limitations time frame of December 27, 2005 to December 26, 2007?

**Issue Number 2.** Were the private schools in which Parents placed Student appropriate educational placements?

**Issue Number 3.** In the event issues are resolved in favor of Parents, what is the appropriate relief?

### **II. FINDINGS OF FACT**

The Hearing Panel makes the following Findings of Fact:

#### **A. The Parties, Counsel and Hearing Panel Members**

1. During all times material to this due process proceeding, the Student resided with his Parents (“Parents”), within the boundaries of the Special School District of St. Louis County (“SSD”) and the Rockwood School District (“Rockwood”), within the Babler Elementary attendance area.

2. Both Districts are Missouri public school districts organized pursuant to Missouri statutes, and both are located in St. Louis County, Missouri.

3. The Student and his Parents were represented at the hearing by Thomas Kennedy, Esq., 230 S. Bemiston – Suite 800, St. Louis, Missouri 63105.

4. SSD was represented by John F. Brink, Esq., with the law firm of Thomeczek Law Firm, LLC, 1120 Olivette Executive Pkwy.- Ste. 210, St. Louis, Missouri 63132.

5. Rockwood was represented by Margaret M. Mooney, Esq., with the law firm of Lashly & Baer, P.C., 714 Locust Street, St. Louis, MO 63101.

6. The Hearing Panel for the due process proceeding was: Richard H. Ulrich, Hearing Panel Chair; Dr. Margaret Gray, Panel Member; and Dr. Terry Allee, Panel Member.

7. Any findings of fact contained herein that could be deemed conclusions of law should be treated as such, and any conclusions of law that could be deemed findings of fact should likewise be treated as such.

#### **B. Procedural Background and Timeline Information**

8. The Parents requested due process (“Complaint”) by correspondence to the Missouri Department of Elementary and Secondary Education (“DESE”) dated December 21, 2007, which was received by DESE on December 26, 2007.

9. On January 2, 2008, DESE notified the Panel Chair of his appointment to serve on the Hearing Panel. On January 4, 2008, DESE notified Dr. Gray and Dr. Allee of their appointments to serve on the Hearing Panel.

10. On January 14, 2008, the Panel Chair issued an Order in response to SSD’s request, with no objection from Petitioners, granting SSD an extension until January 16, 2008 to file a response to Petitioners’ Complaint.

11. On or about January 16, 2008, SSD filed its Response to Petitioners’ Complaint.

12. On January 24, 2008, Petitioners advised the Panel Chair that the parties were in serious settlement discussions and the parties jointly requested an extension of time of the resolution period. This request was granted on January 25, 2008 by Order of the Panel Chair

wherein the resolution period was extended to February 4, 2008. The Order of January 25, 2008 also set a telephonic conference in compliance with the State Plan, for February 7, 2008.

13. A pre-hearing telephone conference was held on February 7, 2008. The Chairperson and attorneys for the parties participated in the conference and an Order was issued on February 8, 2008, pursuant to which the hearing dates of May 6, 7, 8 and 9, 2008 were set at the mutual request of the parties, issues were defined, and other organizational issues were addressed. In addition, said Order struck portions of paragraph 8 (b) and paragraph 8 (c) of the Complaint as requested by SSD.

14. On or about February 15, 2008, SSD filed a Motion to Dismiss Petitioners' prayer for relief which requested reimbursement of expenses incurred by placing the Student in a private parochial school on the basis that such reimbursement is barred by the Missouri Constitution, and that the IDEA does not give clear notice that states may be responsible for said expenses.

15. On or about February 22, 2008, Petitioners filed a response to Respondent's Motion to Dismiss.

16. On or about February 27, 2008, SSD filed a Reply Memorandum in support of its Motion to Dismiss.

17. On or about March 14, 2008, Petitioners requested that the hearing be continued and Respondents did not object thereto. Upon consultation with the attorneys, mutually agreeable hearing dates of May 19, 20, 21 and 22, 2008 were set by Order of March 10, 2008 with the decision to be rendered on or before June 23, 2008.

18. By Order of March 21, 2008, at the mutual request of the parties, the hearing was continued to June 16, 17, 18 and 19, 2008, with the decision to be rendered on or before July 18, 2008.

19. By Order of March 27, 2008, the date for exchange of exhibits and witness lists was confirmed and the time allocated to the parties for presentation of their respective cases.

20. On May 26, 2008, the Panel Chair issued an Order denying SSD's Motion to Dismiss.

21. On or about June 6, 2008, Petitioners filed a Memorandum of Law regarding compensatory education as requested by the Panel's Order of February 8, 2008.

22. On June 16, 17, 18 and 19, 2008, testimony was presented at the hearing.

23. Upon conclusion of the evidence, the parties requested leave to file briefs. Upon being advised by the court reporter that the transcript could definitely be prepared on or before August 1, 2008, the parties, by agreement, were ordered on June 20, 2008, to submit their briefs on or before August 29, 2008, and the decision would be rendered on or before September 26, 2008.

24. On September 26, 2008, SSD filed a request to continue the date the decision was to be rendered to October 10, 2008. The other parties did not object. Said request was granted on September 26, 2008.

### **C. Background Facts**

25. Student was born on February 15, 1999 in Buftea, Romania. Little is known about the first nine months of Student's life except that he may have lived in a foster home, not an orphanage. Student was adopted by the Petitioners in November of 1999. The Petitioners have one biological child, a daughter, who is 17 years old.

26. Student was screened by Parents as Teachers on February 6, 2001. Aggressive behavior was indicated as a concern. Student and his parents participated in the Parents as Teacher's Program.

27. Student attended Hope Montessori West ("Hope") preschool beginning in August of 2001. Prior thereto, he was expelled from the Children's World Preschool at the age of 16 months. Student was then placed at Tutor Time but needed to be moved again and then began attending KinderCare day care programs where he was also expelled. While attending Hope program each afternoon and on Friday for several years, he displayed verbal and physical aggression.

28. Student began speech, occupational, physical and developmental therapy on or about October 5, 2001 through First Steps, pursuant to an Individual Family Services Plan (IFSP), prior to his entry into a Rockwood early childhood special education program.

29. Student was referred for an Early Childhood Special Education Evaluation on October 23, 2001 and the evaluation was completed on January 14, 2002. Student's initial diagnosis in Early Childhood Special Education was Young Child with a Developmental Delay ("YCDD") with delays in communication, social/emotional behavior, and physical development.

30. An Individualized Education Program ("IEP") was developed on February 8, 2002 finding Student eligible for Early Childhood Special Education Services ("ECSE"). The IEP addressed speech intelligibility, vocabulary, answering 'wh' questions, cutting activities, copying shapes, jumping, walking a beam, attending to tasks, complying with adult requests, and appropriate peer interactions.

31. On April 18, 2002, the IEP Team determined that Student was eligible for Extended School Year (ESY) services. Petitioners declined these services because Mother was

hospitalized with an illness which affected her vision and her ability to drive. Instead, the family made arrangements for Student to receive some private services at his home.

32. During the 2002-2003 and 2003-2004 school years, Student attended Rockwood's Early Childhood Special Education program. During these school years, Student attended Rockwood four half days per week and Hope the other four half days and all day on Friday.

33. A review of Student's progress on his behavioral goals in May of 2002 noted he seldom complied with teacher requests the first time, that transitions were hard, that he had difficulty sharing/playing with peers, and he interrupted other children to demand adult attention.

34. During November of 2002, Student hit and kicked staff and was described as controlling and bossy. Student talked about the violence he had seen on TV or in the movies and was described as having a preoccupation with fire, death, blood, gore, evil and weapons. He displayed aggression toward others.

35. For the 2002-2003 school year, Student returned to the ESCE program at Ellisville within the Rockwood District. Leslei Harper was Student's teacher for the 2002-2003 school year, and had been Student's classroom teacher since February of 2002, when Student turned three years of age. On December 18, 2002, Ms. Harper wrote a three page detailed description of Student's progress, lack thereof, and behavioral concerns. Her observations included:

a) Student's behavior could possibly support the conditions of ADHD, Sensory Deficit Integration, and Attachment Disorder;

b) Student has an insatiable demand for attention, difficulty in complying with requests and limits set by teachers, lacks genuine affection with caregivers, and does not understand the difference between pretend and real;

- c) Student's behavior is very unpredictable;
- d) Student's primary motivation for his behavior appears to be control;
- e) Student hurts other children and shows no remorse.

During this timeframe, Kim Cowherd, social worker, worked with Petitioners, the teachers at Hope, and his teacher at Ellisville with the intent to provide consistent behavioral interventions for Student. Ms. Cowherd noted consistent defiant behavior, acting out aggressively in class, and limited progress in areas of behavior.

Ms. Harper suggested a psychiatric evaluation for Student and her suggestion was followed by Parents.

36. A December 19, 2002 progress report indicated that Student made threats and called peers names. He was described as very physically aggressive in biting, hitting, pinching, kicking, and spitting on teachers and as more physically aggressive toward classmates by pushing, tackling, and hitting other children. Notes on a Behavior Checklist dated December 9, 2002 noted that Student talked about the *Sopranos* and guns and bad guys.

37. On January 7, 2003, it was reported at school that Student made gun movements with his fingers, "shoots" at staff when he gets off the bus, and bit his teacher on the leg causing it to hurt badly.

38. On January 24, 2003, a new IEP was written and Student's placement was changed. Although he significantly improved in vocabulary skills and in answering simple questions, there were significant concerns in physical aggressive behaviors and in social and emotional behaviors. It was decided that the Student needed to remain in an ECSE setting but would benefit from being around higher functioning peers who have more verbal and social skills. Student then moved to Crestview, an ECSE facility in Rockwood. Student's January 24,



2003 IEP notes that constant ear aches caused Student to have a hearing loss in his right ear. An ESY program for the summer of 2003 was approved by the IEP Team and Student attended ESY at Crestview.

39. Student did well at the early childhood program at Crestview. May and December 2003 reviews of the behavioral goals in his IEP indicate Student was making sufficient progress in verbally interacting with his peers and appropriately expressing his feelings while interacting with peers. Nothing in the records, at this point in time, note continued verbal or physical aggression.

40. An IEP was developed on January 23, 2004. The IEP goals addressed school appropriate play schemes, articulation, language, verbal interactions with peers, visual motor skills, prewriting, and gross motor skills.

41. An IEP for transition to kindergarten was developed on March 5, 2004. The IEP goals addressed articulation, language, appropriate verbal interactions, prewriting skills, visual motor skills, and gross motor skills. An ESY program was approved by the IEP Team and the Student attended this program over the summer of 2004.

42. For kindergarten, during the 2004-2005 school year, Student began a ½ day kindergarten in a regular education class with 450 minutes a week resource services, as well as OT, PT and Speech at Babler Elementary School in the Rockwood District, where he had a 1:1 aide. Almost immediately, he resumed verbally and physically aggressive behavior. During this school year, Student joined a YMCA aftercare program called Adventure Club that was associated with Babler. He was expelled after a few weeks due to his aggressive behavior. A hearing evaluation in October of 2004 noted mild-moderate conductive hearing loss in his right ear.

43. An IEP was developed on October 14, 2004. The IEP goals addressed pre-academics, initiation and completion of tasks, articulation, language, verbal interactions with peers, prewriting, visual motor skills, and gross motor skills. The IEP increased Student's special education services and called for a re-evaluation and educational diagnosis.

44. On two occasions during the time Student attended Babler, he was hospitalized because of behavioral/emotional concerns and to address medications.

45. Student was evaluated by John Mantovani, M.D., a pediatric neurologist on November 8, 2004, and received a diagnosis of developmental encephalopathy with previously noted sensory integration and neurobehavioral dysfunction, new onset dyskinesias/ataxia possibly related to medication treatment or other factors, and rage attacks.

46. During the process of Student's reevaluation, Judith Smith, school psychologist, completed a review of Student's medical care, his various diagnoses, and a summary of his behavioral difficulties. This report references the diagnosis of Dr. Dave Overstreet, a psychologist, and Dr. Michael Shanker, who was Student's treating psychiatrist. At that time, Dr. Shanker's diagnosis was reported as ADHD combined type and rule out bipolar disorder unspecified and reactive attachment disorder. Dave Overstreet's report was the same. Shortly thereafter, in January of 2005, Dr. Shanker diagnosed Student with bipolar disorder, rule out Asperger's disorder versus reactive attachment disorder.

47. On December 2, 2004, a new IEP was developed and a re-evaluation was implemented on December 14, 2004. At this time, a Behavior Intervention Plan was created for Student. Its hypothesis was that Student responded to directions which he did not clearly or immediately understand with noncompliant behavior. Student's educational diagnosis was changed to emotional disturbance, language impairment, and speech impairment. The IEP notes

a hearing aid in one ear is required due to conductive hearing loss, but no special considerations are noted and no accommodations are indicated. Student's placement was changed due to "regression in academic and behavioral functioning". The evaluation report indicated that Student's right eardrum was ruptured and he had no hearing in his right ear. The report further indicated that Student would require preferential seating with the left ear to the teacher on a temporary basis.

48. Student was transferred to Eureka Elementary School within the Rockwood District, where he was placed in Dianne Siebert's ½ day self-contained class because the IEP team decided that the Student needed a more structured classroom. Ms. Siebert's classroom was a specialized room designed to address students with significant behavioral problems. The classroom provided a structured environment with routines and reinforcement systems in place. Academic instruction was included as part of the routine of the classroom. Ms. Siebert's classroom was staffed with at least two teacher assistants. Teacher assistants had at least 60 hours of college credit and received training related to behavior and nonviolent crisis prevention. A social worker also provided weekly group sessions. Student first received a loaner hearing aid when he attended this class although his new IEP did not reflect this. There were less than ten students in Student's classroom with three aides. Student had two new behavioral goals: "When given a task, Student will be able to initiate and complete task with visual and/or verbal prompts 80% of the time. . .;" "Student will improve peer interaction skills as evidenced by initiating or responding in a positive manner to initiations by peers 5 times per ½ day. . . ." According to Mother, Student performed well in this classroom because there was a defined structure which allowed him to feel safe. At the end of the 3<sup>rd</sup> quarter, Diane Siebert wrote: "All in all Student's behavior is very manageable and I am pleased with his behavioral progress." Marty Woytus,

SSD's area coordinator, confirmed that Student was successful in Dianne Siebert's classroom. Janet Booth, SSD's school social worker, reported at the time that Student "has thrived" in that structured setting.

49. Dr. Shanker saw Student on January 4, 2005. His report stated that Student attacked his sister and bit a 15 year old male cousin. Dr. Shanker noted a variety of medications had been tried with mixed results and reported that Student did horrible on Ritalin and developed tardive dyskinesia when taking Abilify. Dr. Shanker's DSM-IV diagnoses were bipolar affective disorder, type II, rule out Asperger's disorder versus reactive attachment disorder, and speech and motor delay.

50. An IEP was developed at Eureka Elementary School on January 10, 2005, when Student was in kindergarten. The present level of performance indicated that concerns included compliance, task compliance in all pre-academic areas, and peer interaction. The present level indicated that compliance had improved since placement in a self-contained room.

51. The January 10, 2005 IEP had nine goals addressing increasing pre-academic skills including letters, sounds, numbers and counting, initiating and completing tasks, improving peer interaction skills in both initiating and responding to peers, improving communication skills by appropriately interacting with peers, producing targeted sounds, and producing targeted language structures (pronouns, possessives, and verb tenses), demonstrating improved motor skills, improving writing skills, and completing visual motor skills.

52. The January 10, 2005 IEP called for services to be provided in a special education setting. Student was to receive 413 minutes per week of instruction in pre-academics, 400 minutes per week of instruction in task related skills, 30 minutes per week of language therapy, 30 minutes per week of speech therapy, 30 minutes per week of physical therapy, 60 minutes per

week of occupational therapy, and 20 minutes per week of social work consultation. Placement was outside the general class more than 60% of the time. The IEP called for extended school year services of 405 minutes per week of instruction in pre-academic skills and 406 minutes per week of instruction in task related skills.

53. The January 10, 2005 IEP issues called for preferential seating and check often for understanding as accommodations. A January 13, 2005 audiology report from SSD noted that Student received good benefit from his loaner hearing aid. The report included preferential seating as a recommendation.

54. In a letter dated March 10, 2005, Dr. Overstreet stated that Student's diagnosis were Bipolar Affective Disordered, type II, speech and motor delay and Tardive Dyskinesia, with Asperger's Disorder versus Reactive Attachment Disorder being ruled out. Student's psychiatrist, Dr. Shanker, and Dr. Overstreet, were still trying to decide exactly what was wrong with Student.

55. Dr. Overstreet helped Mother with a token system to use with Student that rewarded Student for good behaviors.

56. In April of 2005, Student was moved to Sandy Neuman's cross-categorical self-contained classroom at Eureka Elementary. The move was made because Student had been successful in Ms. Siebert's classroom. Student attended the general education kindergarten classroom at Eureka for 60 minutes daily, in addition to PE, art, and music. A Social Work Services Summary Page dated May, 2005 indicated that Student thrived while in Ms. Siebert's structured setting.

57. Mother acknowledged that Student's kindergarten year was "pretty good" and that Student showed a lot of improvement. Progress reports for the third quarter of kindergarten at

Eureka Elementary School showed progress in pre-reading skills, progress on tracing, and progress on pre-math skills. During the third quarter, his behavioral skills improved and his teacher noted he was quite manageable. He also showed progress in pre-academic skills and continued to progress in behavior.

58. In August of 2005, Student began first grade at Ellisville Elementary School. The move was made because Student was doing well and the school was closer to home. Mother had requested the move.

59. An August 10, 2005 IEP meeting was held at Ellisville. The present level indicated that a behavior plan would be developed as needed. The present level identified the following interventions that had been used: visual schedules, social stories, sensory diet including brushing, weighted vest and ankle weights to help with balance and position in space, teaching routines, verbal and visual prompts as reinforcers, transition warnings, modeling, providing choices of activities for rewards to work, premaking activities, redirection, and individual assistance as needed throughout the day.

60. The August 10, 2005 IEP had 9 goals. Services included 600 minutes per week of instruction in pre-academics, 120 minutes per week of instruction in task related skills, 30 minutes per week of speech therapy, 60 minutes per week of language therapy, 60 minutes per week of occupational therapy, 30 minutes per week of physical therapy, and 20 minutes per week of social work consultation, all provided in a special education setting. The recommended placement was outside regular education more than 60% of the school day.

61. The August 10, 2005 IEP included preferential seating and check often for understanding as accommodations included. When Student started at Ellisville, Student did not have an aide.

62. A new IEP was developed in two meetings held on September 29 and October, 7, 2005. The October 7, 2005 IEP goals addressed phonetic sounds, recognizing letters of the alphabet, identification and comprehension of sight words, writing letters, manipulation of numbers 0 to 20, development of comprehension of math concepts, initiating and completing tasks, responding to teachers without negative comments, maintaining appropriate voice levels, maintaining interpersonal skills with peers, completing motor activities involving balance and strength, appropriate verbal interactions with peers, language, and articulation. The IEP called for 600 minutes per week of academic instruction in special education, 126 minutes of instruction each week in special education in task related skills, 30 minutes per week of speech, 60 minutes per week of language, 60 minutes per week of OT, 30 minutes per week of PT, and 20 minutes per week of social work consult.

63. For the first time, the October 7, 2005 IEP noted under “Special Considerations” that the Student was deaf or hearing impaired, although the January 24, 2004 IEP did note that “Student had a loss of hearing in his right ear but not legal.” Preferential seating and check often for understanding were accommodations included in the IEP.

64. On October 4, 2005, a request for facilitator support was completed. An aide was hired to assist Student. Student participated in some regular education classes and activities at Ellisville, but was able to remain in the general education setting for only about 20 minutes.

65. On October 21, 2005, Student bit a staff member on the leg and punched her in the face.

66. Stephen M. Kanne, Ph.D., ABPP, a neuropsychologist at St. Louis Children’s Hospital, performed a neuropsychological assessment of Student and completed his evaluation on October 25, 2005. Student was six years and eight months of age at the time of the evaluation.

Dr. Kanne's report noted that Student had been given the following diagnoses: ADHD at the age of 3 by Dr. Bradley Berger, Reactive Attachment Disorder by Dave Overstreet, Ph.D., and Tardive Dyskinesia by Dr. Shanker. Dr. Kanne indicated that Student's "symptoms and behaviors, including attention/behavior dysregulation, poor speech, Reactive Attachment Disorder, and significant visual-spatial problems combine to produce a very complex presentation." On the Wechsler Preschool and Primary Scale of Intelligence – III, Student obtained scores of 85 on the Verbal Scale, 81 on the Performance Scale, and 80 on the Full Scale. On the Wechsler Individual Achievement Test, Student obtained a word reading score of 67. On measures of visual motor perception Student obtained standard scores of 64 and 69. He observed that Student's Reactive Attachment Disorder "would certainly exacerbate his poor behavioral choices in many situations (e.g., response to teachers)." Dr. Kanne made two recommendations for behavior management including: when Student engages in appropriate behavior, provide praise for specific behaviors; and when Student engages in inappropriate behavior, administer pre-arranged consequences in a non-emotional manner. This report was given to SSD's representatives.

67. On October 31, 2005, Student hit his teacher assistant in the right eye with a marker. The assistant was sent for medical treatment. Student also bit a teacher assistant on the left hand three times breaking the skin.

68. On December 2, 2005, Student bit a teacher assistant two times, once on each arm, breaking the skin both times. He also punched his teacher in the nose and punched and kicked a teacher assistant in the leg. He also kicked the special education area coordinator in the leg.



69. On December 7, 2005, Student bit a teacher assistant on the arm, punched her in the face and was very aggressive with other students.

70. Other incidents during the time Student was at Ellisville involved hitting, biting, inappropriate language (including use of the word “F\_\_\_”), and other forms of aggression. He was suspended four times and one incident of physical restraint is noted. Student’s behavior was getting worse both at school and at home. Student was unsuccessful at Ellisville.

71. Student attended Ellisville until December 12, 2005, at which time he transferred back to Diane Siebert’s classroom at Eureka Elementary. The move was in response to increased inappropriate behaviors by Student.

72. Student completed first grade in Ms. Siebert’s room at Eureka. As Mother acknowledged and reported to others, Student finished the year doing well and was doing well behaviorally. Progress reports for first grade at Eureka Elementary School showed both academic and behavioral progress. The progress report noted that Student responded very well to the structure of the classroom, seemed very happy most of the time, and was very affectionate toward staff. Student increased his ability to recognize upper and lower case letters of the alphabet, to recognize sight words, copy letters, recognize numbers, add numbers to 5, tell time, and other academic skills. Student also demonstrated behavioral improvements such as following directions most of the time, decreased periods of non-compliance and disrespect, and increased sportsmanship. His overall behavioral improvements allowed him to participate in story time, physical education, and art in the general education setting.

73. Given the success Student experienced from December 12, 2005 until the end of the 2005-2006 school year, IEP’s developed and implemented during that timeframe were

appropriate, and Student received meaningful educational benefit. Of importance is that December 27, 2005 commenced the two year statute of limitations period.

74. An IEP for the 2006-2007 school year was developed on June 8, 2006. ESY services for the summer of 2006 were approved. The IEP noted specific areas of need to include anger management, respecting authority, peer interactions, reading readiness/reading skills, math calculation, math reasoning, and pre-writing skills.

75. The present level of performance of the June 8, 2006 IEP included an evaluation of goals. The IEP included a behavior plan with a hypothesis that when Student is told to do something he does not want to do, is stopped from doing something he wants to do, or is given correction, he may use a disrespectful tone or words, curse, threaten, or become physically aggressive. The behavior plan detailed strategies to address the behavior using points and rewards and included a crises plan. The present level of performance also noted that Student's behavior has improved immensely since he has started back at Eureka Elementary. The June 8, 2006 IEP goals addressed balance and gross motor skills, speaking in a respectful voice when given directions or corrected, initiating appropriate interactions with peers, reading 100 sight words, making correct beginning sounds, verbalizing time from a clock to an hour and a half-hour, writing upper and lower case letters, copying 2 short sentences, tying his shoes, increasing speech intelligibility, increasing understanding of select parts of speech, increasing pragmatic abilities, identifying coins, their value, and adding pennies to one type of silver coin, and adding and subtracting sums and differences to 20 using touch points to no touch points. There were two behavioral goals: "When given a direction or correction Student will speak in a respectful voice tone using appropriate words as assessed by teacher determination an average of 80% of

the time;” “Student will initiate an appropriate interaction or respond positively to peer interactions as assessed by teacher determination an average of 80% of the time.”

76. The June 8, 2006 IEP called for 422 minutes per week of instruction in social skills, 422 minutes per week of instruction in reading, 422, minutes per week of instruction in math, 30 minutes per week of speech therapy, 60 minutes per week of language therapy, 60 minutes per week of occupational therapy, 30 minutes per week of physical therapy, 60 minutes per week of social work services, and 15 minutes per week of social work consult. All services were to be provided in a special education setting. The recommended placement was outside the general class more than 60% of the day.

77. In the June 8, 2006 IEP, it was noted that Student was not hearing impaired contrary to the October 7, 2005 IEP. Preferential seating and check often for understanding were included as accommodations.

78. For 2<sup>nd</sup> grade, Student began the 2006-2007 school year by returning to Eureka Elementary School in Dianne Siebert’s self-contained class for students with behavioral problems. Mother acknowledged that August and September were okay for Student and Dr. Shanker, on August 25, 2006, noted that school was going well for Student. As the school year passed, there was an increase in the intensity and frequency of Student’s behavior incidents in Ms. Siebert’s classroom, which became worse around November of 2006, and that one or two students from the previous year left and several new students were added. There were about 6 students in the classroom, including some new students, and at least one new aide. The students had an age range of 7 to 12, and had widely different diagnoses, from autism and nonverbal to bipolar disorder and extremely verbal. The behaviors of all students escalated, some students were suspended, and Student came home increasingly upset and got off the bus crying each day.

The students in Student's class eventually became known as "the six-pack" because of this combination of difficult behaviors. Due to the "makeup of the students that were in that classroom", school officials were seeing more outbursts and it was difficult to be successful in that setting.

79. By Halloween, Mother thought the class was chaotic and out of control. Shortly afterward, she requested a functional behavioral assessment because she knew that Student did not feel safe in class and was increasingly aggressive at home.

80. In November of 2006, Mother, Val Lyons, the mother of another student in Student's class, and one other mother of a student in this class had a series of three meetings with SSD personnel in which they shared their concerns about the educational programming for their children. Ms. Lyons testified that "the purpose of the meeting was to address increased behaviors, students being bitten in class, very hostile environment, children sleeping during school, just gradual decline of down spiraling of all our children."

81. SSD attempted to address the situation by adding another teacher assistant to the room and made other staff changes. Follow up to the meetings included assessment of Ms. Siebert's classroom by other SSD staff members.

82. Jan Booth is a SSD school social worker. Ms. Booth has a master's degree in social work and is a licensed clinical social worker. She has worked for SSD for 28 years. Ms. Booth is assigned to seven schools and 16 self-contained classrooms in Rockwood. Among her duties, Ms. Booth provides individual and group services to students, consults with teachers and parents, and communicates with outside agencies and medical services providers.

83. Ms. Booth was in Ms. Siebert's room on a weekly basis for approximately 3 hours during the 2005-2006 school year and twice a week for 3 hours during the 2006-2007 school

year. During both school years, Ms. Booth conducted group therapy for ½ hour each week that focused on issues the kids were having. During the 2005-2006 school year, Ms. Booth added a group that met for ½ hour each week where a class meeting was held. During the class meeting, students could talk about anything in the classroom that was bothering them or issues that they wanted to deal with. Student participated in the group therapies with Ms. Booth during the 2005-2006 and 2006-2007 school years. Ms. Booth included a social skills component to the group meetings where students interacted with each other and adults.

84. Ms. Booth talked with Dr. Shanker during the 2004-2005 school year. Dr. Shanker told Ms. Booth that he thought Student had bipolar disorder. Ms. Booth did not receive information that Dr. Shanker had changed his diagnosis to be reactive attachment disorder until January 2007.

85. Ms. Booth had worked with children with reactive attachment disorder in the past. She did not believe that knowledge of a diagnosis of reactive attachment disorder would have changed the way they worked with Student because he had a good, healthy attachment with them.

86. Ms. Booth worked with Ms. Siebert in developing strategies to address student behavior, including Student's.

87. Although Ms. Booth did not have significant behavior problems with Student and he was very good for the most part of the first semester of 2006-2007, she noted that he became more grandiose around this time, and would occasionally make outrageous statements.

88. During the latter part of 2006, Val Lyons observed the class on several occasions and testified that both her son and Student were decompensating in this class. Student became increasingly angry at his parents and his sister, verbally and physically abusing all of them. He

also began wetting his bed again. He began experiencing night terrors. He antagonized the family's dog, to the extent they had to get rid of it. According to his father, Student would cry every night when he went to bed. Student swung a bat at his neighbor, a person he knew and loved.

89. In November of 2006, the Petitioners employed Elizabeth Bates (formerly Blumenthal) to provide speech therapy for Student outside of school. Ms. Bates provided therapy services to Student on approximately forty occasions. She testified that he had a hearing impairment and a speech impairment, and that these were related in that Student could not hear sounds and could not hear words as well as other students. As a consequence, Student could not understand directions, he could not understand expectations, and he became frustrated because others could not understand him.

90. On November 26, 2006, Mother requested a functional behavioral assessment and a reevaluation. The FBA was completed during December of 2006. It was determined that the functions of Student's behaviors were gaining adult attention and escaping tasks.

91. It is not clear as to exactly when Student stopped receiving a meaningful education during the first semester of the 2006-2007 school year. The bulk of the evidence supporting this conclusion focuses around Thanksgiving of 2006.

92. Student's IEP team met on December 19, 2006 to review existing data. Mother expressed concerns that Student was not being served under the current diagnosis and requested that he be re-evaluated. The team determined that additional assessment was needed in the areas of cognition, basic reading, reading comprehension, mathematics calculation, mathematics reasoning, written expression, language, social/emotional, and motor. An evaluation plan and a

notice of action were developed on December 19, 2006. Consent to reevaluate was provided on January 3, 2007.

93. The present level of performance section of Student's IEP reported progress on all Student's IEP behavioral goals, notably 67% success on speaking in a respectful tone of voice using appropriate voice tone when given a direction or correction, and 70% success in appropriate peer interaction with 80% accuracy. The concerns of staff were "showing respect for authority, peer interaction and achievement in all academic areas, fine and gross motor and language issues."

94. An incident report dated December 20, 2006 indicated that Student threw over a study carrel and then fell on top of it. He got up and pushed a second study carrel over and ran out of the room yelling, "This is payback." Student had to be restrained and came up from the floor hitting, kicking, and fighting.

95. Petitioners obtained an audiological report from James Forsen, M.D., on January 12, 2007, which was shared with the IEP Team. This report notes that Student has "moderate to mild" hearing loss in his right ear, a low frequency loss in his left ear, and recommends discussion of an "FM system" at Student's upcoming IEP meeting.

96. In a letter dated January 15, 2007, Dr. Shanker stated that Student "has been somewhat of a diagnostic dilemma." Dr. Shanker had debated the diagnoses of autism and bipolar disorder, but concluded that the most accurate diagnosis at the time was Reactive Attachment Disorder. Dr. Shanker noted that Student was able to form strong relationships. Dr. Shanker stated a concern that Student mimics peers and his current placement may be antagonizing his outbursts. Noting that Student had problems with outbursts in the past, Dr. Shanker stated that "It has not always been clear as to the antecedent." Dr. Shanker also

recommended integrating Student into mainstream classes as much as possible to help foster normal behavior he would learn from his peers.

97. On January 17, 2007, Student became angry and ran outside the school building. He hit a teacher with a stick, kicked and punched adults, and kicked the principal in his private area. Restraint was used and Student was suspended. Apparently, the conduct occurred immediately after Student “lost pick time to spend points” because of previous disrespect toward adults.

98. A reevaluation was completed on January 26, 2007.

99. The January 26, 2007 reevaluation included the Stanford-Binet: Fifth Edition which produced a Verbal Scale score of 86, a Non-Verbal Scale score of 77 and a Full Scale score of 80. Other scale scores included 85 on Fluid Reasoning, 83 on Knowledge, 92 on Quantitative Reasoning, 79 on Visual-Spatial Processing, and 77 on working memory. These scores compared favorably with previous cognitive assessments on the Wechsler Pre-School and Primary Scale of Intelligence (WPPSI) -III and the Stanford-Binet: Fourth Edition (SB: FE). On the WPPSI –III administered by Dr. Kanne in January of 2005, Student obtained a Verbal IQ of 85, a Performance IQ of 81, and a Full Scale IQ of 80. On the SB: FE administered on November 29, 2004, Student obtained a Composite score of 78.

100. On the Wechsler Individual Achievement Test-Second Edition (WIAT-II) Student had standard scores of 65 on Word Reading, 67 on Reading Comprehension, 74 of Pseudo Word Decoding, 64 on the Reading Composite, 84 on Numerical Operations, 66 on Math Reasoning, 73 on the Math Composite, 67 on Spelling, 65 on Written Expression, and 61 on the Writing Composite.



101. The Behavior Assessment Scale for Children was completed by two of Student's teachers and his Mother. His special education teacher produced 9 ratings in the clinically significant range and 9 ratings in the at risk range. His speech pathologist produced 4 ratings in the clinically significant range and 4 in the at risk range. Mother's ratings produced no ratings in the clinically significant range and 9 in the at risk range. Ratings on the Behavior Rating of Executive Functioning – Teacher scale produced five ratings in significant range and five ratings in the elevated range on his mother's ratings. His special education teacher's ratings produced 10 ratings in the significant range and 10 ratings in the elevated range. His speech pathologist's ratings produced 5 in the significant range and 2 in the elevated range.

102. Language assessment included the Clinical Evaluation of Language Fundamentals 4<sup>th</sup> Edition (CELF-4). On the CELF-4, Student obtained a 94 on Receptive Language, 96 on Expressive Language, 100 on Language Content Composite, 91 on Language Structure Composite, and 97 on Core Language Composite. On the Comprehensive Assessment of Spoken Language (CASL) Student obtained scores of 78 on Antonyms, 83 on Syntax Construction, 98 on Paragraph Comprehension, 99 on Nonliteral Language, 90 on Pragmatic Judgment, and 88 on Total Core Composite.

103. As a result of the January 26, 2007 reevaluation, the diagnostic team determined that Student continued to qualify for services with diagnoses of Emotional Disturbance and Speech Impaired – Sound System Disorder. The diagnosis of Language Impairment was removed. Continued occupational and physical therapies were recommended.

104. As reported by Student's special education teacher for the January 26, 2007 reevaluation, in the school setting Student had made significant progress in many academic areas. Some areas of definite improvement indicated on his current report card include the

following: reading--recognizing sight words, identifying sounds in words, ability to answer basic comprehension questions about facts in a text and math--knowledge of one-to-one correspondence, remembering basic addition and subtraction facts, interpreting the calendar. He was showing improvement in his copying skills.

105. It was noted in the January 26, 2007 reevaluation report that Student usually responded well in a very structured setting with well-defined expectations and consequences and that Student tended to have periods of good behavior followed by periods of defiance, and there had been "some improvement" in behavior since the 2004 evaluation, and an evaluation reported a consultation with Dr. Shanker indicating Student's rage and outbursts decreased in frequency but still are of concern. Significant behavior concerns continued to be noted, especially with showing respect for authority, complying with classroom rules and teacher directives, and anger management. It was noted that Student could be verbally and physically aggressive toward staff when he was told "no" or when consequences were implemented.

106. On January 30, 2007, Student came behind an aide, placed his hands up her shirt and then down her back, resting his hands on her buttocks, attempting to pull her pants down. Later that day, Student licked an aide's breast through her sweater as she tried to stop Student from kicking things. He then tried to lick the aide on other parts of her body. Student was suspended.

107. An IEP was developed in a series of meetings held on January 26, 2007, February 2, 2007, and February 6, 2007.<sup>1</sup>

108. The present level indicated that Student had an outburst one time a week on average. The present level also notes tardive dyskinesia caused problems with Student's

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<sup>1</sup> While the last meeting date of this IEP is shown as February 2, 2007, the actual date of the IEP and the last Notification of Meeting is shown as February 6, 2007. The latter date shall be the operative date, and reflected as such in this opinion.

balance. Mother brought two audiology reports to the IEP meeting and Student was scheduled for another audiological assessment on the February 6, 2007.

109. Student's parents stated that Student needed an FM system and requested that he be placed in a general education class with assistance. The IEP noted that "physician will speak with the parents about using a hearing aide in the left ear and the medical treatment for both ears. Then the use of an appropriate FM system will be investigated." In the meantime, Student was to have preferential seating and his teacher was to check for understanding of verbal information.

110. An audiologist from SSD completed an assessment on February 6, 2007. She found a moderate conductive loss in Student's right ear and had an audiometric diagnosis of hearing impaired "at least temporarily." She noted that Student used to wear a hearing aid in his right ear, but due to drainage from his chronic ear infections, the aid was discontinued. The IEP accommodations included consultation with teachers concerning use of a hearing aide if approved by physician, investigate use of FM system, and monitor impact of temporary hearing loss on speech. The February 6, 2007 IEP noted concerns that included an increase in verbal and physical aggression towards adults, peer interactions, and achievement in all academic areas. Inappropriate behaviors are described as cursing, name calling, and threatening adults; throwing items (pencils, chairs, trash cans, and tipping over desk); kicking, hitting, yelling, biting, and leaving the classroom when angry; and recent incidents requiring the intervention of several adults when Student ran out of the building and resisted returning.

111. The February 6, 2007 IEP had 14 goals addressing speaking in a respectful voice when given directions or corrected, initiating appropriate interactions with peers, reading 100 sight words, making correct beginning sounds, verbalizing time from a clock to an hour and a half-hour, identifying coins, their value, and adding pennies to one type of silver coin, adding

and subtracting sums and differences to 20 with and without regrouping, increasing speech intelligibility, copying 2 short sentences, opening small packages, performing balance and gross motor skills, and using calming strategies.

112. The February 6, 2007 IEP called for 525 minutes per week of instruction in social skills, 525 minutes per week of instruction in reading, 525 minutes per week of instruction in math, 60 minutes per week of speech therapy, 60 minutes per week of occupational therapy, 30 minutes per week of physical therapy, 60 minutes per week of social work services, and 15 minutes per week of social work consult. All services were to be provided in a special education setting.

113. The February 6, 2007 IEP noted progress that Student had made on IEP goals, including behavioral goals. With respect to behavior, the IEP noted that “[r]ecently” Student had more incidents requiring intervention. The IEP did not make any revision to Student’s behavioral goals, although his behavior program was modified by incorporating many of the October, 2005 recommendations suggested by Dr. Kanne.

114. The social worker reported that Student had made progress in group therapy with Jane Booth, was often a leader, and modeled good behavior and responses. She noted that Student could be cued to become aware of other student’s attempts to negatively influence his behavior.

115. The recommended placement was a private separate school facility. The decision was based on Student’s need for more intense therapeutic support “as evidenced by” an increase in aggression toward staff. No representative of a private school was invited to the IEP meetings or attended any of them. Apparently, no member of Student’s IEP Team had sufficient knowledge of the attributes a private day program generally or of Edgewood. No one at the IEP

meetings with familiar with Edgewood. The decision that Student would attend Edgewood was made administratively based on the provisions of Student's IEP. The IEP included a Notice of Action refusing placement in a general education classroom with the support of a trained aide.

116. Jan Booth prepared a Social Work Summary dated February 7, 2007. In the report, Ms. Booth noted that Student had become more aggressive both verbally and physically "[i]n the past few months." Ms. Booth concluded that the then-current placement could no longer meet Student's needs. Ms. Booth believed that the decision to change Student's placement in February 2007 to a separate private school was appropriate because he needed more intense intervention than they were able to give in Ms. Siebert's classroom.

117. The February 6, 2007 IEP included revised extended school year service from June 1, 2007 to July 1, 2007 to include 545 minutes per week of instruction in reading, 545 minutes per week of instruction in math, 545 minutes per week of instruction in social skills, 30 minutes per week of physical therapy, 30 minutes per week of speech therapy, and 30 minutes per week of occupational therapy.

118. At the Parents' request, upon their initial decision to decline the assignment to Edgewood, the February 6, 2007 IEP was amended on March 5, 2007, to provide homebound instruction due to medical reasons. The IEP called for 100 minute per week of instruction in math, 100 minutes per week of instruction in reading, 100 minutes per week of instruction in social skills, 15 minutes per week to consult to coordinate the special education curriculum, 5 minutes per month of speech consultation, 15 minutes per month social work, 5 minutes per month of occupational therapy (consulting), and 5 minutes per month of physical therapy.

119. Dr. Shanker testified that he advised the family to put Student in a homebound program because he felt that the classroom was "really problematic for Student" and Student

“was really deteriorating.” Dr. Shanker completed a treatment plan for re-entry stating that Student should only return to school “when proper setting is available.”

120. Homebound Instruction started on or about March 8, 2007, and ended on or about March 28, 2007.

121. On or about March 13, 2007, Parents completed an application for admission to Promise Christian Academy (“Promise”). Parents applied for Student to attend other schools. All of the schools except Promise rejected Student’s application.

122. Parents agreed to placement at Edgewood in April of 2007.

123. On April 10, 2007, Student was conditionally accepted at Promise. The conditions for acceptance at Promise were:

- “Attend Edgewood starting now and through the summer – We would like to meet with the staff to debrief when his session is completed.
- Involve Frank (RAD therapist) for psychological support with both Edgewood and Promise
- Involve Bette to be a part of our team of specialists to assist with Student.
- We would like to meet with you after any incident and problem solve/ reevaluate placement.

If Student strikes out to a teacher or another student or is in danger of hurting himself we would ask that you take him home for the remainder of the day.”

124. Parents requested an FM system be available. Student was seen again by SSD audiologist on March 8, 2007 and fitted with a hearing aid on his left ear that could be used with an FM system. However, Dr. Forsen noted on March 9, 2007 that Student will not wear his hearing aid.

125. Student had surgery on April 4, 2007, to reconstruct the right ear drum, to do a bone graft in the ear, and to scrape out the infection. There was immediate improvement in Student's hearing and his hearing has been okay since then.

126. On April 12, 2007, Student entered the Edgewood Children's Center as a day student in Susan Breight's<sup>2</sup> classroom. Ms. Breight has a degree in special education and is certified in special education. She is employed as an ED/BD teacher for children ages 7 to 11.

127. Maria Nash, Edgewood's Director of Special Education, noted that while Student was at Edgewood Children's Center he received services from a variety of disciplines including speech therapy, occupational therapy, physical therapy, art therapy, as well as services from a primary therapist, a special education teacher and a paraprofessional.

128. Edgewood has a day treatment facility school and a residential program located on one campus. The main focus of Edgewood's programming is children with emotional disturbances. One hundred fifty-two students attend the school, 40 of whom are in the residential program. Edgewood's school provides an intense therapeutic intervention.

129. As part of its standard process for entering students, Edgewood seeks to obtain releases of information from outside service providers. Edgewood also develops a treatment plan for each student. Information about the student is gathered and then the therapist would meet with the parents to go over the plan and modify it. A full treatment plan was not completed for Student because he did not attend Edgewood long enough for it to be completed.

130. The parents visited Edgewood on two occasions before Student entered, but were only shown the main building and the building servicing students with autism. A key is required

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<sup>2</sup> Although the spelling of Mr. Breight's name was Breite in the transcript, her name was spelled Breight in the records received into evidence.

to enter all buildings at Edgewood. The Parents were made aware that not all of the classrooms were in the same building. For reasons based on confidentiality and the nature of the students that it serves, it is Edgewood's policy that parents generally are not allowed to visit classrooms. Mother observed Student in his classroom on one occasion. Mother spoke with Student's teacher.

131. Students at Edgewood not in the residential program generally are referred by a local school district through the IEP process. Edgewood serves children from St. Louis City, St. Louis County, communities surrounding St. Louis County, and approximately 10 school districts in Illinois. The average length of time that a student stays at Edgewood is about two years.

132. Children in Edgewood's classrooms are placed primarily on their age. There are 12 classrooms; each classroom has a maximum of 10 students. The 12 classrooms are housed in two buildings. Each classroom is staffed by a certified special education teacher, a teacher's assistant, and a licensed therapist. Therapist's offices are located very near the classroom. Teacher's assistants assist with addressing behavioral issues, which allows the teacher to focus on teaching. The ages of the children in Student's classroom were about 7 to 9 years old.

133. Each student at Edgewood receives two individual therapy sessions per week and the therapist provides 3 group therapy sessions per week. Therapists provide crisis intervention and therapeutic support throughout the school day. Art therapy is provided to each classroom every other week. Team building, which is used to facilitate positive peer interaction and improve social skills, is a group session provided in each classroom. Student's teacher participated in group sessions.

134. The therapist in Student's classroom was in the room most all of the time working with the teacher and students.



135. Edgewood classrooms are designed to provide consistency and structure. Edgewood staff members are trained to respond in a consistent way. Students in Student's classroom were made aware of expectations for the classroom on a regular basis. Student's teacher and the teacher's assistant talked frequently about rules and teaching methods.

136. Generally speaking, Edgewood does not send children home if they misbehave or get out of control at school. The school's philosophy is to help children learn how to handle their behaviors at school. There was a quiet room next to Student's classroom that could be used for children to deescalate. Edgewood staff members are trained in restraint procedures, crisis prevention, and verbal de-escalation.

137. Except for a light restraint on his first day at Edgewood, Student never was physically restrained while at Edgewood. Other students were restrained about six times during the approximately six weeks that Student attended Edgewood.

138. As a general rule, daily notes are sent home with each student at Edgewood for parents to review. The notes provided information about the child's day. However, in this case, Parents did not consistently receive these daily notes about Student's days while he attended Edgewood.

139. Edgewood uses a point system that allows students the opportunity to earn points for following rules and positive behaviors. Individual classrooms develop their own system based on the needs of individual students. At the end of the week, a student may use points to purchase a treat at the school store. Student's classroom used a reward system. Student's teacher took into account individual students in implementing the system. Student liked the reward system and it was motivating for him. Edgewood uses other strategies to encourage positive behaviors.

140. Edgewood generally does not develop a behavior plan as soon as a student enters. Instead, Edgewood likes to give a student at least a month or more so that Edgewood may identify the primary issues in its environment. Children sometimes exhibit different behaviors at Edgewood than they did at a previous placement. Ms. Breight developed a behavior plan for Student. Edgewood also devised a treatment plan. However, neither the behavior plan nor treatment plan were developed with any parental input and neither addressed the problems of sexualized conduct or aggressive behavior toward adults which were important considerations for the placement at Edgewood.

141. Edgewood has had students with a diagnosis of reactive attachment disorder who have been successful. Edgewood therapists have received training with respect to reactive attachment disorder.

142. Mother spoke with Ms. Breight about the use of an FM system at Edgewood. They agreed that it was not necessary.

143. Ms. Nash's office was directly outside of Student's classroom, so she was able to observe the classroom every day. During the relatively brief time that Student attended Edgewood, Ms. Nash observed that Student was showing signs of following routines, following directions, interacting appropriately with peers, and reducing inappropriate behaviors. Ms. Breight reported that Student was talking back less to her and the assistant and that he was adjusting to the program. Student's behaviors were average for students in Ms. Breight's class.

144. Parents reported to Frank Copanas on April 26, 2007 that Student's behavior continued to improve. On May 14, 2007, they reported to Mr. Copanas that Student's behavior continued to be stable with slow, steady progress. However, Mother also reported that Student was bullied and did not have any friends at Edgewood. Student was showing more aggressive

behavior at home and was angrier than he had ever been. He was wetting the bed, crying, cursing more, and having night terrors again. Student told his mother that Edgewood would have “lockdowns” where an alarm would go off, the doors would be locked and the students would have to put their head down on their desks; Ms. Nash testified that “lockdown” was an inappropriate term for occasions when students were required to remain in class due to some behavioral problem. Of notable significance, Ms. Breight agreed that Student had negative behavioral problems at Edgewood which were reported in various school records on 24 separate days during the six weeks when he was in attendance in her class. However, there were no acts of aggression towards adults and no sexual acting out. Ms. Breight also testified that Student was able to make friends, unlike other children with reactive attachment disorder she had seen.

145. Student worked on academic subjects in Ms. Breight’s classroom, including reading/phonics, handwriting, English, journal (creative writing), math, spelling, and social studies. Ms. Breight prepared daily lesson plans and instruction was individualized to meet the needs of each child.

146. At the time Student entered Edgewood, the school was in the process of replacing a speech therapist and had been unable to provide speech services to Student until May 10, 2007. Edgewood was aware that Student had missed speech services and planned to provide the services to Student during the summer program that is offered to all Edgewood students.

147. Physical Therapist Denise Jacobson reported in her notes dated April 18, 2007, that she went to Edgewood to seek Student and was advised that Student was restricted from doing PE type activities because of his ear surgery. As requested, Mother provided a new prescription for PT so that services could be continued. PT services were provided starting on May 2, 2007.

148. Ms. Breight completed a report card for Student. For the most part, Student's grades were based on work completion and participation. When Student received the attention he needed, Ms. Breight reported that Student worked hard with assistance. The negative inference is that when Student did not receive the attention he needed, he did not work hard. Ms. Breight noted in the report card that Student needed to continue to work on talking back and verbal aggression. As he had in the past in other settings, Student cursed a lot at Edgewood.

149. Ms. Breight did not believe that mimicking was a problem for Student. Although Student cursed a lot at Edgewood, he had exhibited that behavior previously.

150. Edgewood prepared reports on progress on IEP goals. The reports showed that Student made progress on IEP goals. Some goals had not been formally addressed during the short period of time that Student attended Edgewood.

151. Dr. Shanker initially reported on May 12, 2007 that Student was responding to the environment at Edgewood. However, he testified that "as time went on [Student] tends to ... escalate based upon what his environment is ... So he started picking up on the cussing and his cussing escalated quite a bit." Dr. Shanker also testified that he felt that while at Edgewood, Student "was deteriorating at that time, really emulating a lot of the characteristics that he was seeing from the other kids and it was [his] concern that [Student] was going to continue to deteriorate. So I was concerned and I really didn't want him to continue there."

152. Frank Copanas, Student's attachment therapist, observed Student while he was attending Edgewood. He testified that it was his "personal hope" that Student "could be in a less restrictive environment." Mr. Copanas testified that he had concerns following his visit to Edgewood. Finally, he testified that the trust problem between the Petitioners and Student centered around the Student's experience at school.

153. Becky Bates, Student's speech therapist, was serving Student while he attended Edgewood. When asked about Student's receptiveness to therapy at that time, she testified that "I thought we were having an out of body experience. . . [and] he was not the same kid." Ms. Bates told Student's mother that she was very concerned for Student's well-being while he was at Edgewood.

154. Student attended Edgewood through May 30, 2007.

155. Edgewood was not an appropriate placement for Student, as the Panel believes Edgewood did not provide the least restrictive environment for Student.

156. An IEP Addendum was completed on May 31, 2007, to address ESY for 2007 at Edgewood. The Addendum called for 300 minutes of reading each week, 300 minutes of math each week, 915 minutes of social skills each week, 30 minutes of speech each week, 30 minutes of occupational therapy each week, 60 minutes of individual therapy each week, and 90 minutes of group therapy each week. Services were to be provided from June 18, 2007 through July 27, 2007.

157. Student did not attend the 2007 ESY program at Edgewood. However, he received homebound instruction from July 9, 2007, through August 2, 2007.

158. On July 17, 2007, Petitioners gave notice to SSD of their intention to withdraw Student from public school and make a private placement at public expense. Petitioners investigated several other schools before selecting Promise. It was the only school which accepted Student.

159. Student entered the third grade at Promise on August 21, 2007, on a conditional basis. On August 30, 2007, a letter was sent to the parents of other students with Mother's permission to help parents understand Student. At some point, the parents were warned that

Student might not be able to continue to attend if his inappropriate language continued. Student's teacher at Promise was a speech/language pathologist. All of the students at Promise had special education needs.

160. On September 3, 2007, a behavior contract/plan was developed at Promise. Behaviors of concern included aggressive words and hands. Unkind words were listed as B----, Wh---, L---, L----, and F---. Student had major behavioral problems when he started at Promise. Promise would call the Parents to pick him up from school. Those calls did not taper off until November 2007.

161. Promise developed an Individualized Education Plan for Student sometime in October 2007. The educational diagnosis was listed as attention deficit hyperactive disorder, speech and language disorder, emotional disturbance (RAD – Reactive Attachment Disorder).

162. The IEP noted that Student's behavior often interfered with his ability to learn. The first listed Adaptations / Interventions is "Prayer." Goals addressed reading, math, and social interaction. Social interactions specifically addressed included responding appropriately to correction, controlling outburst toward peers and use his words rather than shouting, refraining from touching other students, and refraining from using inappropriate gestures, words, or actions with peers and adults.

163. A memo dated November 28, 2007, noted that transitions were difficult for Student, especially coming in from recess. He expressed defiance by saying, "No, you are not my boss" and was disobedient. Student used the word "F\_\_\_" and "often bullies and therefore few [students] will engage him."

164. On December 27, 2007, Parents filed for a due process hearing.

165. In a February 11, 2008 note to Dr. Shanker, Kathy Bingley, Student's teacher at Promise, stated that behaviors they continued to observe are "difficulty transitioning, impulsivity, cursing, needing to be in control/first, physical."

166. On February 14, 2008, Ms. Bingley wrote a summary of observations of Student while at Promise. In it she stated that Student would need to attend another school for the rest of the year. Options she suggested included home schooling with a certified teacher, Epworth, or Evangelical Children's Home. Behavior concerns included:

- Does not transition easily from task to task or room to room
- Does not accept ownership of the choices he has made; usually justifies his action due to someone else's behavior
- Short fuse; gets angry verbally and physically when not in control, not number one, or being corrected for not following the 'rules'
- Resorts to cursing to relieve frustration/anger
- Bullies classmates by pushing, shoving, intimidating them with loud noises in their face, tackling them.

167. However, not surprisingly, and consistent with prior inconsistencies, while at Promise, some progress was also reported. The IEP reported that in the few short weeks Student had been there, they saw "growth in his ability to exhibit self control and proper choices in behavior." The IEP stated that Student was successful in Math. The IEP also noted that Student's behavior had improved. The IEP stated, "Currently, if Student misbehaves (3 checks) and is spiraling downward he has to go home. This has become less and less of an issue as he learns he is safe and is accepted in our classroom."

168. Thereafter, there are a series of reports from Promise which indicate continued improvement on Student's academic and behavioral goals. Finally, Student's 2007-2008 report

card stated that the Student was “learning daily as he feels safe and secure!” and reports satisfactory grades in all subjects except social skills.

169. Betty Bates observed Student’s behavioral changes after he began attending Promise. She testified that she was initially “astounded” that he was able to engage in a group activity with other students without conflict. Over the course of the time Student attended Promise, she described the change in Student as “180 degrees,” in that Student was anxious to please his teachers, making friends with other students, without any reports of aggression. Student’s speech also changed significantly while at Promise. Ms. Bates testified that Student could carry on dialogue and be understood.

170. Dr. Michael Shanker testified that since September 1, 2007, Student’s overall demeanor has improved and the frequency of his aggressive outbursts has declined. Dr. Shanker testified that he would attribute some of Student’s success to his educational setting at Promise.

171. Dr. Ralph Carrafa, a licensed psychologist, observed Student on three occasions at Promise and also met with him twice at his office. He testified that he saw some “rather remarkable changes in the very short time that [Student. was at Promise],” in particular that Student’s aggression “diminished significantly.” Dr. Carrafa also testified that Student was a calmer boy and less hyperactive which was significant because he was taking less medication. Dr. Carrafa’s report indicates that, by February 2008, Student’s “behavior except for cursing and very occasionally aggression had markedly changed. . . He clearly felt safe and defiance was nearly absent. He was responsive and loving to staff and to students. He knew and followed rules and routines.” Dr. Carrafa testified that the instructional activities for Student at Promise were appropriate in addressing Student’s special needs and that he appeared to be learning effectively when he was there. He believed that ultimately Student will require a residential



treatment program but that, at present, the minimally acceptable educational program for Student was a program like Promise.

172. On February 14, 2008, a letter was sent to the families of other students informing them that Student would not be returning to Promise. Student was not allowed to continue at Promise in large part because the school could not tolerate his language. Issues that Promise still was dealing with included “short fuse, gets angry verbally and physically when not in control” and “bullies classmates by pushing, shoving, intimidating them with loud noises in their face, tackling them.”

173. Promise indicated they saw a two week cycle that Student exhibited. They noted that he appeared to have two weeks of good behavior followed by two weeks of bad behavior.

174. Ms. Bingley’s final report indicated that during the six months Student had been at Promise, there were academic improvements in decoding, handwriting, keyboarding and behavioral improvements in accepting consequences, serving his time out, listening to reasoning and willing to apologize.

175. No one from Promise testified at the hearing. There was no evidence that Student’s education program at Promise included a therapeutic element.

176. On February 26, 2008, Student began school at Annunziata because that was the only school that would accept him. On April 2, 2008, a Speech and Language Individualized Education Program was developed by the Archdiocese of St. Louis Department of Special Education Department. On April 16, 2008, the Archdiocese of St. Louis Department of Special Education Department developed an IEP for Student at Annunziata.

177. Student stated that two older students have picked on him at Annunziata.

178. No one from Annunziata testified at the hearing. There was no evidence that Student's education program at Annunziata included a therapeutic element.

179. Student attended school for 54 ½ days at Annunziata. He received final grades of B in math, C in reading, B in language, A in spelling, B in religion, B in science, B in social studies, C in art, and A in music and PE. His teacher reported that he was a "hard worker" while studying addition and subtraction. In language, he was writing paragraphs using the Step-Up-To-Writing program. Jan Butler, Student's speech therapist at Annunziata, wrote that Student was very verbal and spoke fluently but still has some inconsistent articulation errors.

180. Dr. Caraffa visited Annunziata on one occasion and observed Student in his classroom. There were about ten students in his class, plus a teacher and an aide, which was twice the size of Student's class at Promise. He reported that Student had many of the same problems as he had when he first started at Promise, including difficulty attaching to staff, impulsivity, aggressiveness, threatening behaviors, and cussing, among others. He was not behaving like this when he left Promise. Dr. Caraffa wrote that Student was beginning to "make some strides toward compliance" before the summer break but still was disconnected from staff. Further, Dr. Caraffa testified that Student was the most difficult student at Annunziata.

181. Mr. Copanas testified, as to his visit with Student on May 15, 2008 in his office, that Student was able to hold a conversation, played with the toys in an undestructive manner, and was less anxious than before. Mr. Copanas also testified that Student was "markedly different" and "much more cooperative in the classroom setting" when he observed him in his classroom on May 23, 2008 at Annunziata compared to when he's seen him at Edgewood. However, Mr. Copanas' notes reflect that Student's principal and teacher both "... report that Student is defiant, non-compliant and threatening..., and they struggled with how to intervene."

182. Student was still using the SPIRE reading program at Annunziata that had a packet of homework including ten spelling words every week. Mother testified that after a period of going into a shell at the beginning of the new placement, he now “loves it.” She stated that Student is much calmer and his behavior had improved so much from the time Student left Edgewood that the family got a new puppy.

183. Mother testified that she had enrolled Student in a summer therapy camp at Miriam, beginning the next day, where he will receive related services of occupational therapy, speech therapy, art therapy, and tutoring in reading. This program was recommended to her by Ralph Caraffa.

184. Mother testified she thought there was a good chance that Student would be “kicked out” of Annunziata because it was a bigger program than Promise, and she didn’t know how much of Student’s cursing they would tolerate.

185. Records from Promise do not show any significant differences between Student’s behaviors there and at Edgewood. After six-months the behaviors and issues continued to be the same addressed in previous years. When Student was asked to leave Promise, the level of placement suggested by Promise was the same level as Edgewood– separate private day school.

186. Student’s behavior escalated when he went to Annunziata and Student was bullying other students again.

187. As Dr. Shanker testified, not all of Student’s behaviors are explained by his Reactive Attachment Disorder.

188. Dr. Caraffa was not surprised that various professionals have suggested various placements for Student along the placement continuum. He noted that Student is a “multi-

problemated,” “difficult to really understand,” and “complex” child and was not surprised that people who worked with Student would have different opinions about what he needs.

189. There was much testimony as to Student’s hearing difficulties, and inconsistency in regard to diagnosing Student’s hearing impairment, and SSD’s failure to address same. The Panel recognizes that SSD was inconsistent in its IEP’s relative to Student’s hearing problem. However, it does not believe that said inconsistencies amount to a denial of FAPE given the accommodations made and Student’s successes.

190. From August 2007 until February 2008, the Petitioners incurred tuition expenses from Promise Christian Academy in the amount of \$6,026.67 and these expenses were paid. From February of 2008 until May of 2008, the Parents incurred tuition expenses from Annunziata in the amount of \$2,333.32. This expense was not paid at the time of the hearing because the final expense might be reduced by a parish subsidy which had not yet been determined at the time of the hearing. The cost of occupational therapy provided by the Miriam Learning Center for ten sessions from March 6, 2008 until June 4, 2008 was \$850.00, which was paid. The cost of speech therapy by Elizabeth Bates from July 24, 2007 until January 4, 2008 was \$1,060.00, which was paid. The cost of the summer program at Miriam Learning Center was \$125 per day, and Petitioners had not yet been billed.

### **III. – CONCLUSIONS - DECISION**

#### **A. Governing Law.**

This case arises under, and is governed, under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, as amended (“IDEA”); the IDEA’s implementing regulations, 34 C.F.R. Part 300; Missouri’s special education statutes, §§162.670-162.999, RSMo.; and the Missouri state regulations implementing its special education statutes, 5 C.S.R. §70-742.140

("State Plan"). The State Plan constitutes regulations of the State of Missouri, which further defines the rights of students with disabilities and their Parents and regulates the responsibilities of educational agencies. The State Plan was in effect at all material times during this proceeding.

The IDEA, its regulations and the State Plan set forth the rights of students with disabilities and their Parents, and regulate the responsibilities of educational agencies, such as Rockwood and SSD in providing special education and related services to students with disabilities.

Rockwood is a Missouri school district organized pursuant to Missouri Statutes §162.011 *et seq.* RSMo. Parents and Student are now and have been residents of Rockwood at all times relevant to this due process proceeding.

SSD is a Missouri school district organized pursuant to Missouri Statutes 162.011 *et seq.* RSMo.. Parents and Student are now, and have been, residents of Rockwood, which was served by SSD at all times relevant to this due process proceeding.

Student is clearly a "child with a disability," as that term is defined in the IDEA, its regulations, 34 C.F.R. §300.7 and the State Plan. When initially enrolled in the Rockwood ECSE program in 2002, Student was diagnosed as a Young Child with a Disability. Student has had a plethora of education and medical diagnoses since early 2002. Student, within the time he attended public school, exhibited, on multiple occasions, aggressive behaviors while also displaying periodic academic and behavioral progress. His complexities are accurately described by Dr. Kanne in stating that Student's "symptoms and behaviors, including attention/behavior dysregulation, poor speech, Reactive Attachment Disorder, and significant special problems combine to produce a very complex presentation;" Dr. Shanker's conclusion that Student "has been somewhat of a diagnostic dilemma;" and Dr. Caraffa's conclusion that Student was "multi-

problemated”, “difficult to really understand”, and “complex.” His most recent IEP developed by Respondents on February 6, 2007 diagnosis was Emotionally Disturbed and Speech Impairment/Sound System Disorder, with a DSMIV diagnosis of Reactive Attachment Disorder.

Pursuant to Missouri law, §162.890 RSMo, Rockwood is not responsible for providing special education and related services to students with disabilities, as defined by the Missouri State Plan, who reside in the school district except for children between the ages of three (3) and six (6) enrolled in Rockwood’s Early Childhood Special Education program. Accordingly, since during the applicable time frame of December 27, 2005 and December 26, 2007, Student was beyond the age for which Rockwood had a responsibility to assure Student received FAPE under the IDEA, Rockwood is not subject to any relief which might be applicable.

The IDEA and Missouri law require 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 of Westchester County v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982), and §162.670 RSMo. 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 term “free appropriate public education” is found in the IDEA 20 U.S.C. §1401(8) and is defined by 34 C.F.R. §300.8 as follows:

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

provided to the student with a disability, “meet the standards of the SEA” (State Board of Education), and “the requirements of this part”. 34 C.F.R. Part 300.

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.Ed2d 1090 (1998).

Herein, Parents are challenging Student’s October 7, 2005, June 6, 2006, December 19, 2006 and February 6, 2007 IEP’s and the implementation thereof. Parents are particularly challenging the educational placement at Edgewood, pursuant to the February 6, 2007 IEP. Parents have, given periodic times of educational and behavioral successes, been faced with strong dilemmas in their diligent and exhaustive efforts to find the appropriate placement for Student. Parents seek reimbursement for their private school expenses and related services.

### **1. Compliance with the IDEA**

In analyzing whether the mandates of the IDEA have been met, we start with *Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley, id.*, wherein the United States Supreme Court pronounced:

[A] court’s inquiry in suits brought under §1415(e)(2) [of IDEA] is twofold. First, has the state complied with the procedures set forth in the Act. And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits. *Id.*, pp. 206-207.

#### **a. Procedural Compliance with the IDEA**

The IDEA imposes significant procedural requirements on public school districts. *See generally* 20 U.S.C. § 1415. In its seminal *Rowley* decision, the Supreme Court stated that “Congress placed every bit as much emphasis upon compliance with procedures giving parents

and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard.” *Rowley*, 102 S.Ct. at 3050 (internal citations omitted).

Over the intervening years, however, lower federal courts have recognized the anomaly of permitting technical procedural violations to undermine an IEP that would have resulted in the student making educational progress. “[C]ircuits that have addressed th[e] question head on have consistently held that ‘procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity.’” *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 811-12 (5th Cir. 2003); *accord DiBuo v. Board of Educ.*, 309 F.3d 184, 190 (4th Cir. 2002); *T.S. v. Indep. Sch. Dist. No. 54*, 265 F.3d 1090, 1095 (10th Cir. 2001); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir. 2001); *Urban v. Jefferson Co. Sch. Dist.*, 89 F.3d 720, 726 (10th Cir. 1996); *Independent Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 562 (8th Cir. 1996); *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992); *Cordrey v. Euckert*, 917 F. 2d 1460 (6th Cir. 1990), *cert. denied* 449 U.S. 938 (1991); *Mandy S. v. Fulton Cty. Sch. Dist.*, 205 F. Supp. 2d 1358 (N.D. Ga. 2000).

In 2004, Congress codified the lower courts’ movement away from allowing cases to turn on strict procedural compliance with IDEA. Specifically, Section 1415 was amended to de-emphasize the role of procedural irregularities, requiring that due process hearing officers focus their decisions on the substance of a student’s IEP:

- (E) Decision of hearing officer. –
  - (i) In general. – Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.



- (ii) Procedural issues. – In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies –
  - (I) impeded the child’s right to a free appropriate public education;
  - (II) significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents’ child; or
  - (III) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E).

**b. Substantive Compliance with the IDEA**

The substantive heart of the IDEA is its requirement that a disabled child be provided with access to a “free appropriate public education.” (“FAPE”). *Rowley*, 102 St. Ct. at 3034. The term “free appropriate public education” is defined above.

IDEA is designed to enable children with disabilities to have access to a free appropriate public education that is designed to meet their particular needs. *O’Toole v. Olathe Unified Sch. Dist. No. 233*, 144 F.3d 692, 698 (10th Cir. 1998). IDEA requires the District to provide a child with a disability with a “basic floor of opportunity. . . which [is] individually designed to provide educational benefit to the handicapped child.” *Rowley*, 102 S. Ct. 3034, 3047.

In so doing, the IDEA does not require that a school district “either maximize a student’s potential or provide the best possible education at public expense,” *Rowley*, 102 S. Ct. 3034, 3049; *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 1840 (1998); *Rowley*, 102 S.Ct. at 3049; *Peterson v. Hastings Public Sch.*, 31 F.3d 705, 707-08 (8th Cir. 1994); *A.W. v. Northwest R-I Sch. Dist.*, 813 F.2d 158, 163-164 (8th Cir. 1987). Likewise, the IDEA does not require a school district to provide a program that will “achieve outstanding results,” *E.S. v. Indep. Sch. Dist. No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); that

will provide “superior results,” *Fort Zumwalt Sch. Dist.*, *supra*, 119 F.3d at 613; or that will provide the placement the parents prefer. *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F. 3d 648, 658 (8th Cir. 1999).

## **2. Burden of Proof**

The burden of proof in an IDEA due process hearing is placed upon the party seeking relief. *Schaffer v. Weast*, 549 U.S. 49, 62 (2005). The due process complaint in this matter was filed by Parents. Accordingly, the burden of proof on the issues to be determined by the Panel rests with the Parents.

The Supreme Court’s reference as to the burden of proof is burden of persuasion, which means that the student and their parents lose at the conclusion of the case if the evidence on both sides is evenly balanced. *Id.* at 58. The standard of proof in this administrative proceeding, as in most civil cases, is proof by a preponderance of the evidence. *Tate v. Department of Social Services*, 18 S.W. 3d 3, 8 (Mo. App. E.D. 2000).

Respondents maintain that the decisions of teachers, special educators and administrators are entitled to deference by the Hearing Panel. Courts of review are required to give “due weight” to judgments of educational policy. *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204-06 (1982). In order for courts to give deference to policy judgments of school officials, it follows that a Hearing Panel should also give due weight to such decisions. *Johnson v. Metro Davidson Cty. Sch. Sys.*, 108 F. Supp. 2d 906, 915(M.D. Tenn. 2000). However, if the decisions of school personnel were conclusive, then administrative hearings by an impartial hearing panel would be unnecessary. *Ojai Unified Sch. Dist. v. Jackson*, 4 F. 3d 1467, 1476 (9<sup>th</sup> Cir. 1993).

**B. Findings-Conclusions as to the February 6, 2007 IEP and as to whether Student received FAPE after Thanksgiving of 2006.**

Herein, Tara Little, SSD's service coordinator, appears to be the person who selected Edgewood as Student's educational placement. Ms. Little was not invited and did not attend Student's February 6, 2007 IEP meeting, or either of the two prior meetings culminating in the February 6, 2007 IEP, and did not testify at the hearing. Materials about Student were apparently forwarded to her attention after the IEP meeting. No evidence was presented at the hearing which suggested any reason why Ms. Little selected Edgewood, or whether Ms Little had ever met Student, had ever seen Edgewood (or any other day program), or had actually reviewed the materials forwarded to her about Student.

There was no participating, either in person, by phone or any other method, at the February 6, 2007 IEP by Edgewood in violation of 34 C.F.R. §300.325(a)(2), which requires such participation. Neither Petitioners nor the remainder of the IEP Team could discuss the potential private placement with an knowledgeable person. The purpose of this regulation is to allow the Team to make a more informed decision and to avoid a situation like the instant case when nobody at the IEP meeting knows the advantages and disadvantages of the prospective private placement.

The members of Student's IEP Team who drafted the February, 2007 IEP and placed him at Edgewood, knew little about the placement they ordered. Marty Woytus, SSD'S coordinator, did not know why a purchase of service placement was called for as opposed to a Phase III public school placement which SSD had available in its continuum of services.

Rather than waiting to make an informed decision at a meeting with the required participants, the Team wrote an IEP without the required educational expertise. Accordingly,

little or no deference or weight should be accorded to the decisions of these individuals concerning their decision to place Student in a private day program because the IEP Team did not include the statutory private placement member and because there was no evidence that any educational expertise was involved in this placement decision.

In determining whether the IEP placement was inappropriate, the Hearing Panel should consider the evidence relevant to the facts as these existed in February, 2007 when the contested IEP was developed. *Taylor P. v. Missouri Dept. of Elementary and Secondary Educ.*, 2007 U.S. Dist. LEXIS 74070, \*86 (W.D. Mo. Oct. 3, 2007); *Jennifer D. v. New York City Dept. of Educ.*, 550 F. Supp. 2d 420, 430 (S.D.N.Y. 2008).

Petitioners assert that placement of Student at a private separate (day) facility, and placement at a particular school, Edgewood, denied him a FAPE because it was emotionally, educationally and psychologically detrimental to Student, given his unique educational needs. The IDEA guarantees placement in the least restrictive environment (“LRE”), as follows: “To the maximum extent appropriate, children with disabilities. . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be satisfactorily achieved.” 20 U.S.C. §1412(a)(5)(A); see also, 34 C.F.R. §300.114 – 300.118; Sec. 162.680.2, RSMo.; Missouri State Plan, Reg. IV (3), at p. 52-53.

The LRE requirement in our Circuit is expressed as follows: “[T]he IDEA creates a preference for mainstream education, and a disabled student should be separated from her peers only if the services that make segregated placement superior cannot ‘be feasibly provided in a

non-segregated setting.”” *Pachl v. Seagren*, 453 F. 3d 1064, 1067 (8<sup>th</sup> Cir. 2006), quoting *Roncker v. Walter*, 700 F. 2d 1058, 1063 (6<sup>th</sup> Cir. 1983); *T. F. v. Special Sch. Dist. of St. Louis Cty.*, 449 F. 3d 816, 820 (8<sup>th</sup> Cir. 2006). Thus, “[t]he IDEA requires *both* that the child be provided a FAPE *and* that such a FAPE be provided in an LRE to the maximum extent appropriate.” *L.B. v. Nebo Sch. Dist.*, 379 F. 3d 966, 973 (10<sup>th</sup> Cir. 2004), citing *Murray v. Montrose County Sch. Dist.*, 51 F. 3d 921-26 (10<sup>th</sup> Cir. 1995). The mainstreaming requirement is essentially a separate substantive standard under the IDEA. *P. v. Newington Bd. of Educ.*, 512 F. Supp. 2d, 89, 101-02 (D. Conn. 2007) (citing cases).

This preference in favor of the regular education environment has long been held to extend to students with severe disabilities who attend self-contained classes within a public school. It clearly may violate the LRE requirement to place such students in a more segregated setting outside of a public school. *Mallory v. Drake*, 616 S.W. 124, 125-26 (Mo. App. W.D. 1981); *Hunt v. Bartman*, 873 F. Supp. 229, 250 (W.D. Mo. 1994); see 34 C.F.R. §300.115. In *Mallory*, for example, the Court of Appeals upheld a decision of a hearing panel which determined that placement of a severely disabled student in a state school violated the LRE requirement and ordered a less restrictive public school placement. *Id.*

The mainstreaming requirement is often raised in situations where a school district insists that it should have the opportunity to try a less restrictive placement before a separate day program or a private residential program is decided upon. In such a case, a Missouri court recently held, in a case where parents insisted upon a private residential placement, that “the school district should have had the opportunity, *and to an extent had the duty*, to try these less restrictive alternatives before recommending a residential placement.” *Taylor P. v. Missouri Dept. of Elementary and Secondary Educ.*, 2007 U.S. Dist. LEXIS 74070 (W.D. Mo. Oct. 3,

2007), citing *T.F. v. Special Sch. Dist. of St. Louis Cty.*, 449 F. 3d 816, 821 (8<sup>th</sup> Cir. 2006) (emphasis added). In the instant case there was not an explanation of why SSD did not take the opportunity to try a less restrictive alternative, before deciding upon a separate private day school like Edgewood.

Here, the placement decision was not made by a group of persons who were *both* knowledgeable about Student *and* able to evaluate the considerations which permit segregation of a child from the mainstream environment. 34 C.F.R. §300.321 requires that placement decisions must be made of a group of persons knowledgeable about the child, including the parents and at least one regular and one special education teacher of the child, and knowledgeable about the public entity's resources. 34 C.F.R. §300.325(a)(2) requires that a "representative of a private school or facility" must attend an IEP meeting, or have another form of participation, when the school district proposes to place a child in a private school. See also, Missouri State Plan, Reg. III, at p. 51. In this case, as stated above, no such person was in attendance at the February 6, 2007 IEP, no such person attended by teleconference, and the Petitioners did not excuse this nonattendance. The absence of a private school representative essentially prevented the IEP Team, including Student's parents, from fully evaluating Student's placement needs, particularly the risk that he could be placed with children with extremely difficult behaviors.

In *Shapiro v. Paradise Valley Unified Sch. Dist.*, 317 F. 3d 1072 (9<sup>th</sup> Cir. 2003), the court held that the failure of the school district to invite a representative of a private school to an IEP meeting was a denial of FAPE. *Id.*, at 1077. In *Shapiro*, the student had attended a private oral education program for several years but then sought admission to public school. The school district proposed to create an oral self-contained program. The district's IEP was created without

input from anyone from the private school, who were not invited to the IEP meeting. The Court of Appeals held that this violated the procedural requirements of the IDEA, citing *W.G. v. Board of Trustees*, 960 F. 2d 1479, 1484 (9<sup>th</sup> Cir. 1992), which at that time required “the teacher” to participate in formulation of the IEP. *Id.*

Assuming, arguendo, that Student’s IEP development was only procedurally deficient, clearly procedural flaws do not always amount to a denial of FAPE. *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 652 (9<sup>th</sup> Cir. 2005). The question is whether the procedural violation affects the substantive rights of the parent and the child. *Id.*, at 652 (concurring opinion); *L.M. v. Capistrano Unified Sch. Dist.*, 2008 U.S. App. LEXIS 17634, \*14 (9<sup>th</sup> Cir. Aug. 19, 2008). The omission of any representative from a private school in this case was not mere harmless error. Here, Student’s IEP Team was facing an administrative nightmare. It knew that Student’s class was disintegrating. A group of parents had complained to SSD officials about “increased behaviors, students being bitten in class, very hostile environment, children sleeping during school, just gradual decline spiraling down of all of our children.” Student’s allegation of abuse in February, 2007 against the aide who also served Student; all three classroom aides had been replaced by a new group of inexperienced aides, and at least five students left this class (including Student) and went to Phase III and/or private purchase of service programs at about this time. A change in Student’s placement was a forgone conclusion, the way in which it was done was a procedural violation of the IDEA.

Having arrived at the above stated conclusions however, the Panel is harnessed by the law that, under the IDEA, the party requesting the hearing may not raise issues at the hearing that were not raised in the Complaint. 15 U.S.C. §1415(f)(3)(B). Herein, Petitioners did not specifically allege this procedural violation. Given this constraint, the Panel holds that it cannot

consider the above procedural violation as being dispositive of whether Student's placement at Edgewood was appropriate. However, the Panel can, and does hold that whatever the procedure used to place Student at Edgewood, such placement was not appropriate as Edgewood was not the least restrictive environment for Student. Student's successes and failures at Edgewood are hotly contested; however, given Student's prior successes in less restrictive environments, Edgewood was not the least restrictive environment for Student.

**C. Findings-Conclusions as to the October 7, 2005 and June 8, 2006 IEP's.**

Student received a meaningful education as he experienced both academic and educational successes while the October 7, 2005 and a part of the time the June 8, 2006 IEP's were operative. As noted above however, sometime around Thanksgiving of 2006, Student's classroom became almost non-functional at a point in time not clearly established by the evidence and Student did not receive a meaningful education. The Panel concludes that Student, commencing after Thanksgiving of 2006, did not receive FAPE, with the exception of the time between approximately March 8, 2007 to March 28, 2007 when Student received Homebound services from SSD at Parents' request.

Having held that Student did not receive FAPE from SSD after Thanksgiving of 2006 (with the exception of the approximate three week period of Homebound Services noted above), the Panel must next look to the appropriateness of the placements at Promise and Annunziata

**D. Petitioners Failed to Show that Promise Christian Academy and Annunziata were Appropriate Placements.**

As to receiving reimbursement for expenses incurred, Parents must, after showing Student was denied FAPE for a period of time, and that the services they provided were appropriate. *See Sch. Comm. Of Burlington v. Dep't. of Educ.*, 471 U.S. 359, 370 (1985); *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8<sup>th</sup> Cir. 1999) (in order to obtain



reimbursement for a private program, the parents must demonstrate that “(1) the school district’s proposed IEP would not have provided [the student] with a free appropriate public education; and (2) the [private program] complied with the IDEA.”).

Parents’ unilateral placement at Promise and Annunziata can only be found appropriate if they provided special education that was designed to meet the Student’s unique needs. *See, e.g., Gagliardo v. Arlington Central Sch. Dist.* 489 F.3d 105, 112 (2<sup>nd</sup> Cir. 2007) (holding that a unilateral private placement is only appropriate if it provides “education instruction *specifically* designed to meet the *unique* needs of a handicapped child”); and *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 24 (1<sup>st</sup> Cir. 2007) (holding that a decision to reject public education in favor of enrolling a child in private school cannot be described as “reasonably calculated to enable a child to receive educational benefit” if the private school does not offer at least “some element of special education services in which the public school placement was deficient”).

As a corollary to the principle that reimbursement is not appropriate for a private placement if the placement does not provide special education designed to meet the child’s needs, reimbursement is similarly not an appropriate remedy merely because a child makes some progress academically or socially of the private placement. *See e.g., Rafferty v. Cranston Pub. Sch. Comm.*, 315 F.3d 21, 26-27 (1<sup>st</sup> Cir. 2002) (even if the child makes academic progress at the private school, “that fact does not establish that such a placement compromises the requisite adequate and appropriate education”).

Parents challenged the number of changes in Student’s educational placement over the years and the number of persons who have served him. At the same time, they emphasized the overriding importance of a consistent and stable environment for Student. Mr. Copanas confirmed the magnitude of the importance in Parents’ eyes of the need for such an environment

by stating that Student needed a place “where he’s not going to be moved, where someone is willing to say I’m going to take you on whatever you’ve got, whatever you’re going to give me, and I’m going to keep you.” The preponderance of the evidence showed that Promise and Annunziata failed on these fundamental points. No one from Promise or Annunziata testified at the hearing. Promise and Annunziata were not appropriate placements because of their inability to meet the most fundamental need of stability and behavioral control.

Events after Student had to leave Promise further demonstrated the inappropriateness of that private placement. After being in limbo for a period of time, Student began attending Annunziata. As Parents’ evidence showed, any improvements in behavior that Student may have demonstrated while at Promise evaporated on his departure and entry into Annunziata.

The little evidence regarding Annunziata failed to show that it is an appropriate placement. Student’s behaviors intensified there and continued to be significant.

The Panel concludes that Promise and Annunziata were not appropriate placements. Although there is conflicting evidence, which was the common thread of the hearing, as to Student’s successes at these schools, it is uncontroverted that Student’s behaviors remained significant. Obviously, Student’s behavior is the basis of his educational woes. In the context of this case, continued significant behavioral concerns at Promise and Annunziata illustrate that the special element of special education services missing in the public school placement after Thanksgiving of 2006, were also missing in the private school placement. No one from either school testified and the fact that Student was expelled from Promise, in and of itself, strongly suggests that Promise was not appropriate. In addition, there is an existing fear of Parents that Student will be expelled from Annunziata because of his behavior. Both Promise and

Annunziata are extremely restrictive, as is Edgewood. None of these schools provided a least restrictive environment for Student.

Parents are not entitled to reimbursement for the costs of Promise or Annunziata.

Petitioners are not entitled to reimbursement for other services provided to Student as Petitioner's exhibits included billing information from Miriam Learning Center, the Center for Vision & Learning, Tanya Crews, and Mrs. Bates. There was no testimony explaining the purpose of the services, their relevance to Student's education program, or that the services were necessary for Student to benefit from special education services. There is no basis for reimbursing the Parents for the services.

### **CONCLUSIONS**

For the reasons stated above, the panel concludes that Student received FAPE prior to Thanksgiving of 2006. Thereafter, he did not except for the very short time (about March 8, 2007 to March 28, 2007), Student received Homebound services from SSD. The private placements of Student at Edgewood, Promise and Annunziata were not appropriate. Rockwood has no liability or responsibility in this matter as beginning with Student's kindergarten year (2004-2005), Rockwood no longer had the right or ability to define Student's special education.

### **REMEDY-RELIEF**

In awarding relief to Parents, the Panel holds that SSD is to provide Student with compensatory special education services as follows:

1. Instruction in Math – 525 minutes a week times the number of weeks in SSD's 2006-2007 second semester;<sup>3</sup>

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<sup>3</sup> In awarding compensatory special education services, the Panel, in arriving at the award of a semester of services (based upon the February 6, 2007 IEP), offset the approximate three weeks that remained in the first semester of the 2006-2007 school year after Thanksgiving, by the three weeks of Homebound Services provided by SSD in 2007.

2. Instruction in Reading – 525 Minutes a week times the number of weeks in SSD’s 2006-2007 second semester;
3. Instruction in Social Skills – 525 Minutes a week times the number of weeks in SSD’s 2006-2007 second semester;
4. Speech Therapy – 60 minutes a week times the number of weeks in SSD’s 2006-2007 second semester;
5. Social Work (consultive) – 15 minutes a week times the number of weeks in SSD’s second 2006-2007 semester;
6. Occupational Therapy - 60 minutes a week times the number of weeks in SSD’s 2006-2007 second semester;
7. Physical Therapy – 30 minutes a week times the number of weeks in SSD’s 2006-2007 second semester; and
8. Social Work - 60 minutes a week times the number of weeks in SSD’s 2006-2007 second semester.

SSD has a period of three years in which to provide said compensatory services. This provision of compensatory services shall be in addition to any other services that SSD might otherwise be obligated to provide.

### **Appeal Procedure**

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

Dated: \_\_\_\_\_

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Richard H. Ulrich, Chairperson

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Dr. Margaret Gray, Hearing Panel Member

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Dr. Terry Allee, Hearing Panel Member

**CERTIFICATE OF SERVICE**

I do hereby certify a copy of the foregoing was placed in the U.S. Mail, postage prepaid this 10<sup>th</sup> day of October, 2008 addressed to:

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