

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

STUDENT, by and through)	
Parents,)	
)	June 18, 2009
Petitioners,)	
vs.)	
)	
SCHOOL DISTRICT,)	
)	
Respondent.)	

COVER SHEET INFORMATION

1. Student, through Parents, filed a request for due process hearing.
2. At all times material to this due process proceeding, Student’s residential address is located within the boundaries of the District.
3. The Parents and Student were represented by Stephen Walker, Esq., 212 E. State Road 73 – Suite 122, Saratoga Springs, Utah 84043-2966.
4. The Fort Osage R-I School District was represented by Teri B. Goldman, Esq., Mickes Goldman, LLC, 555 Maryville University Dr., Ste. 240, St. Louis, Missouri 63141.
5. Parents initially requested due process by filing a complaint with the Department of Elementary and Secondary Education (“DESE”) which was received by DESE on April 24, 2007.
7. The hearing panel, Terry Allee, designated by Respondent; Fred Davis, designated by Petitioners; and Mr. Richard H. Ulrich, Chairperson.
8. Issues: Whether Student was provided with a Free Appropriate Public education from April 24, 2005 and if not, was appropriate notice of Rainbow as a parental placement was given to District and if appropriate notice was given, whether Rainbow was an appropriate

placement; if the notice and placement were appropriate, whether Parents are entitled to reimbursement and so, the amount of that reimbursement.

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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 RSMo.

I. THE ISSUES

The following issues were presented to the Hearing Panel:

- Issue Number 1.** Was Student provided with a Free Appropriate Public Education from April 24, 2005?
- Issue Number 2.** If not, was appropriate notice of Rainbow as a parental placement given to District?
- Issue Number 3.** If appropriate notice was given, was Rainbow an appropriate placement?
- Issue Number 4.** If the notice and placement are appropriate, are Parents entitled to reimbursement?
- Issue Number 5.** If so, what is the amount of that reimbursement?

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, who was eleven years of age when the hearing began, resided with her parents (“Parents”), within boundaries making her eligible to attend the Fort Osage School District R-I School District (“District or Respondent”).

2. District is a public school organized pursuant to Missouri statutes.

3. The Student and her Parents were represented at the hearing by Stephen Walker, Esq., 212 E. State Road 73 – Suite 122, Saratoga Springs, Utah 84043-2966.

4. District was represented at the hearing by Teri B. Goldman, Esq., Mickes Goldman, LLC, 555 Maryville University Dr., Ste. 240, St. Louis, Missouri 63141.

5. The Hearing Panel for the due process proceeding was: Richard H. Ulrich, Chairperson; Terry Allee, Panel Member; and Fred Davis, Panel Member.

6. 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

7. On April 24, 2007, Parents filed their request for a due process hearing/complaint (“Complaint”) (R-94, p. 981).¹

¹ All references to the Petitioners’ Exhibits throughout this decision will be cited as “P-[#]”; references to Respondent’s Exhibits will be to “R-[#]”, references to the Panel’s Exhibits that were introduced at the hearing will be to “Panel Ex. [#]”, and references to the Panel’s Exhibits that are being supplemented to fully depict the timeline information will be to “Panel Supplemental Ex. [#].” Citations to the transcripts of the 29-day administrative hearing will be referenced as “Tr. [#].”

8. On April 24, 2007, Samara N. Klein was designated by the Missouri Department of Elementary and Secondary Education (“DESE”) as the Chairperson of the three member due process hearing panel (R-94, pp. 986, 987).

9. On or about April 30, 2007, Respondent filed a challenge to the sufficiency of the Complaint (R-94, p. 988).

10. On May 5, 2007, the Chairperson entered a “Ruling on Respondent’s Notice of Insufficiency and Order for Petition to Amend its Complaint.” (R-94, pp. 991-997 and Panel Ex. 1 which supplements R-94 by including pages 994, 995 and 996 which are missing from Respondent’s Exhibit 94.)

11. On May 8, 2007, an unsuccessful resolution session was held.

12. On or about May 14, 2007, Petitioners filed an Amended Due Process Complaint (R-94, pp. 1001-1005).

13. On or about May 18, 2007, District filed a Response to Petitioners’ Amended Due Process Complaint and Motion for a More Definite Statement (R-94, pp. 1009 – 1027).

14. On or about May 18, 2007, the parties filed a joint request for an extension of the statutory timelines (R-94, p. 1028).

15. On May 20, 2007, the Chairperson entered a Scheduling Order/Hearing Notice scheduling the due process hearing for July 9, 2007 (R-94, pp. 1030-1031).

16. On May 20, 2007, the Chairperson entered an Order extending the timeline for the decision to September 14, 2007, at the mutual request of both parties (R-94, p. 1029).

17. On May 22, 2007, a resolution session was held based on Parents’ amended due process complaint. It was unsuccessful.

18. On May 30, 2007, the Chairperson entered an Order (Ruling) regarding Respondent's Motion for a More Definite Statement (Panel Supplemental Ex. 1).

19. Shortly after July 4, 2007, Petitioners filed a Clarification of Issues (Panel Supplemental Ex. 2).

20. On or about July 8, 2007, Petitioners requested a continuance of the timelines to December 1, 2007.

21. On or about July 9, 2007, Petitioners filed a Supplemental Clarification of Issues (Panel Supplemental Ex. 3).

22. On August 19, 2007, the Chairperson issued an Order granting an extension of the timelines for a decision to February 10, 2007 (sic) in response to Petitioners' request which was unopposed by Respondent (Panel Supplemental Ex. 4).

23. On September 18, 2007, the Chairperson issued an Order revising the scheduling order/hearing notice (Panel Supplemental Ex. 5).

24. On or about October 6, 2007, Respondent filed a motion for the Chairperson to recuse herself (Panel Supplemental Ex. 6).

25. On or about October 6, 2007, Respondent filed a motion to recuse panel member, Marilyn McClure (Panel Supplemental Ex. 7).

26. On October 10, 2007, the Chairperson entered a response to the motion to recuse, wherein she recused herself as chairperson (Panel Supplemental Ex. 8). The Chairperson did not rule on the Respondent's motion to recuse Ms. McClure believing that it was up to Ms. McClure to respond.

27. On October 15, 2007, Ms. McClure recused herself.

28. On October 22, 2007, Richard H. Ulrich was assigned as the Chairperson (Panel Supplemental Ex. 9).

29. Fred Davis was designated by Petitioners to serve as a panel member.

30. On October 16, 2007, the Chairperson entered an Order wherein the hearing dates of October 23 and October 24, 2007 were vacated at Petitioners' request and without Respondent's objection. Said Order set the hearing for November 27, 28, 29, 30, December 19 and 20, 2007 with the decision to be rendered on or before February 10, 2008 (Panel Supplemental Ex. 10).

31. The hearing commenced on November 27, 2007, and evidence was presented on November 27, 28, 29 and 30, 2007. During this time, it was determined that time, in addition to the preset hearing dates of December 19 and 20, 2007, was needed.

32. On December 6, 2007, the Chairperson entered an Order establishing additional dates for the hearing based upon a joint motion and availability dates of the attorneys and panel members as follows: January 8, 9, 10, 15, 16 and 17, 2008 and February 20, 21 and 22, 2008. The decision, by agreement, was to be rendered on or before June 2, 2008 (Panel Supplemental Ex 11).

33. Evidence was presented on December 19 and 20, 2007.

34. Evidence was presented on January 8, 9 and 10, 2008.

35. On January 11, 2008, the Chairperson entered an Order, given the complexities and progress of the hearing, establishing additional hearing dates, mutually agreed upon by the parties and panel members, of April 21, 22, 23, 25 and 25, 2008 and May 12, 13, 14, 15 and 16, 2008, with the decision being due on or before July 1, 2008 (Panel Supplemental Ex. 12).

36. Evidence was presented on January 15, 16 and 17, 2008.

37. On February 18, 2008, the Chairperson entered an Order vacating the hearing dates of February 20, 21 and 22, 2008, at the Petitioners' request due to Petitioners' attorney's ill health. The remaining hearing dates and date the decision was to be rendered remained pursuant to the Order of January 11, 2008 (Panel Supplemental Ex. 13).

38. Evidence was presented on April 21, 22, 23, 24 and 25, 2008.

39. On May 5, 2008, the Chairperson entered an Order, based upon the agreement by the parties, establishing additional hearing dates of September 8, 9, 10, 11 and 12, 2008, with the decision to be entered on or before October 31, 2008, subject to the request of the parties to filing post-hearing briefs. Said Order also allocated the remaining hearing dates between the parties to conclude their respective cases (Panel Supplemental Ex. 14).

40. Evidence was presented on May 12, 13, 14, 15 and 16, 2008.

41. On June 12, 2008, the Chairperson entered an Order ruling on Respondent's oral motion for directed verdict presented at the close of Petitioners' case. (Panel Supplemental Ex. 15).

42. Evidence was presented on September 8, 9, 10, 11, 12, 17 and 18, 2008.

43. On September 19, 2008, the Chairperson entered an Order granting a continuance, at Respondent's request, due to health problems experienced by Respondent's last witness. The matter was continued to November 24, 2008 to conclude the witnesses' testimony by telephone conference. The parties mutually requested an extension of the timelines to file post-hearing briefs. Based upon the court reporter's representation that the transcripts would be completed on or before October 13, 2008, the parties, at their request, were granted until December 31, 2008, to file post-hearing filings which were to include proposed findings of fact, conclusions of law and proposed decision and, at their options, to file responsive briefs on or before February 6,

2009. By agreement, the decision was to be rendered on or before March 6, 2009. (Panel Supplemental Ex. 16).

44. On November 20, 2008, the Chairperson entered an Order setting a telephonic conference on November 24, 2008 between the attorneys and the Chairperson to discuss Respondent's last witnesses' inability to appear to conclude her testimony on November 24, 2008 due to ongoing health problems. (Panel Supplemental Ex. 17).

45. On November 24, 2008, the Chairperson entered an Amended Order as the November 20, 2007 Order indicated that the Respondent's last witness could not appear for her re-cross testimony, whereas, her inability to appear was for her cross-examination (Panel Supplemental Ex. 18).

46. On December 22, 2008, the Chairperson entered an Order after having received e-mail correspondence from both parties, about concluding the Respondent's final witness testimony. It was ordered that the witnesses' testimony would be concluded on February 5, 2009 or February 6, 2009, which were the dates discussed in the November 24, 2008 telephonic conference. The final day of the witness' testimony was allocated between the parties to assure conclusion of the hearing. The Order further stated that in the event the witness was not available on either of these dates, her testimony, absent extraordinary circumstances, would be stricken. Given the time lapse in the attempt to meet the medical needs of the witness, Respondent requested an extension of the timelines which was granted. Pursuant to this request, the parties were granted until March 2, 2009 to file their post-hearing briefs and until April 2, 2009 to file responsive briefs, with the decision to be rendered no later than May 2, 2009 (Panel Supplemental Ex. 19).

47. On December 30, 2008, the Chairperson entered an Order acknowledging that Respondent had advised that its last witness would be able to conclude her testimony on February 6, 2009 and it was so ordered (Panel Supplemental Ex. 20).

48. On or about February 4, 2009, Respondent's attorney advised that Respondent's last witness, based upon her doctor's recommendation, could not appear on February 6, 2009 to conclude her testimony.

49. On February 16, 2009, the Chairperson entered an Order striking the witnesses' testimony (Panel Supplemental Ex. 21).

50. On February 20, 2009, the Chairperson entered an Order granting Respondent's request to continue the timelines, extending the date for the filing of post-hearing briefs to March 9, 2009, responsive briefs to April 9, 2009, and the decision date to May 9, 2009 (Panel Supplemental Ex. 22).

51. On or about April 7, 2009, Respondent submitted a written request to extend the timeline for submitting Reply Briefs to April 13, 2009 and for the timeline for the Panel's decision to be extended to May 15, 2009. Petitioners had no objection to this request and Respondent's request was granted giving the parties until April 13, 2009 to submit Reply Briefs and extending the decision date to May 15, 2009. (Panel Supplemental Ex. 23).

52. On or about April 13, 2009, Petitioners' attorney, due to unforeseen intervening circumstances, requested an extension for the filing of Reply Briefs and an extension for decision. Pursuant to this request and without objection from Respondent, the parties were granted until April 20, 2009 to file their Reply Briefs and the decision was to be entered on or before May 28, 2009. Panel Supplemental Ex. 24).

53. On or about May 22, 2009, Respondent requested, without objection from Petitioners, a continuation of the timelines for the decision to be rendered on or before June 18, 2009. The request was granted by Order dated May 26, 2009. (Panel Supplemental Ex. 25)

54. The 29 days of hearing were intense and often heated.² The attorneys excelled in their knowledge of educational law, understanding of the issues and trial competency.

C. Background Facts

55. Student's mother³ is a third grade teacher at Buckner Elementary School in the District School District. (Tr. 41.) Although she has no certification in special education, she has had children with special needs in her classroom. (Tr. 42.)

56. At birth, Student was diagnosed with Down's syndrome. (Ex. R-1, pp. 1, 2 and 8; Tr. 1189.)⁴

57. According to District witness Rebecca "Becky" Hughes, a District teacher,⁵ children with Down's syndrome always have delays in cognitive ability. Tr. 5714, 5960. In addition, children with Down's syndrome typically have issues with hearing and sometimes with vision. Tr. 5715. Moreover, children with Down's syndrome have difficulties with memory, transition and generalization. Tr. 5714-5718. Such children may have delays in adaptive behavior which is defined as skills relating to daily living, communication, socialization, self-

² Throughout the hearing, the District requested that time limitations be imposed, but that request was denied. *See, e.g.* Tr-89. Pursuant to the 2007 Missouri State Plan for Special Education, "in general, a hearing should last no longer than two (2) days. Any hearing exceeding five (5) days requires good cause to be shown and must be documented on the record." That provision was not in place at the time that Parents' Complaint was filed, but was in place on the date that the hearing began. The Panel holds that since the time limitation was not in effect when the Complaint was filed, it is not applicable. In any event, the record shows good cause, given the number of witnesses, exhibits, and issues involved for the hearing to exceed five (5) days.

³ Student's Parents are extremely dedicated and committed. Their love and care for their daughter was profoundly manifested throughout the hearing.

⁴ At hearing, Mother, however, testified that it was "close to a month" before the Down's syndrome diagnosis was made. (*See* Tr. 3938.) Mother testified that Student had Down's at birth. (Tr. 1189).

⁵ Ms. Hughes was a fulltime teacher at Elm Grove (school within District) for 16 years since graduating from college. Tr. 5760. During those 16 years, Ms. Hughes had workshops in the area of Autism, most of which were taken after Student left the District. Ms. Hughes had delivered services to approximately 20-25 students at the time of her testimony. Tr. 5877.

help and motor. Tr. 5715. In the area of communication, children with Down's generally have delays and have receptive language skills that are higher than their expressive language skills. Tr. 5715-5716. However, children with Down's generally relate appropriate with people at their cognitive/developmental level. Tr. 5717.

58. Per the testimony of Petitioners' witness, Molly Pomeroy,⁶ children with Down's syndrome typically have a developmental delay and do not perform tasks at their chronological age. Tr. 4184. In addition, they typically are "very social individuals." Tr. 4184. They typically are somewhat delayed in their ability to care for themselves. Tr. 4184. Ms. Pomeroy also acknowledged that most children with Down's have vision and hearing issues and have difficulty with abstract concepts. Tr. 4187-4188. She further testified that the research showed that approximately 80% of children with Down's syndrome are dually diagnosed with mental retardation. Tr. 4186.

59. On or about October 23, 1996, Student's hearing was evaluated with an Auditory Brainstem Response test. Ex. R-1 at 18. The results were consistent with a severe-to-profound hearing loss in the right ear and borderline normal hearing in the left ear. However, the audiologist recommended retesting Student's hearing when her ears were determined to be medically clear. Ex. R-1, p. 18; *see also* Tr. 1531-1532.⁷

⁶ Ms. Pomeroy's credentials will be set forth later in the findings.

⁷ From 1996 and on a continuous basis, Student's Parents had her regularly checked by Dr. Pavolovich, an ear-nose-throat physician. *See* Ex. R-2, p. 50; Tr. 1532, 1536. In 1999, Mother reported that, since undergoing an adenoidectomy, Student was hearing better. *Id.* At hearing, Brenda Williams testified that Parents took Student every six months for an audiological exam and that, during the four years she served as Process Coordinator at Buckner Elementary, the District consistently asked Parents to provide information from those exams (Tr. 4686) and only toward the end of that four-year period did the District receive a report stating that Student had a hearing loss in one ear. Tr. 4686. At that time, the District purchased an FM system for Student. Tr. 4686.

60. From birth until approximately age 3, Student received early intervention services through the Missouri First Steps⁸ program; special instruction from the Sunshine Center in Independence, Missouri; private speech therapy from Ms. Stickney Knight⁹; Tr. 6580; and occupational and physical therapy from Preferred Rehab Therapy. Ex. R-2, p. 50; *see also* Ex. R-1, pp. 21-23, R-2, pp. 29-32, 34-35, 37-48, 50-54; Tr. 6561. With respect to those early services, Dr. David Harris wrote that Student probably was receiving more services “than she needs at this time. However, the parents seem to be comfortable with getting a great number of services, and I feel that it certainly will not hurt Student to get this much therapy.” Ex. R-1, p. 21. Dr. Harris further noted that the amount of speech therapy that Mother was seeking was “a fairly aggressive approach, and that Student may not need quite this much therapy.” Ex. R-1, p. 22.

61. On or about October 26, 1998, Student was evaluated at the Sunshine Center School in Independence, Missouri, where she received some of her First Steps services. Ex. R-2, p. 46. In the Sunshine evaluation report, the special educator noted that Student displayed tantruming behavior, expressed affection and was beginning to imitate. Ex. R-2, p. 47. Nothing in that report indicated that Student might have autism or that Student’s various developmental delays were attributable to anything other than her Down’s syndrome. *See* Ex. R-2, pp. 46-47.

62. From approximately 1996 to 1999, and as part of her First Steps services, Student received speech-language therapy from Ms. Knight. *See* Ex. R-2, pp. 41-45; Tr. 4018, 6584-6586. In or around May 1999, Parents transferred Student’s First Steps speech-language therapies to Ms. Knight at a different employer. Ex. R-2, p. 41; Tr. 6585-6586. As therapist, Ms.

⁸First Steps is a Missouri state-operated program which services children from birth to age three in their homes. Tr. 6547.

⁹ At hearing, Ms. Knight was referred to as Ms. Knight and Ms. Stickney. They are the same person. Tr. 4017-4018. Ms. Knight’s credentials will be set forth later in the findings.

Knight prepared periodic progress reports regarding Student. *See, e.g.*, Ex. R-2, pp. 41-44. Ms. Knight's documentation from 1999 revealed that, at that time, Student was easily distracted and had difficulty attending, displayed some behavioral issues secondary to comprehension and initiated pretend play. Ex. R-2, pp. 41-45. Nothing in Ms. Knight's documentation indicated that Student might have autism *See Id.*; Tr. 6587. In addition, Ms. Knight did not, in those reports, recommend the use of an augmentative communication device for Student. Tr. 4019, 6587.

63. On or about April 30, 1999, a speech-language pathologist from Preferred Rehab Therapy evaluated and prepared a progress report regarding Student's speech and language skills. Ex. R-2, p. 39. The evaluation report stated that Student had severe articulation and oral motor delays. Ex. R-2 at 40. Nothing in that report indicated that Student might have autism, and gave a diagnosis of Down Syndrome. *See Ex. R-2*, pp. 39-40.

64. On or about May 6, 1999, Student was evaluated at the Sunshine Center School. Ex. R-2, p. 48. That Sunshine report noted that Student interacted with peers, showed jealousy when attention was given to others, imitated real-life activities, and attempted to comfort others in distress. Ex. R-2, p. 48. Nothing in that report indicated that Student had autism, and stated that Student has been diagnosed with Down Syndrome. *See Ex. R-2*, p. 48.

65. On or about May 28, 1999, the District School District proposed to conduct an initial evaluation to determine Student's eligibility under the IDEA and Mother provided written consent for that on the same date. Ex. R-2, pp. 25-27. At that time, the District provided Parents with copies of the IDEA Procedural Safeguards. *Id.*

66. On or about June 15, 1999, the District School District prepared an evaluation report to document Student's initial evaluation and eligibility under the IDEA. Ex. R-2, pp. 50-

55; Tr. 1163. Mother and Ms. Knight were among those who participated in the evaluation/eligibility meeting. Ex. R-2, p. 55. The June 1999 evaluation report revealed the following regarding Student: a history of ear and sinus infections, an adaptive behavior composite of 46 (below the 0.1 percentile), a short attention span, the imitation of real-life activities, empathy towards others and an interest in playing with peers. Ex. R-2, p. 52. The report also noted that Student's fine motor skills were significantly delayed and that her short attention span and reluctance to accept redirection limited her ability to participate in fine motor activities. Ex. R-2, p. 53. After reviewing the results of the evaluation, a multidisciplinary team, that included Mother, concluded that Student met the initial eligibility criteria for early childhood special education based on delays in multiple areas including cognition. Ex. R-2, p. 43. Mother and Ms. Knight, among others, signed in agreement with that diagnostic conclusion based solely on Down's syndrome. Ex. R-2, p. 55. Nothing in the initial evaluation report indicated that Student had autism. *See* Ex. R-2, p. 54.

67. On or about June 20, 1999, the District developed an initial IEP for Student. Ex. R-2, p. 56; Tr. 4020. Mother and Ms. Knight participated in the development of that IEP. Ex. R-2, p. 56. The IEP stated that, at that time, Student was neither deaf nor hard of hearing. Ex. R-2, p. 59. The June 1999 IEP included goals in language, speech, occupational and physical therapy, and basic concepts. Ex. R-2, pp. 62-67. The IEP offered Student special education services in the District's early childhood special education program as well as the related services of speech-language, occupational and physical therapy. Ex. R-2, p. 56.

68. On or about June 20, 1999, the District provided Parents with a notice of action proposing Student's initial placement in early childhood special education and gave Parents a

copy of the IDEA procedural safeguards. Ex. R-2, pp. 76-77. Mother provided written consent for Student's initial placement on that same date. Ex. R-2, p. 77.

69. After Student's initial placement in special education in June 1999, the District began implementing Student's IEP and prepared progress reports to reflect how and whether she was progressing on her IEP goals and objectives. *See, e.g.* Ex. R-2, pp. 69-73. During the 1999-2000 school year, Student made slow progress toward her occupational therapy goals. Ex. R-2, p. 69. Similar to her First Steps' therapists, the District's occupational therapist noted that Student's decreased attention to task interfered with her successful completion of most activities. Ex. R-2 at 69. In the fall of 1999, Student displayed no hand dominance, although she favored her right hand. She was unable to imitate strokes, trace the letters of her name or shapes and required assistance to complete hand washing, toileting, scissoring and drawing lines. Ex. R-2, pp. 69-70. By March 2000, Student had made progress with hand washing, was able to zip some zippers and attempted to place scissors in her hand spontaneously. Ex. R-2, pp. 71-72. By May of 2000, her overall alertness, attention, strength and endurance had improved and she was able to complete hand washing with minimal assistance. Ex. R-2, p. 73.

70. On or about May 11, 2000, Student's multidisciplinary team convened to prepare her annual IEP for the 2000-2001 school year. Ex. R-3, p. 78; Tr. 4966, 4968. Mother and Ms. Knight were among the participants in that meeting. Ex. R-3, p. 78; Tr. 4020-4021. The IEP present level of performance noted Student's progress on her IEP goals. Ex. R-3, pp. 80-81. As noted in the present level, Student could then count to three, point to 3-5 body parts, match some colors on a consistent basis, match some shapes, and match picture to picture. The IEP also noted that Student followed classroom routines with little assistance. Ex. R-3, p. 80. In May 2000, Student's behavior did not impede her learning or that of others and a behavior plan was,

therefore, unnecessary. Ex. R-3, p. 83. The May 2000 IEP contained goals in basic concepts, rote counting, expressive and receptive language, speech, fine motor and gross motor and continued to offer Student 510 minutes per week of early childhood special education with related services in speech, language, occupational and physical therapies. Ex. R-3, pp. 78, 85-92. The progress reports that the District prepared to reflect the implementation of those IEP goals demonstrated that Student was able to complete a hand washing routine with only occasional assistance, demonstrated increased hand strength with scissoring activities and had improved overall strength and endurance. Ex. R-3, pp. 90-93.

71. During the 2000-2001 school year, Student continued to receive special education services through the District's early childhood special education program.

72. On or about November 10, 2000, Student's IEP team again convened to review and revise her IEP. Ex. R-3, p. 95. Parents and Ms. Knight were among those who participated in the development of that IEP. Ex. R-3, pp. 95-96; Tr. 4022-4023. At that time, Student did not have a medical diagnosis of autism. Tr. 4022-4023. The IEP present level of performance noted that Parents were concerned, at the time, about Student's speech and language skills and her corresponding difficulty interacting with peers but further noted that her low facial muscle tone made speech difficult. Ex. R-3, pp. 97-98. The present level also noted that Student continued to make progress on her IEP goals and was counting to three with spoken words, following one-step commands and had significantly improved her ability to attend to books. Ex. R-3, p. 97. The IEP further indicated that Student, at the time, did not display behaviors that impeded her learning or that of others. Ex. R-3, p. 100. The IEP continued to include goals in basic concepts, rote counting, expressive and receptive language, speech, and fine and gross motor. Ex. R-3, pp. 102-114. Based on parental concerns, the team added 60 minutes per week of itinerant services

to the already existing services. Ex. R-3, p. 95. Accordingly, on or about November 10, 2000, the District provided Parents with a written notice and proposed to change Student's placement to help her meet her IEP goals. Ex. R-3, p. 115.

73. Subsequent to the development of the November 2000 IEP, the District provided Parents with written progress reports to show Student's progress on her IEP goals and objectives. Ex. R-3, pp. 101-114. Those reports demonstrated that, even though she was absent a great deal in the spring of 2001 due to illness, Ex. R-3, p. 113, Student progressed on many goals and mastered some. Ex. R-3, pp. 101-114. More specifically, as of January 2001, Student demonstrated a right hand preference, was able to imitate vertical strokes and could snip with scissors. Ex. R-3, p. 105. As of April 2001, Student could imitate both horizontal and vertical strokes, was able to snip even more with scissors, and demonstrated an increased interest in toilet training. Ex. R-3, p. 106. As of October 2001, she showed an emerging ability to hold a pencil with proper grasp, and was able to imitate horizontal, vertical and circular strokes. Ex. R-3, p. 108. As a result of her progress with fine motor skills, the District's occupational therapist proposed new goals for that area. Ex. R-3, p. 109.

74. On or about August 10, 2001, Dr. Gerhard Cibis prepared a letter to Parents stating that Student's eye examination remained normal and she did not need glasses. Ex. R-2, p. 68.

75. On or about November 20, 2001, Student's IEP team again convened to review and revise her IEP. Ex. R-4, p. 116; Tr. 4687. Parents and Ms. Knight were among those who participated. Ex. R-4, p. 117. The present level of the IEP noted progress in all areas of concern. More specifically, the present level noted that Student could identify five basic body parts, match colors, shapes and pictures, followed three classroom transitions without difficulty, was

beginning to recognize the letter “B” in her name, and was using some sign, gestures and a few words to communicate. Ex. R-4, p. 118. Although Parents continued to express concerns regarding Student’s progress in speech,¹⁰ the IEP present level also noted that Student was initiating communication with gestures and imitating most signs. Ex. R-4, p. 119. In addition, she demonstrated an increased desire to use speech, followed more directions, and had significantly increased her noun vocabulary. Ex. R-4, p. 119. At that time, according to the IEP, Student was not considered to be deaf or hard of hearing and did not demonstrate behaviors that impeded her learning or that of others. Ex. R-4, p. 120. Based on the present level, the IEP team developed goals in receptive and expressive language, (some of which were new), speech and articulation, cognition (some of which were new), and occupational and physical therapy. Ex. R-4, pp. 124-129. In the cognitive area, the team proposed to increase Student’s communication abilities through the use of words, signing or a communication system such as PECs or another augmentative communication system.¹¹ To implement those goals, the IEP offered Student 450 minutes per week of early childhood special education, 60 minutes per week of itinerant instruction and the related services of occupational, physical and speech-language therapies. Ex. R-4, p. 116.

76. After the development and implementation of the November 2001 IEP, the District provided Parents with written progress reports that reflected the progress Student made with respect to the IEP goals and objectives. Ex. R-4, pp. 124-126. Those reports noted that

¹⁰ The IEP does not reflect that Parents expressed any concerns about Student’s behavior, an assistive communication device or the possibility of autism. *See* Ex. R-4, p. 118.

¹¹ PECS is a picture exchange system of communication. Tr. 1097. At hearing, Brenda Williams testified that, during the four years that she served as the Process Coordinator for Buckner Elementary, Tr. 4655, 4658, Parents initially “expressed strong feelings that focus for Student’s communication was on verbal communication through speech without using any type of device or PECS programming.” Tr. 4678. As a result, at that time, the team focused on sound production although her speech therapists began using pictures to aid in the process. Tr. 4678. According to Brenda Williams, District’s process coordinator, Buckner Elementary School, except for the 2005-2006 school year, Parents did not mention using assistive technology to support communication until the latter time of Student’s attendance at Buckner. Tr. 4678-4679.

Student's attention to task improved, she could make up to 15 snips with scissors, she showed an emerging ability to copy the letter "B", and she had become more vocal and social. *Id.* From November 2001 through May 2002, Student mastered many of her physical therapy goals. Ex. R-4, pp. 133-135.

77. In or about February 2002, the District began screening Student in preparation for her transition to kindergarten in the fall of 2002 and an IDEA reevaluation to determine her IDEA categorical eligibility. Ex. R-92, p. 918. In regards to that screening and reevaluation, Parents were provided with a copy of the IDEA procedural safeguards. Ex. R-92, p. 918.

78. On or about March 14, 2002, Student's multidisciplinary team conducted a review of existing data and prepared a reevaluation plan. Ex. R-92, p. 918. On that same date, Mother provided written consent for that reevaluation. Ex. R-92, p. 918. At that same time, Mother was provided with a copy of the IDEA procedural safeguards. Ex. R-92, p. 918.

79. On or about March 20, 2002, Student's IEP team reconvened to discuss her need for extended school year services¹² and determined that she required such services in the areas of speech and language to receive a free appropriate public education under the IDEA. Ex. R-4, p. 123.

80. On or about April 25, 2002, Student's IEP team convened to review the results of the reevaluation conducted to determine her eligibility for a categorical IDEA diagnosis and the District prepared a report that reflected the results of that reevaluation. Ex. R-4, p. 137; Ex. R-92, p. 918; Tr. 2900-2901, 4687, 5006, 6686. The following individuals were among those who

¹² Pursuant to the IDEA, extended school year services ("ESY") is defined as "special education and related services that – (1) are provided to a child with a disability – (i) beyond the normal school year of the public agency; (ii) in accordance with the child's IEP. . . ." 34 C.F.R. § 300.106(b). Additionally, a school district must "ensure that extended school year services are available as necessary to provide FAPE. . . ." 34 C.F.R. § 300.106(a). Although most, if not all, of Student's IEPs offered her the opportunity to access ESY services, Parents chose – with minor exceptions – not to accept such services.

participated in the meeting: Parents, Beverly Emery, Ms. Knight, and Stephanie Dustman. Ex. R-4, p. 149; Tr. 2901, 5006, 6597-6599. As reflected in the written report, Student – at that time – continued to receive private speech therapy in addition to the District’s special education services and was seen regularly by a cardiologist, an ENT, an allergist and an ophthalmologist. Ex. R-4, p. 137, 143. The report further stated that, although Student’s then-current and past speech-language pathologists had recommended starting a picture exchange program, Student had not yet used such a system or an augmentative communication device. Ex. R-4, p. 143; Tr. 6686. As part of the reevaluation, the District administered a functional hearing assessment which showed that Student could hear conversational speech and whispers. Ex. R-4, p. 143. However, because of her frequent congestion, the speech-language pathologist frequently used an FM amplification device in therapy. Ex. R-4, p. 143. The District also attempted to administer a non-verbal intelligence test (the Leiter), but was unable to obtain an IQ. Ex. R-4, pp. 145-146; Tr. 615-616, 2206-2207, 4796-4797. However, the District also administered the Learning Accomplishment Profile Diagnostic Edition (LAP-D). Ex. R-4 at 148. On that instrument, Student achieved standard scores ranging from 44-47 in “cognitive – matching” and “cognitive – counting.” Ex. R-4 at 148.¹³ Noteworthy is that the only areas of domain assessed were matching and counting (Ex. R-4, p. 148). District’s witness, Rebecca Hughes, testified that an assessment which focuses only on matching and counting cannot give an adequate understanding of a child’s IQ and that a child’s cognitive ability cannot be accurately assessed by only measuring the child’s ability to match or count. Tr. 5917. On the Vineland Adaptive Behavior Scale, with Mother as an informant, Student obtained an adaptive behavior composite score of 63. Ex. R-4, p. 146. On that instrument, Student’s highest score was in the socialization domain. Ex. R-4, p. 146. The evaluation report also stated that Student participated in a toileting

¹³ Those scores were at least two standard deviations below the mean. Ex. R-4, p. 149.

routine, played appropriately with toys, and participated in dramatic and cooperative play. Ex. R-4, p. 139; Tr. 5012; *see also* Tr. 5012-5014. At that time, Student was not consistently “crossing the midline.” Tr. 5012-5013, 5371. Crossing the midline is an important developmental milestone that involves learning to use both hands together and the inability to engage in that skill can negatively impact a student’s education. Tr. 5371. Based on the information acquired through the reevaluation, Student’s multidisciplinary team concluded that Student met the state eligibility criteria for an IDEA categorical diagnosis of mental retardation. Ex. R-4, p. 149; Tr. 2901, 5015.¹⁴ That determination was based on an obtained cognitive score falling between 44 and 47 as measured by the LAP-D and commensurate adaptive behavior as evidenced by the Vineland composite score. Ex. R-4, p. 149.

81. On or about April 25, 2002, Parents signed the evaluation report prepared on that same date. Ex. R-4, p. 149; Tr. 5014; *see also* Tr. 6700 (noting that Ms. Knight was part of the team making the diagnostic conclusion).

82. On or about April 25, 2002, the District provided Parents with a written notice proposing to change Student’s IDEA diagnosis from Early Childhood Special Education to Mental Retardation and provided Parents a copy of the IDEA procedural safeguards. Ex. R-4, p. 150; Ex. R-92, p. 918; Tr. 4687-4688.

83. On or about May 13, 2002, Student’s IEP team convened to review and revise her IEP in response to the recently completed reevaluation. Ex. R-4, p. 151; Tr. 4688. The following individuals were among those who participated: Parents, Beverly Emery, Buckner Elementary School Principal Patrick Farnan, Ms. Knight, and Stephanie Dustman. Ex. R-4, pp. 151, 161-162. The IEP present level noted that Student’s educational diagnosis was mental retardation and that she would attend Buckner Elementary School during the 2002-2003 school

¹⁴ Nothing in the 2002 reevaluation report indicated that Student might have autism. *See* Ex. R-4, pp. at 137-149.

year. Ex. R-4, pp. 151-152. Further, the present level noted that, although Student was not deaf or hard of hearing, she frequently was congested and, therefore, amplification assisted her with hearing. Ex. R-4, pp. 152, 155. The IEP reflected that, at that time, Student did not display behaviors that impeded her learning or that of others. Ex. R-4, p. 155. The May 2002 IEP included goals in the following areas: math, reading, communication, speech-language, gross and fine motor. Ex. R-4, pp. 163-174. The language goal reflected the use of the PECS system and the IEP also included PECS as an accommodation. Ex. R-4, pp. 160, 169. The IEP also included numerous accommodations and modifications including an enlarged computer cursor, a touch screen window on the computer,¹⁵ a visual schedule, and paraprofessional or adult supervision at lunch, recess, assemblies and in general education. Ex. R-4, p. 160. Based on the goals, the IEP offered Student 715 minutes per week of specialized instruction in pre-academics and adaptive music with related services of speech-language, occupational and physical therapies and adaptive physical education. Ex. R-4, p. 151.

84. Beverly Emery,¹⁶ Student's special education teacher from 2002-2006, testified that the placement identified in the May 2002 IEP was appropriate for Student and that she and Parents agreed with that placement. Tr. 2922. In Ms. Emery's opinion, Student needed to be in special education for the specified time because she would not have been able to do the regular education activities in kindergarten and could receive her needed services in special education. Tr. 2923.

85. On or about May 13, 2002, Ms. Knight, Student's private speech-language pathologist, prepared her own present level of performance for Student. Ex. R-5, pp. 187-87; Tr. 2929, 4677, 6610, 6680. Ms. Knight's present level was provided for the team to consider as the

¹⁵ The touch screen window for the computer was included, in part, to address visual concerns that occupational therapist, Stephanie Dustman, observed. Tr. 5010.

¹⁶ Ms. Emery's credentials will be set forth later in the findings.

team began its preparation of the new IEP. Tr. 4677-4678, 6681-6683. According to Ms. Williams, it was not intended to be a part of the May 2002 or a subsequent September 2002 IEP. Tr. 4677-4678. However, Ms. Knight testified that her present level of performance was intended to provide the District with suggestions that should be incorporated into the learning experience for Student. Tr. 6683. Ms. Knight's present level noted that Student enjoyed pretend play and was beginning to demonstrate recall of past events. Ex. R-5, p. 184. Mother testified that Student remembers everything. Tr. 3944. Further, Ms. Knight noted that Student was easily distracted and demonstrated behaviors secondary to her inability to express her wants and needs. Ex. R-5, p. 184. Although Ms. Knight stated that Student's development was low, she had made "amazing strides" during the past year. Ex. R-5, p. 186. Nothing in Ms. Knight's "present level" indicated that Student might have autism. *See* Ex. R-5, pp. 184-187; Tr. 2933-2934. Although Ms. Knight recommended the initiation of a PECS communication system, she did not recommend an assistive communication device other than PECs in that document. *See* Ex. R-5, pp. 184-187; Tr. 2934, 6683, 6687.

86. On or about May 21, 2002, the District retained an educational audiologist from the Blue Springs Multi-District Deaf/Hard of Hearing Program to conduct an audiological assessment of Student in preparation for her transition to kindergarten. Ex. R-4, p. 177; Tr. 4688. The Blue Springs referral resulted from concerns that the District's speech-language pathologist had observed. Tr. 4688-4689. The resulting report stated that Student turned to the noise of toys and "these results rule out a severe hearing loss for at least one undesignated ear." Ex. R-4, p. 177. In addition, the report stated that Student had a narrow ear canal in her right ear with excess ear wax. Ex. R-4, p. 177. The audiologist, therefore, recommended that Student's

parents seek medical intervention from her ENT, that Student be provided with preferential seating and that the District apply for the use of an auditory trainer. Ex. R-4, p. 177.

87. On or about May 7, 2002, and in response to the audiologist's recommendation, the District applied for an auditory trainer to use with Student due to her frequent congestion. Ex. R-4, pp. 175-176; Tr. 4688.¹⁷

88. During the 2002-2003 school year, Student attended the District's Buckner Elementary School ("Buckner") as a kindergarten student. Tr. 2348, 2902. Buckner is for children attending kindergarten through fourth grade. Tr. 6169. When students are promoted to fifth grade, they normally attend Fire Prairie Middle School. Tr. 6169.

89. When Student entered kindergarten, Buckner was not Student's home school and she attended there at Parents' request as that is where her Mother taught. Tr. 43, 454-455, 1427. In possibly the summer of 2006, Parents moved to a home in the Buckner attendance area. Tr. 455. It was important for her parents that Student go through public education with her peers at Buckner so "that's where we decided that she would go to school was in the special education program at Buckner." Tr. 43. The District honored that request. Tr. 454-455. Student attended Buckner for two years of kindergarten, one year of first and one year of second grade. Tr. 43, 2902-2903.

90. During the 2002-2003 school year, Beverly Emery was Student's special education teacher, Sarah Dobson was her regular education kindergarten teacher, Stephanie Dustman was her occupational therapist, and Kourtney Koke was her District speech-language pathologist. Tr. 2348, 2902. Brenda Williams was the District's process coordinator at Buckner during that time. Tr. 229, 3472, 4660, 4758-4759. Kristi Hinton was the District's Director of

¹⁷ Thus, the District began using an amplification or FM system with Student before her diagnosed hearing loss in July 2005.

Student Support Services and served in that role from 2002-2006. Tr. 229, 4766. Patrick Farnan was the principal at Buckner. Tr. 229. During that school year, Parents continued to provide Student with private speech-language services by Ms. Knight.

91. Beverly Emery was called by Petitioners to testify at hearing. Tr. 2346. Ms. Emery has a bachelor's and master's degrees in special education. Tr. 2348, 2527, 2897. Ms. Emery's bachelor's degree is in the area of behavior disorders. Tr. 2527. She holds teaching certification in the educable mentally handicapped (EMH) and behavior disorders. Tr. 2898. As Ms. Emery testified, children considered EMH generally fall within the mildly retarded range. Tr. 2899.

92. At the time of her testimony, Ms. Emery had been employed for fifteen years as a special education teacher in the District, all at the Buckner. Tr. 2346, 2897. In that capacity, she taught students of multiple grades beginning with kindergarten. Tr. 2347. Within Buckner, Ms. Emery generally provided special education to children in grades kindergarten through second and her students typically stayed with her for several years, depending on their maturity and level of functioning. Tr. 807, 2347, 2900, 6169-6170. Typically, when the students reached second or third grade age, they transitioned to an intermediate special education class at Buckner with Ms. Malotte. Tr. 2347-2348, 2427-2428, 2431, 169.

93. Generally, Ms. Emery's classroom had approximately 6-8 children with her as the certified teacher, although not all those children were in the classroom at the same time. Tr. 2899, 3533. She was the certified teacher and typically had 1-2 paraprofessionals. Tr. 2899.

94. All of the children in Ms. Emery's Buckner classroom were mentally retarded. Tr. 2898. All were mildly mentally retarded, with the exception of Student who Ms. Emery classified as being in the more moderate range of mental retardation. Tr. 2900. Ms. Emery also

has experience teaching children with Down's syndrome and autism. Tr. 2898, 2909. She has taken classes through Project Access in the area of autism. Tr. 2909.

95. When Student entered Ms. Emery's classroom as a kindergarten student in August 2002, she had no verbal communication and "really no sign communication." Tr. 2905. At that time, she communicated with grunts and pointing and that method of communication showed communicative intent. Tr. 2916. At that time, according to Ms. Emery, the use of an augmentative communication device had not been suggested and a picture exchange system was not being used. Tr. 2911-2912. However, as will be set forth below, at some point during Student's kindergarten year, Ms. Knight began requesting an augmentative communication device. Ms. Emery testified that, at that time, she recalled a discussion with Mother about teaching sign language to Student, "and mother was quite insistent that Student learn to talk and was afraid that, you know, that would be a crutch, and so we didn't start doing signing at that time." Tr. 2913. By the time Student was withdrawn from the District in 2006, Student had limited verbal communication and Ms. Emery was attempting to teach her sign language. Tr. 2905.

96. When Student first entered Ms. Emery's classroom in August 2002, her fine and gross motor skills were very poor and she was not ready to perform paper/pencil tasks. Tr. 2905. After four years, by May 2006, those skills had improved some and, although she could not write her name with paper and pencil, she could write it on the computer, with manipulative cards and plastic letters. Tr. 2905-2906, 3943. She also improved in cutting, tracing and coloring and, by June 2006, she could cross the mid-line, a skill she did not have in September 2002. Tr. 3480-3481. By June 2006, she also had established a dominant hand, also a skill she did not have in

August 2002. Tr. 3484-3485. In August 2002, Student was cognitively delayed and, in May 2006, she remained cognitively delayed and performed significantly below her peers. Tr. 2906.

97. In August 2002, Student could not academically perform consistent with her typical kindergarten peers and could not even academically perform where most of the other children in Ms. Emery's classroom were performing. Tr. 2906. She was at a pre-academic level at that time. Tr. 2906. By May 2006, Student had improved and knew some colors and could count using manipulatives. Tr. 2907; Tr. 3490-3497.

98. In August 202, Student needed a lot of assistance with her adaptive skills. Tr. 2907. At that time, she required someone to eat with her all the time and was still learning to hold silverware and eat. Tr. 2907. In the beginning, she had difficulty using regular eating utensils, but later on was able to do so. Tr. 2941, 3486. She also still needed help with her coat and Ms. Emery could not recall if she was toilet trained at that time. Tr. 2907, 3487-3488. By May 2006, Student had improved on and increased her adaptive skills. Tr. 2908. She was eating independently and could open her milk carton, was independently using the bathroom, and was able to put her coat on. Tr. 2908.

99. Ms. Emery could remember no discussions about Student's hearing being of concern in August of 2002. Tr. 2908, 2915. During the 2002-2003 school year, Student passed a functional hearing screening and Ms. Emery had no concerns regarding her hearing. Tr. 2914.

100. In the 2002-2003 school year, Ms. Emery observed, in the beginning, that Student had a little difficulty with changes in routine and observed that she needed routine because it made school easier for her. Tr. 2911. However, as time passed, Student was better able to adjust to changes and had no particular problems with transition. Tr. 2911. In August 2002, Student had no problem behaviors, although she was a little distractible. Tr. 2921, 2930.

101. In August 2002, Student was very social and loved her school friends and responded to the adults around her in the classroom. Tr. 2907. That characteristic, according to Ms. Emery, remained the same in May 2006. Tr. 2907.

102. On or about September 5, 2002, Mother, Kristi Hinton and Brenda Williams held a meeting to discuss concerns relating to Student's transition to kindergarten. Ex. R-92, p. 919; Tr. 6283-6284. The meeting was informal and did not constitute an IEP meeting. Tr. 6284. During that meeting, Mother expressed that, in her opinion, Student required modifications in art. Ex. R-92, p. 919. The group then discussed to whom Mother should take her specific concerns due to her discomfort about speaking to the building principal, Patrick Farnan, who was her direct supervisor. Ex. R-92, p. 919. A decision was made that Ms. Williams should be her direct contact for such concerns. Ex. R-92, p. 919. In addition, the group discussed, and it was determined, that Ms. Knight, as a private therapist, was not allowed to provide therapy to Student at Buckner. Ex. R-92, p. 919.

103. On or about September 9, 2002, Brenda Williams sent Parents a notification for an IEP meeting for September 16, 2002 to discuss options for art instruction. Ex. R-5, p. 178; Ex. R-92, p. 919. Ms. Williams included a copy of the IDEA Procedural Safeguards. Ex. R-5, p. 178.

104. On or about September 16, 2002, Student's IEP team convened to review and revise her IEP at Mother's request. Ex. R-5, p. 180; Ex. R-92, p. 920; Tr. 2925-2926, 4670. The following were among the individuals who participated: Mother, Beverly Emery, Brenda Williams, and Stephanie Dustman. Ex. R-5, pp. 180, 194; Tr. 5021, 5072. Because of the limited purpose for the meeting, the IEP was not significantly changed. Cf. Ex. R-5, p. 180 with Ex. R-4, p. 151. However, the team agreed that, because Student was not developmentally ready

for grade level art activities, she would not attend a regular education art class but would instead be provided with alternative art activities in the special education classroom. Ex. R-92, p. 920; Tr. 2927. At that time, Student was being integrated with her typical peers for some activities and Ms. Emery had an opportunity to observe her in that setting. Tr. 2927-2928. In Ms. Emery's opinion, Student enjoyed that time and benefited from playing with and modeling her typical peers. Tr. 2928. At that meeting, Mother shared that she was happy with the way things were going in kindergarten and Student appeared to be doing well with the school routine. Ex. R-92, p. 920. Ms. Emery believed that Parents agreed with the services enumerated in the IEP. Tr. 2927.

105. Stephanie Dustman,¹⁸ an occupational therapist for the District, testified that, generally, the occupational therapist, rather than a certified occupational therapist assistant (COTA)¹⁹ attended IEP meetings in the District and was responsible, after discussion with the COTA, to develop IEP present levels and goals/objectives in the OT/fine motor area. Tr. 5016-5020. The COTA, however, was responsible for providing the direct therapy to students with supervision by Ms. Dustman. Tr. 5018. From 2002 through Student's departure in May 2006, Cindy Grimmatt served as the COTA who provided direct therapy services to her. Tr. 5083-5084.

106. During the 2002-2003 school year and through March 2003, the District implemented the May and/or September 2002 IEPs and prepared written progress reports that showed Student's progress on the IEP goals and objectives. Ex. R-5, pp. 195-203; Tr. 2934-

¹⁸ Ms. Dustman's credentials will be set forth later in the findings.

¹⁹ A COTA is an individual who has completed a two-year program leading to an associate's degree and an examination for national board certification. Tr. 5004-5005, 5396. Upon completion of that degree and certification, the COTA is authorized to provide direct OT services and consultation under the supervision of a certified OT. Tr. 5004-5005. COTAs also are required to be recertified every three years. Tr. 5498-5499. The COTA position is not a paraprofessional position. Tr. 5396.

2935; *see also* Ex. R-2, p. 36; R-92, p. 920. Those progress reports showed that, during that time, Student made progress on her goals and particularly in the area of speech, language, communication, and physical therapy. *See, e.g.*, Ex. R-2, p. 36; R-5, pp. 195, 199, 200-203. Those progress reports also showed that, during that time, the District implemented the use of a communication board and/or picture exchange system. Ex. R-5, pp. 200-201.

107. During the 2002-2003 school year, Ms. Emery felt that she had a good working relationship with Parents and she did not remember Parents expressing any concerns about Student's educational progress. Tr. 2935. According to Ms. Emery, Student was "progressing well for her." Tr. 2935.

108. In the occupational therapy area, Ms. Dustman reviewed the COTA's data and discussed with her how to report progress. Tr. 5021-5022. The COTA prepared handwritten notations to show the level of Student's progress. Tr. 5021.

109. On or about March 10, 2003, Student's IEP team again reconvened to review and revise her IEP. Ex. R-5, p. 215; Ex. R-92, p. 921; Tr. 2935-2936, 4674. The following individuals were among those who participated: Parents, Beverly Emery, Cindy Grimmett (the COTA), Brenda Williams, and Ms. Knight. Ex. R-5, pp. 215, 225; Ex. R-92, p. 921; Tr. 5084. Stephanie Dustman did not attend but participated in the development of the IEP. Tr. 5022, 5084. The present level of the March 2003 IEP stated that Student continued to enjoy pretend play, was making more effort to communicate, was using the restroom independently and had progressed in pre-academics. Ex. R-5, pp. 216-218. In addition, the present level stated that, with respect to her motor skills, Student could now cross the midline, had made significant progress in speech and language and had "now met all of her communication goals." Ex. R-5, p. 218. The IEP reflected that, at that time, Student had the use of an assistive hearing device, had

no behaviors that impeded her learning or that of others, and was again eligible for extended school year services. Ex. R-5, pp. 219-220; Tr. 2938. The IEP added additional accommodations and modifications including preferential seating and the use of an FM amplification system. Ex. R-5 at 224; Tr. 2938. The May 2003 included goals and objectives in the following areas: activities of daily living, eating, speech, math, reading, handwriting, perception (hand-eye), strength, gross motor and communication. Ex. R-5, pp. 226-242. To implement those goals, the IEP provided Student with 885 minutes per week of specialized instruction in pre-academics as well as the related services of speech/language, occupational and physical therapies. Ex. R-5, p. 215. Ms. Emery did not recall if Parents objected to the IEP goals included in the IEP. Tr. 2943. Ms. Emery testified that the IEP goals were appropriate for Student, were implemented and Student made progress. Tr. 2946-2954.

110. On or about March 10, 2003, the District provided Parents with a written notice that proposed to reduce Student's time in regular education by 30 minutes per week. Ex. R-5, p. 243; R-92, p. 921; Tr. 2936-2937, 2954-2955, 4674. The basis for that change was to provide Student with additional specialized instruction to increase her progress. Ex. R-5, p. 243. Ms. Emery believed that Parents agreed with the change. Tr. 2937, 2955.

111. During the 2002-2003 school year, Ms. Grimmert continued to provide Student's direct occupational therapy under Ms. Dustman's supervision. During that year, Ms. Dustman also consulted with Beverly Emery regarding Student's sensory needs in the special education classroom and she and Ms. Grimmert assisted Ms. Emery in planning sensory activities for Student. Tr. 4674. Per Ms. Dustman, when Student worked 1:1, she displayed no sensory needs and, during the 2002-2003 school year, displayed no behavioral issues. Tr. 5026-5027. Student also communicated "pretty well" with gestures. Tr. 5026. Stephanie Dustman testified that the

occupational therapy/fine motor goals contained in the March 2003 IEP were appropriate for Student at the time they were developed and, to her knowledge, Parents were in agreement with those goals although she was not in attendance at that meeting. Tr. 5024-5025. She further testified that data was taken with respect to Student's progress on those goals. Tr. 5026.

112. During the remainder of the 2002-2003 school year and through March 2004, the District implemented the March 2003 IEP and prepared written progress reports to show Student's progress on the IEP goals and objectives. Ex. R-5, pp. 225-242. Those written reports showed that Student made progress on her IEP goals and objectives and, in many cases, achieved mastery. Ex. R-5, pp. 225-242; Tr. 2944-2952; *see also* Tr. 5026.

113. On or about April 8, 2003, Stephanie Dustman corresponded with Dr. Stephen Christy, a developmental optometrist regarding her concerns with Student's visual functioning at school. Ex. R-5, p. 244; Tr. 5387-5388. The visual issues she observed are common to children with Down's syndrome. Tr. 5389. Ms. Dustman shared her concerns with Parents and encouraged them to see Dr. Christy. Tr. 5028, 5387-5388. To her knowledge, Parents did not visit Dr. Christy, but took Student to another eye doctor. Tr. 5387-5389. After her letter, Ms. Dustman never received any information from Parents or Dr. Christy regarding her concerns. Tr. 5027-5028.

114. Ms. Dustman further testified that during the years she worked with Student, she had continuing concerns regarding Student's vision, but those concerns did not relate to Student's visual acuity, the ability to see. Tr. 5008-5011, 5389-5390. Rather, the issues she observed related to visual perception, depth-perception and hand-eye coordination. Tr. 5008, 5027, 5389-5390. More specifically, she stated that Student had difficulty maintaining visual attention with fine motor tasks and positioned her head to look out the right corner of her eye.

She also reached past items or did not reach far enough to grasp items. Tr. 5008, 5027, 5389-5390. She shared those concerns with Parents. Tr. 5008-5009.

115. The March 2003 IEP offered Student a total of 1560 minutes per week of extended school year services for one month. Ex. R-5, p. 222; Tr. 5023. Stephanie Dustman and Cindy Grimmatt, the COTA, would both have had responsibility for implementing the fine motor portions of the ESY IEP. Tr. 5023. Although Student's March 2003 IEP offered Student over 1500 minutes per week of extended school year services, Student only attended for a portion of those services. Ex. R-92, p. 921; Tr. 5027. Several witnesses, including Ms. Dustman testified that, without ESY services, Student likely would regress or become more inconsistent in her skills. Tr. 5030. The Panel concurs with this principle. It was the District's belief this ESY was a necessary component of Student's program and attendance throughout would have allowed her to make even greater progress. Tr. 5030.

116. During the March 10, 2003 IEP meeting, all IEP team members agreed that Student would best be served during the 2003-2004 school year by remaining in a kindergarten class. Ex. R-92, p. 921; Tr. 2959. Accordingly, during the 2003-2004 school year, Student again attended kindergarten at Buckner. Tr. 2903, 2959. Beverly Emery continued as her special education teacher, and Stephanie Dustman and Cindy Grimmatt continued as the OT and COTA respectively. Sarah Dobson was her regular education teacher, Aimee Geringer was her speech-language pathologist, and Brenda Williams remained as the process coordinator. Tr. 83, 2903.

117. On or about March 10, 2004, Student's IEP team reconvened to review and revise her IEP. Ex. R-6, p. 245; Ex. R-92, p. 921; Tr. 2955.²⁰ The following individuals are among those who participated: Parents, Sarah Dobson, Beverly Emery, Brenda Williams, and Ms. Knight. Ex. R-6, pp. 245-246; Tr. 2956, 4968-4969, 4971. Stephanie Dustman did not attend,

²⁰ No IEP meetings were held for Student between March 2003 and March 2004. Tr. 2955.

but participated in the development of the IEP. Tr. 5028, 5030-5031. The present level of the IEP stated that Student was playing with peers more in interactive play and continued to make progress with verbal communication. Ex. R-6, p. 247; Tr. 2960. In addition, she was independently using the restroom, becoming very independent, and transitioned through the halls with a peer. Ex. R-6, p. 247; Tr. 2960. The present level also stated that Student could pick out the letters of her name and place them in order with a model, and effectively used a spoon and fork to eat.²¹ Ex. R-6, pp. 247-248; Tr. 2961. She also used an FM amplification system and PECS for communication. The IEP also stated that, at that time, Student had no behaviors that impeded her learning or that of others, was deaf and/or hard of hearing and, therefore, required an amplification system, and was eligible for extended school year services. Ex. R-6, pp. 250-251; Tr. 2961. The March 2004 IEP included goals and objectives in the following areas: articulation, language, speech, activities of daily living, math, reading, handwriting, perception, and gross motor. Some of the goals and objectives were new, thus reflecting the progress Student had made. Ex. R-6, pp. 258-275; Tr. 2964. In the section of the IEP entitled “parental concerns,” none were listed. Ex. R-6, p. 249. Based on the goals and objectives, the IEP provided for Student to receive special education for over 60% of the time and to receive the related services of speech-language, occupational and physical therapies. Ex. R-6, p. 245. The IEP also included accommodations and modifications to address Student’s disability. Ex. R-6, p. 257.²² Due to concerns regarding regression,²² the March 2004 IEP also proposed that Student attend ESY services for one month. Ex. R-6, p. 253; Tr. 5029-5030. According to Ms. Emery,

²¹ Stephanie Dustman testified that she observed Student effectively using a typical spoon and fork to eat at school. Tr. 5029. Accordingly, it was her belief that Student did not need an eating goal based on the present level information. Tr. 5031; *see also* Tr. 5400-5405.

²² Mother testified that Student needed each of the accommodations and modifications included in the IEP. Tr. 430.

ESY services were very important for Student because she regressed over the summer and even during Christmas breaks. Tr. 2922.

118. The District kept conference summary notes of the March 10 meeting. Ex. R-6, p. 277; Tr. 2969, 4957. Those notes reflected the team agreed on the content of the IEP present level,²³ that Student had made good progress and that Student's physical therapy time should be reduced due to improvement in her gross motor skills. Ex. R-6, p. 277; Tr. 2962, 2969, 4959. At some point during the meeting, according to the notes, the speech-language pathologist introduced the idea of using the PECS communication system with Student. After a discussion of that issue, Parents agreed to allow PECS to be initiated as long as all aspects of speech were included. Ex. R-6, p. 277; Tr. 2969-2970.²⁴ The PECS served as a communication device, although not a mechanical one. Tr. 2963. By the conclusion of the meeting, "[t]he team agreed that the "information reviewed will best meet Student's needs during the upcoming school year." Ex. R-6, p. 277; Tr. 4960. The meeting notes do not reflect any parental concerns regarding the amount or nature of Student's progress. *See* Ex. R-6, p. 277; Tr. 4960. In addition, the notes do not reflect that anyone recommended the use of an augmentative communication device other than the PECS. Tr. 2970-2971.

119. When asked about the March 2004 IEP, Mother stated that the needs addressed in the IEP were not "all needs that Student had. I don't know if they were the most important needs or – they're definitely not the only needs that she had." Tr. 413. When asked to identify unaddressed needs, she stated that "I don't know, I'm not a special education teacher or an

²³ Mother testified that she did not recall if she agreed with the March 10, 2004 present level, the goals and objectives and the services to be provided. Tr. 442. She further testified that she did not remember whether she disagreed with anything in that IEP or whether she communicated with the District about such disagreement. Tr. 444.

²⁴ Ms. Emery testified that, prior to that time, Mother discouraged using the PECS and other communication strategies because Parents wanted Student to talk. Tr. 2907.

occupational therapist or a physical therapist or a speech therapist. I don't know what her most important needs are." Tr. 414. With respect to the IEP accommodations and modifications, she testified that "These are some of the things that Student needed in the school setting, yes," and also stated that the IEP did not include anything that Student did not require. Tr. 414-415.

120. On or about March 10, 2004, the District provided Parents with a written notice that proposed reducing Student's time in regular education and increasing her time in special education to allow for greater progress. Ex. R-6, p. 178; Tr. 2971, 4958. Mother signed the written notice, agreed to the proposed change and waived the 10-day waiting period. Ex. R-6, p. 178; Tr. 2971, 4958.

121. The District implemented the March 2004 IEP through the remainder of the 2003-2004 school year until March 2005 and prepared written progress reports that showed Student's progress on her IEP goals and objectives. Ex. R-7, pp. 279-285; Tr. 2962, 2965, 2967-2968, 4973-4974.

122. During the summer of 2004, Student attended only three of the 5-6 offered extended school year services for the proposed occupational therapy. *See* Ex. R-7, pp. 279-285; Tr. 5023; 5029; *see also* Tr. 5030.

123. During the 2004-2005 school year, Student continued, at Parents' request, to attend Buckner but as a first grade student. Her educational disability was mental retardation. Ex. R-24, p. 390; Tr. 2903, 2978. At that time, Buckner was not Student's home school. Tr. 6164. She continued to attend Buckner at Parents' request even though, at the time, the District had a similar program for special education students at the Elm Grove Elementary School. Tr. 6164. At Parents' request, Student was allowed to stay in Ms. Emery's room for four years. Tr. 808.

124. During the 2004-2005 school year, Ms. Emery continued as Student's special education teacher for the third year, Aimee Geringer was her speech-language pathologist, Tr. 1173, Stephanie Dustman was her occupational therapist, Cindy Grimmett was her COTA, Marcie Terrill was her regular education teacher, Tr. 83, and Brenda Williams was the process coordinator. Ex. R-24, p. 388; Tr. 6169. During that year, Student was mainstreamed with her typical first grade peers for lunch, recess, music, physical education, snack and DEAR time. Ex. R-24, p. 390.

125. On or about August 26, 2004, Brenda Williams spoke to Mother regarding Mother's concerns about Student's daily schedule and the time Student spent in the regular education setting. Ex. R-92, p. 923. During that conversation, Mother questioned if the amount of time Student was integrated into regular education was appropriate. Ex. R-92, p. 923. In response, Ms. Williams informed Mother that she would share her concerns with Student's teacher and brainstorm strategies that would make that time more beneficial for Student. Ex. R-92, p. 923. On or about August 30, 2004, Ms. Williams spoke to Ms. Emery regarding Parent's concerns. Ex. R-93, p. 923.

126. On or about October 27, 2004, Ms. Emery met with Parents for a parent-teacher conference and discussed Student's progress. Ex. R-92, p. 922. On that same date, Parents spoke to Ms. Geringer about Student's speech therapy and sought assurance that Student was not simply sitting in Ms. Geringer's room when with other students. Ex. R-92, p. 924. In response, Ms. Geringer explained that, if Parents were concerned, she would see if she could schedule Student for individual time. Ex. R-92, p. 924.

127. On or about November 4, 2004, Brenda Williams initiated the process for Student's required three-year reevaluation. Ex. R-92, p. 925; Tr. 4691, 4693. Although the

evaluation was not due until the spring of 2005, the team decided to start the process somewhat early because the District had many questions regarding Student's disability and prior IQ testing and knew that this reevaluation would take some time. Tr. 6160. As part of that process, Ms. Williams mailed Parents a "Parent Input Form" and a copy of the IDEA procedural safeguards. Ex. R-92, p. 925.

128. Ms. Williams testified regarding the IDEA three-year reevaluation process as conducted in the District. Tr. 4690-4691. At the beginning of each school year, Ms. Williams, as the process coordinator, determined which students required a three-year reevaluation, and when to begin each reevaluation to satisfy state and federal timelines. Tr. 4691.

129. As of November 22, 2004, Ms. Williams had not received Parents' input and, therefore, spoke to Mother about the need for that information and scheduling. Ex. R-92, p. 925; Tr. 4849.

130. On or about November 23, 2004, Mother asked Ms. Emery to document the days and length of time that Student was receiving her speech, occupational and physical therapies. Ex. R-92, p. 922.

131. On or about December 1, 2004, Brenda Williams spoke to Mother to discuss her concerns regarding Student's reevaluation. Ex. R-92, p. 951; Tr. 4692. During that conversation, Mother questioned why the District chose to begin the process early and indicated that she did not want to hold an IEP review this early in the school year. Ex. R-92, p. 951; Tr. 4691-4693. In response, Ms. Williams explained the time required to complete the process and necessary timelines. Ex. R-92, p. 951. Mother agreed to return the "Parent Input Forms" by the following day. Ex. R-92, p. 951.

132. On or about December 6, 2004, the District began preparing for Student's three-year reevaluation by conducting a review of existing data. Ex. R-8, pp. 286-302; Ex. R-92, p. 925; Tr. 445, 2976, 4974-4975, 6172-6173. The following were among those who participated: Parents, Marcie Terrill, Ms. Emery, Ms. Williams, Ms. Geringer, Ms. Dustman and Mr. Farnan. Ex. R-8, p. 292; R-92, p. 925; Tr. 445, 4031. The documentation prepared showed that, in August 2004, Dr. Cibis diagnosed Student with intermittent estropia. Ex. R-8, p. 286. At that time, Parents reported that they were considering making an appointment with a developmental optometrist. Ex. R-8, p. 286. Parents also reported that Student's hearing was affected by drainage but agreed to provide the District with a current medical report. Ex. R-8, p. 287; Tr. 2977. The review documentation also showed that Student's teachers stated that she was progressing on her IEP goals, was very sociable and consistently played appropriately with her peers. Ex. R-8, p. 291; Tr. 2982. The documentation also showed that Student's parents and teachers agreed that there had been changes in her behavior over the last 2-3 months. Ex. R-8, p. 291; Tr. 2979.²⁵ After reviewing existing data, the team decided that a reevaluation, with assessment, was necessary and an evaluation plan was, therefore, prepared. Ex. R-8, p. 288; R-92, p. 925. No one at that meeting suggested that Student might have autism. Tr. 4031 and 4032.

133. On or about December 6, 2004, the District provided Parents with a written notice that proposed a three-year reevaluation and sought Parents' consent for same. Ex. R-8, p. 303; Tr. 446, 474-476, 4974-4975, 6173-6174. As part of that reevaluation, the District sought Parents' consent to administer a non-verbal general intelligence (IQ) test to Student. Ex. R-8, p.

²⁵ During the 2004-2005 school year, Ms. Emery testified that her general classroom behavior management techniques were adequate to deal with any behaviors that arose that year. Tr. 2981.

304; Tr. 446-447, 6175-6176. Parents never provided that consent. Tr. 2984, 2987, 6176. The reasons for their refusal to provide said consent are set forth below.

134. Ms. Emery and Mother had some discussion regarding the proposed IQ test. Tr. 2984. As a result of those conversations, Ms. Emery concluded that Mother was afraid that Student's placement would change and Student would be moved from Ms. Emery's classroom if the District obtained a low IQ score. Tr. 2985. Ms. Emery explained to Mother that the IQ test would not make a difference with respect to that and, at some time, Student would have to move from her classroom. Tr. 2985. In December 2004, the other special education classroom option for Student was Becky Hughes' classroom at Elm Grove. Tr. 2430, 2986. For the most part, the children in Ms. Hughes' class had IQs lower than the children in Ms. Emery's room. Tr. 2986.

135. Mother testified about the December 6, 2004 meeting. Tr. 52-53. According to Mother, Parents expressed concerns to the team that things were not working and the computers that had been promised also were not working. Tr. 54. Because Parents felt as though trust was being lost, they retained a parent advocate, Rand Hodgson, to assist them. Tr. 53-54. Mother further testified that, in her opinion, Ms. Emery wanted the District to administer an intelligence test because Student's speech-language pathologist (Aimee Geringer) did not feel that Student belonged at Buckner but should attend another school (Elm Grove Elementary) in the District. Tr. 55, 453-454, 456. Parents did not want an IQ test administered because, per Mother, such a test could not accurately assess the intelligence of a child with autism due to a lack of communication skills. Tr. 55.²⁶ In addition, Mother testified that, based on what she knew about IQ testing and children with disabilities, it seemed that the score could put a cap on the educational expectations of a child. Tr. 445. Mother testified that, as of December 2004, Parents were not seeking to have the District assess to determine if Student had autism. Tr. 447.

²⁶ At that time, there was no formal diagnosis of autism for Student .

136. Further, Mother testified that they did not want Student to attend Elm Grove Elementary because the program there was for disabled children considered to be “trainable mentally handicapped, and I felt like she [Ms. Geringer] was giving up on my daughter.” Tr. 456. However, Mother further testified that Ms. Emery never indicated to her that she was going to recommend that Student be moved to Elm Grove. Tr. 457. In addition, Mother testified that, as of January 2005, no one other than Ms. Geringer was pushing for Student to move to Elm Grove. Tr. 457.

137. Brenda Williams testified that she never told Parents that Student could not return to Buckner Elementary or District if the parents refused to consent to such testing. Tr. 4731.

138. On or about December 15, 2004, Father observed Student during a speech-language therapy session with Aimee Geringer. Ex. R-92, p. 925. After the session, Father requested a copy of Ms. Geringer’s logs showing when Student had received therapy. Ex. R-92, pp. 925-926. Ms. Geringer informed Father that, before she could provide him with the requested information, she would have to remove the names of other students. Ex. R-92, p. 926; *see also* Tr. 231-232, 457-458. Ms. Geringer subsequently redacted the other students’ names and, on that same date, provided Parents with copies of the redacted logs showing the days on which she provided speech-language therapy to Student. Ex. R-92, pp. 925-926; R-9, pp. 306-310; Tr. 4975-4979.²⁷

139. On or about December 18, 2004, Parents corresponded with the District. Ex. R-10, p. 311; Tr. 447, 477, 4033-4034, 4979-4980, 6176-6177; *see also* Ex. R-92, pp. 925-926. In that letter, Parents informed the District that they would consent to only some of the tests the

²⁷ Prior to hearing, Parents alleged that Student did not receive all the speech-language therapy required by her IEPs. *See* Panel Exhibit 1 at 2. At hearing, the evidence adduced demonstrated that the only period of time in which this allegation applied was the time period covered by Ms. Geringer’s services. *See* Tr. 4975-4979. Tr. 232. As Ex. R-9 demonstrates, the allegation regarding missed therapy time is outside the relevant two-year statute of limitations.

District proposed for the reevaluation. Ex. R-10, p. 311; Tr. 477, 6177. Parents, for reasons stated above, refused to permit the District to administer a general intelligence test. Ex. R-10, p. 311; Tr. 446-447. Parents also refused to give the District consent for the proposed speech-language testing but Mother was unable to recall why. Tr. 448-449.

140. On or about December 20, 2004, Brenda Williams spoke with Mother regarding the December 18 consent to evaluate letter sent by Parents. Ex. R-92, p. 927; Tr. 4693. During that conversation, Ms. Williams questioned why Parents wanted to omit the cognitive and language assessments referenced in Parents' letter. Ex. R-92, p. 927; Tr. 4693. In response, Mother expressed a concern about where Student would receive her services and that she might be transferred to Elm Grove Elementary School from Buckner. Ex. R-92, p. 927; Tr. 4693. In response to those concerns, Ms. Williams explained that those specific assessments were important in monitoring Student's progress. She also explained that Student's services should be discussed as part of the IEP process. Ex. R-92, p. 927; Tr. 4693. At the end of the conversation, Mother stated that she would talk with her husband about the cognitive and language assessments and also informed Ms. Williams that they were considering having Student's skills assessed outside the school setting. Ex. R-92, p. 927.

141. On or about January 3, 2005, Father came to Buckner and informed Ms. Williams he and his wife would not provide consent to all the assessments the District wanted done. Ex. R-92, p. 928. Father also informed Ms. Williams that they did not trust Buckner staff to administer the language assessment and, therefore, would have Student evaluated outside the school setting. During that conversation, Father again questioned the need for a cognitive assessment and Ms. Williams attempted to explain that the District would like to obtain a baseline of Student's cognitive abilities. Ex. R-92, p. 928.

142. On or about January 10, 2005, Mother questioned Beverly Emery about the status of Student's reevaluation. Ex. R-92, p. 928.

143. During January and February 2005, Parents obtained several outside evaluations of Student. *See* Ex. R-11, pp. 312-314; R-12, pp. 315-319; R-16, R-17; Tr. 6612-6613. Parents had the outside testing completed because they had concerns about Student's progress. Tr. 44. Although Mother previously had concerns that Student might be autistic, she did not act upon that concern at the time because it "was just one more thing for her to be labeled with." Tr. 44. Parents presented the outside evaluations to the District at subsequent team meetings and the District members of the team considered those evaluations and incorporated the results of them into the District's evaluation reports. Tr. 4695, 4980-4981; *see also* Tr. 4837.

144. On or about January 11, 2005, and at Parents' request, Ms. Knight conducted a communication assessment of Student. Ex. R-11; Tr. 45-46, 449, 4980-4981, 6177, 6676-6678. That evaluation was not completed in the school environment. Tr. 463. Parents did not ask the District to pay for that assessment. Tr. 487-488. Ms. Knight testified that the main purpose of her evaluation was to relate to the District where Student was in the language area. Tr. 6677. One of the tests that Ms. Knight administered, the PLS-4, is designed to be administered to children six and under and Student, at the time, was 8 and a half years old. Tr. 6690. Ms. Knight's communication assessment showed that Student continued to exhibit significant delays in speech and language but did not seek input from school personnel regarding Student's abilities in this area. *See* Ex. R-11. Ms. Knight's assessment did not indicate any diagnosis. *See* Ex. R-11. In addition, in her assessment, Ms. Knight did not make any recommendations. *See* Ex. R-11; Tr. 451.

145. On or about that same date, January 11, 2005, Parents had Sara English complete a private occupational therapy evaluation of Student. Ex. R-12; Tr. 47-48, 451-453, 3002. Ms. Knight referred Parents to Ms. English. Tr. 460. The evaluation was not completed in the school setting. Tr. 452, 462. Parents did not ask the District to pay for that evaluation. Tr. 487-488. Ms. English's evaluation demonstrated that Student continued to exhibit fine-motor delays. Ex. R-12. In addition to administering tests in the fine-motor area, Ms. English also administered the Sensory Profile, with only Parents as informants. Ex. R-12, p. 317; Tr. 460, 3002. The Sensory Profile is a questionnaire that contains statements about a child's response to sensory events. Ex. R-12, p. 317. Per Parents' responses, Ms. English concluded that Student demonstrated sensory concerns in a number of areas and provided recommendations regarding how to address those issues. Ex. R-12, p. 319. Ms. English's evaluation did not indicate a diagnosis. *See* Ex. R-11.

146. Stephanie Dustman, the District's occupational therapist, testified regarding sensory issues. Tr. 4989, 4992, 5350. At the time of her testimony, Ms. Dustman had been employed as an occupational therapist with the District for 9 ½ years and had a total of 18 years experience in the field. Tr. 4989, 4991. In her District position, she conducted evaluations and planned programs for children with special needs, supervised the District's COTAs who provided direct therapy to students, and collaborated with and helped teachers plan classroom accommodations. Tr. 4989. Ms. Dustman has bachelor's and master's degrees in occupational therapy and holds national certification and Missouri licensure in that area. Tr. 4990. As part of her training, she has taken courses and been trained in sensory and sensory integration issues. Tr. 4992; *see also* Tr. 4996.

147. Ms. Dustman testified that sensory “is something that we all do.” Tr. 4992. Sensory integration describes how living organisms take information from their environment and bodies into the nervous system and make purposeful responses to that information. Tr. 4992-4993. Individuals, including special needs and typical children, however, can have a sensory integration disorder. Tr. 4999.

148. Occupational therapists cannot diagnose sensory integration dysfunction, but can help plan programs for children who have that disorder. Tr. 5000. School occupational therapists also can use some standardized instruments, such as the Sensory Profile and Sensory School Companion, to measure behavior that would suggest sensory integration disorder. Tr. 5001. Occupational therapists also can engage in skilled classroom observations as part of that process. Tr. 5002. The Sensory Profile was not developed to diagnose autism and/or specifically for use with children with autism. Tr. 5096, 5099, 5117. Rather, the Sensory Profile is used to determine if an individual has sensory problems. Tr. 5117.

149. Sensory integration difficulties are not exclusive to children with autism; rather, many students, including those with ADHD, Downs’ syndrome and other disorders, have sensory issues. Tr. 4999. When Ms. Dustman determines that a student has sensory issues, she has training that allows her to help school age children to be able to participate in classroom activities. Tr. 4994, 5117. For example, Ms. Dustman has recommended such things as preferential seating, covered lights, headphones and weighted vests for children with sensory issues. Tr. 5003-5004.

150. Mother testified about her conversations with Ms Hinton about the proposed intelligence testing. Tr. 55. Per Mother, “this is when we tried to start working with the school district.” Tr. 55. Mother also testified that, during her conversations with Ms. Hinton, she

requested that Parents be allowed to have outside individuals (including Marilyn Weber) conduct observations of Student at Buckner, but that Ms. Hinton refused that request due to District policy. Tr. 56-57, 59.

151. Mother testified that she could not remember if she asked the District to assess for autism around January 2005. Tr. 479. She further testified that she did not recall telling the District not to do such testing. Tr. 481.

152. On or about January 13, 2005, Ms. Hinton and Mother had a telephone conference regarding Student's reevaluation. Ex. R-15, p. 331.

153. On or about January 13, 2005, Student's multidisciplinary team convened to conduct an additional review of existing data that was necessitated by Parent's provision of outside evaluation reports just recently obtained. Ex. R-13; Tr. 478. The following individuals were among those who participated: Mother, Beverly Emery, Brenda Williams, Patrick Farnan, and Kristi Hinton. Ex. R-13, p. 320. At the conclusion of the meeting, the team again determined that a reevaluation with assessment continued to be necessary. Ex. R-13, p. 323. Accordingly, on that same date, the District provided Parents with an additional written notice that proposed to conduct the three-year reevaluation and sought Parents' written consent to do so. Ex. R-14, p. 328; Tr. 2987. At Parents' request, the District agreed to remove references to general intelligence testing. Ex. R-14, p. 329; *cf.* Ex. R-14, p. 329 with Ex. R-8, p. 304; Tr. 479, 2987.

154. On or about January 14, 2005, Ms. Hinton corresponded with Parents regarding Student's three-year reevaluation. Ex. R-15, p. 331; Ex. P-3; Tr. 52-53, 55, 480. In that correspondence, Ms. Hinton informed Parents that the District wished to complete an intelligence test on Student to establish baseline data. Ex. R-15, p. 331; Tr. 480. However, Ms.

Hinton, in response to Parents' opposition to such testing, indicated that, as a compromise, the District would be willing to conduct only an informal evaluation in that area. Ex. R-15, p. 331; Tr. 480. Ms. Hinton's letter also addressed additional testing that the District might consider pursuing if Parents so requested, but agreed not to discuss or engage in such testing pursuant to the earlier telephone conference. Ex. R-15, p. 331; Tr. 481.

155. On or about January 18, 2005, Mother provided written consent to the revised reevaluation plan based on the District's willingness to remove formal IQ testing. Ex. R-14, p. 328; Ex. R-92, p. 929; Tr. 478, 480.

156. On or about January 25, 2005, and when Student was eight years old, Parents took her to psychologist Jamie Prestage for a psychological assessment based on their concerns that Student was displaying characteristics within the Pervasive Developmental Disorders spectrum. Ex. R-16; Ex. P-4; Tr. 43, 51, 481, 2989. Parents' advocate, Rand Hodgson, referred them to Ms. Prestage. Tr. 481-482, 483-486.²⁸ Prior to evaluating Student, Ms. Prestage had never met Student and Mother was unable to recall whether Ms. Prestage was informed about Student's educational diagnosis of mental retardation. Tr. 484-487. Per Mother's testimony, Parents did not ask for Ms. Prestage to observe Student at school (Tr. 487), but given the District's policy on such observation, such a request would have been fruitless. Ms. Emery had no input into the evaluation. Tr. 2989-2990.

157. Ms. Prestage's report indicated that she had a master's degree in psychology, but she did not testify at the hearing. Ex. R-16. When conducting her assessment, Ms. Prestage did

²⁸ When asked during cross-examination whether Mr. Hodgson had attended a team meeting for Student at the time of Ms. Prestage's evaluation, Mother testified that she could not remember when the family began working with him and could not remember when Parents shared Student's IEPs and evaluations with him. Tr. 482-483. As of January 25, 2005, Parents had shared "some of our concerns" with Mr. Hodgson. Tr. 482. Mr. Hodgson told them that, if those were their concerns, Parents needed to act upon them and he recommended different people, including Ms. Prestage. Tr. 483-484. Mother could not recall whether Mr. Hodgson or Ms. Prestage suggested that they obtain school input into the autism evaluation. Tr. 485.

not seek the input of school personnel. *See* Ex. R-16; *see also* Tr. 485. For her assessment, Ms. Prestage sought only the input of Parents, conducted an informal observation of Student in a non-school environment, and administered the Childhood Autism Rating Scale (“CARS”), with Student’s parents serving as the informants. Ex. R-16; Tr. 486; *see also* Tr. 45 (wherein Mother testified that “We took Student to a psychologist and we had to fill out several questionnaires and this was her diagnosis that she had autism.”). On the CARS and based only on parent input, Student’s score fell within the severely autistic range. Ex. R-16, p. 345. Based on the evaluation, Ms. Prestage stated that Student met the criteria for a diagnosis of Autistic Disorder based on the DSM-IV. Ex. R-16, p. 346. Ms. Prestage’s report noted Student’s history of Down’s syndrome, but did not explain how that might impact her developmentally. *See Id.*

158. Mother acknowledged that Ms. Prestage was the first to provide Student with a diagnosis of autism. Tr. 44. Parents did not ask the District to pay for that evaluation. Tr. 487.

159. Ms. Prestage’s evaluation did not contain all the evaluation requirements for an IDEA diagnosis of autism in the Missouri State Plan. Tr. 3472-3473; Ex. R-93, pp. 972-973. Her report did not reflect that she reviewed Student’s medical records or observe Student’s behavior across multiple environments. Tr. 3472-3474. Some of the statements in Ms. Prestage’s report were inconsistent with Beverly Emery’s observations of Student. Tr. 2990-2991. Contrary to Ms. Prestage’s report, Ms. Emery did not notice that Student’s play was solitary, did not observe her spinning in a circle for a long period of time, and did not observe her to be fixated on objects to the exclusion of anything else. Tr. 2990-2991 Ms. Emery also did not observe Student get real upset when classroom routines changed. Tr. 2992.

160. According to Ms. Emery, the CARS was not a diagnostic tool, just a scale, (Tr. 2747-2749) and an evaluation that relied only on the CARS would not be sufficient for a

diagnosis of autism but is one of those things that the District uses to begin an assessment that identifies autism. Tr. 2747-2752. The District's witness, Becky Hughes, also testified that the CARS is not a diagnostic tool. Tr. 5816-5817. She further testified that autism should never be diagnosed based solely on a parent's information on the CARS because the CARS is a subjective tool that can be used to get whatever result the parent wants. Tr. 5973.

161. On or about February 17, 2005, Brenda Williams contacted Parents to discuss dates on which to convene Student's team to review the results of her reevaluation. Ex. R-92, p. 929.

162. On or about February 25, 2005, Mother provided Brenda Williams with the outside autism and occupational therapy assessments Parents had obtained. Ex. R-92, p. 929; Tr. 487.

163. On or about February 28, 2005, Parents had Marilyn Weber conduct an observation of Student at a local shopping mall to see if Student had characteristics of autism. Ex. R-17, p. 347; Ex. P-5; Tr. 56-57; 488, 3000. Per Mother, they did not specifically request that Ms. Weber be allowed to observe Student in the school setting because, per Ms. Weber and consistent with the District's policy, the District would not allow such an observation. Tr. 489. Mr. Hodgson provided Parents with Ms. Weber's name. Tr. 488. Parents did not request that the District pay for Ms. Weber's evaluation. Tr. 489, 493. Prior to the observation, Mother talked to Ms. Weber on the telephone, but could not remember anything regarding Ms. Weber's professional background other than she worked at the Sherwood Center and had a child with a disability. Ms. Weber did not testify at the hearing.

164. In her report, Ms. Weber stated that, in her opinion and based on her observation and information from Mother, Student displayed many characteristics of autism and met criteria

for an educational diagnosis of autism in Missouri. Ex. R-17, pp. 347-348. Although she made recommendations, she did not recommend an augmentative communication device. Ex. R-17; Tr. 492-493. Ms. Weber did not seek any input from District personnel. *See* Ex. R-17; Tr. 3001.

165. Mother testified about Ms. Weber's report. Tr. 490-493. She acknowledged that Ms. Weber conducted her observation at the play area in a local shopping mall to see how Student interacted with the children who were there. Tr. 491. Prior to that date, Ms. Weber had never met Student. Tr. 492. Mother could not recall how long the observation lasted and could not recall if, prior to the observation, she had shared Student's IEPs and other school records with Ms. Weber. Tr. 492. She also could not recall if she told Ms. Weber that Student had a diagnosis of mental retardation. Tr. 493. The play area was not a familiar place for Student and she did not know any of the children who were there. Tr. 491-492. The observation was conducted in the evening and not a lot of children were present. Tr. 492. When asked, Mother was unable to say whether what Ms. Weber was able to observe gave an accurate representation of how Student performed in the school setting. Tr. 492.

166. On or about February 28, 2005, the District provided Parents with a notification for a team meeting to be held on March 4, 2005. Ex. R-18, pp. 350-351; Ex. R-92, p. 929. That notification included a copy of the IDEA Procedural Safeguards. Ex. R-18, pp. 350-351; Ex. R-92, p. 929.

167. On or about March 1, 2005, Beverly Emery contacted Mother to obtain her consent for the District to administer the CARS in the school setting, but Mother stated that she would not provide such consent. Ex. R-92, p. 930.

168. On or about March 2, 2005, Parents had an outside evaluation completed by Molly Pomeroy of Partners in Behavioral Milestones. Ex. R-19; Ex. P-6; Tr. 59-61, 493, 618.

Rand Hodgson, Parents' advocate, recommended Ms. Pomeroy to Parents. Tr. 494, 712. At that time, Parents already had a diagnosis of autism and were attempting to find additional ways to help Student. Tr. 60, 496. At that time, Ms. Pomeroy had a bachelor's degree. Ex. R-19, p. 361. Ms. Pomeroy's report showed that, on that date, she administered the Psychoeducational Profile-Revised ("PEP-R") in a three-hour session, but without the parents present. Ex. R-19, p. 352; Tr. 495, 618, 3679, 4194, 4209.²⁹ Ms. Pomeroy met Student for the first time on that date and conducted the assessment at the PBM offices in a sterile 1:1 work environment. Ex. R-19, p. 352; Tr. 494, 4195. Mother was unable to recall if, prior to that evaluation, she shared any school records with Ms. Pomeroy. Tr. 495, 4209. She did not request that Ms. Pomeroy solicit information from school staff who had worked with Student. Tr. 495. School personnel had no input into the evaluation. Tr. 3842, 4195. Parent did not request the District to pay for Ms. Pomeroy's evaluation. Tr. 496.

169. As noted in Ms. Pomeroy's report, the PEP-R is an assessment of children with autism or related development disorders, contains an inventory of behaviors and skills designed to identify uneven and idiosyncratic learning patterns and generally is to be used with children ranging in age from 6 months to 7 years. Ex. R-19, p. 352. Ms. Pomeroy's report indicated that, at the time she administered the test to Student, Student was 8 years old, beyond the age range contemplated by the PEP-R. Ex. R-19, p. 352; Tr. 4197-4198. Ms. Pomeroy's report included detailed information about Student's skills as assessed by the PEP-R. Ex. R-19. On the behavioral scale of the instrument, which was based on notes taken throughout the assessment and parental report, Ex. R-19, p. 358, Student achieved appropriate ratings in reacting to physical contact, initiation of social interactions, eye contact, and awareness of examiner's presence. Ex. R-19, p. 359. In the summary of scores, Student achieved scores ranging from an age equivalent

²⁹ Mother testified that she was not aware that Parents ever asked the District to administer the PEP-R. Tr. 494.

of 16-17 months in cognitive verbal (items requiring a verbal response, *see* Ex. R-19, p. 356); to 38-41 months in the area of eye-hand integration. Ex. R-19, p. 360. In the gross motor area, Student achieved an age equivalent score of 52-70 months. Ex. R-19, p. 360. Per Ms. Pomeroy's report, Student's overall developmental score³⁰ was 30 months, giving her a developmental delay of 74 months. Ex. R-19, p. 361.

170. Ms. Pomeroy's report also included several recommendations, including that Student be placed in a sterile and 1:1 learning environment, and be instructed using errorless teaching. Ex. R-19, p. 361. She also recommended that Student be provided with a language rich environment and that a communication system be established. Ex. R-19, p. 361. Ms. Pomeroy's report did not state that Student had autism, although, per Mother, Ms. Pomeroy was aware that Student had that diagnosis. Tr. 498-499.

171. Ms. Pomeroy testified on behalf of Petitioners at hearing. Tr. 3549. At the time of her testimony, Ms. Pomeroy had a bachelor's degree in psychology and a master's degree in special education with an emphasis in behavior disorders. Tr. 3549, 3814. Ms. Pomeroy also has completed additional work in behavioral analysis and has board certification in that area which allows her to use the "BCBA" designation after her name. Tr. 3549-3555.³¹ She also testified that she has attended seminars and conferences on special education and autism. Tr. 3558. Ms. Pomeroy does not hold any Missouri teaching or other state agency certification and her only teaching experience in a public school was as a substitute at the State School for the Severely Handicapped. Tr. 3814-3815, 3830.

³⁰ A child's developmental level references the rate or level at which a child is demonstrating skills. Tr. 4210. In deciding whether a student's behavior is appropriate or not, it is important to focus on the developmental level and not the student's chronological age. Tr. 4212, 5741.

³¹ Ms. Pomeroy sat for her BCBA examine in November 2007 and was authorized to use the BCBA designation after December 2007. Tr. 3835. When asked if the Missouri Department of Elementary and Secondary Education recognized or required a BCBA to work in the public schools, Ms. Pomeroy stated that she did not know if there was any Missouri agency that recognized the BCBA as a legitimate certification to perform any job in the state. Tr. 3828-3829.

172. During and after college, Ms. Pomeroy worked in residential facilities with children dually diagnosed as developmentally disabled or emotionally disturbed. Tr. 3559. She also worked in group homes or state facilities with adults and adolescents with developmental delays or developmental delays and mental retardation. Tr. 3559. She also has worked with families in their homes or school settings with children with autism, Down's syndrome and other disabilities. Tr. 3560. From 1999-2006, Ms. Pomeroy worked as a consultant for PBM before beginning her own company, Creative Concepts Behavior Therapy. Tr. 3560, 3830-3834. At PBM, she analyzed and designed programs to increase children's skills or to decrease inappropriate behaviors and consulted regarding the implementation of those programs. Tr. 3560. She also has helped to develop IEPs, write intervention plans and conduct functional behavioral assessments. Tr. 3561.

173. On the day Ms. Pomeroy administered the PEP-R, she had never met Student before and testified that Student performed very well in the sterile environment where the test was given. Tr. 3707. She also was unaware that Student was attending the Rainbow Center ("Rainbow") and never observed Student there. Tr. 3812.

174. Ms. Pomeroy testified that the PEP-R was specifically designed to assess children who exhibit characteristics of autism, but was not a test to determine if a child met the criteria of autism. Tr. 3681. In that regard, she stated that the PEP-R could also be used to assess mentally retarded children to see if they were lacking any skills. In relation to Student and based on her administration of the PEP-R, she testified that Student was not achieving at her chronological age on any of the PEP-R skills. Tr. 4199. On that instrument, Student's strongest area was in gross motor and she tested a little above the five-year-old level, even though she was nine years old at the time of administration. Tr. 4199. On that instrument, most of Student's skills fell

around the two-to-three year old level. Tr. 4220. Student's lowest score was in the cognitive-verbal expression area. Tr. 4200. Ms. Pomeroy testified that she was aware of Student's diagnosis of apraxia and acknowledged that it would make it difficult for her to produce verbal language. Tr. 4201. She further testified that not all children with autism are apraxic. Tr. 4201. Ms. Pomeroy stated, that with respect to those items on the PEP-R that Student passed, her profile was consistent with the developmental age of 2½ to 3½ years. Tr. 4202. If she added Student's emerging skills into the equation, her developmental age would be from 3-4 years. Tr. 4203. Ms. Pomeroy testified that, if precocious skills as used in the State Plan criteria for autism meant above one's chronological age, the PEP-R showed that Student had no precocious skills. Tr. 4203-4204.

175. Ms. Pomeroy also testified that the skills that Student displayed that day on the PEP-R had been learned elsewhere and generalized with Student. Tr. 4195. During the test administration, Student was compliant when tasks demands were placed on her throughout the entire session. Tr. 4197

176. Ms. Pomeroy testified that she provided the PEP-R information to the District when she attended an IEP meeting. However, she was unable to recall which single IEP meeting she attended. Tr. 3726.

177. Ms. Hughes also testified about the PEP-R and confirmed that it is not a diagnostic tool for autism, but is a tool used to look at idiosyncratic skills and to develop curriculum. Tr. 5733. In looking at the PEP-R that Ms. Pomeroy prepared regarding Student, Ms. Hughes testified that she did not see the idiosyncratic skills that are typical of autism. Tr. 5734. Per Ms. Hughes, all of Student's skills were "flat" with the exception of her gross motor score which still was significantly delayed in comparison to her same age peers. Tr. 5734. Ms.

Hughes used Ms. Pomeroy's PEP-R report as one of the factors in reaching her conclusion that Student did not have autism. Tr. 5734. As she stated, on that instrument, Student had high mastery levels in the area of play, interest, relating and affect. Tr. 5734. Ms. Pomeroy's report also showed that Student explored her environment, played, initiated social interaction, maintained eye contact, appropriately sought help and was cooperative with the examiner. Tr. 5735-5736. As a result of those scores and characteristics, she confirmed that, in her opinion, Student was not autistic. Tr. 5736.

178. On or about March 4, 2005, Mother contacted Brenda Williams and indicated that she would now give consent for the District to administer the CARS, but wanted it to be completed before the team meeting scheduled for that afternoon. Ex. R-92, pp. 930-931. Ms. Williams was unable to have the CARS administered that quickly. Ex. R-92, p. 930.

179. On or about March 4, 2005, the District convened Student's multidisciplinary team to discuss the reevaluation completed by the District and to consider the results of the various outside evaluations obtained by Parents. Ex. R-20, pp. 362-382; R-21, p. 383; R-92, p. 929; Ex. P-7; Tr. 62, 496, 501, 1533, 3001. The following individuals were among those who participated: Mother, Beverly Emery, Brenda Williams, Ms. Knight, Marcie Terrill, and Rand Hodgson, Parents' parent advocate. Ex. R-20, p. 382; Tr. 501-502. The evaluation report that was prepared reflected the results of the previous reviews of existing data, the new assessments the District administered, and the outside evaluations provided by Parents. Ex. R-20; *see also* Tr. 501-503, 4806.

180. As part of its assessments, the District administered the Occupational/Physical Therapy Functional Assessment. Ex. R-20, pp. 365-368; *see also* Tr. 5117, 5121-5122. Within the report of that assessment, the examiner noted that Student's endurance for physical activity

appeared to be decreased and that Student had an overall decrease in strength. Ex. R-20, pp. 365-366. That assessment also showed that Student's cutting skills had improved and she no longer used adaptive scissors. Ex. R-20, p. 366. The report also noted that Student often did not maintain visual attention to objects, but had learned to use the mouse to control the cursor. Ex. R-20, pp. 366-367. The evaluation report also stated that Student loved to play pretend games in the classroom, interacted with her peers and shared and played appropriately with some toys. Ex. R-20, p. 367.

181. The report did not reflect current IQ testing because of Parents' lack of consent, but referenced the April 2002 administration of the LAP-D that showed a z-score of -2.33. Ex. R-20, p. 372; Tr. 3002-3003, 4698-4701. According to Ms. Williams, The LAP-D "is a reliable measurement for cognitive functioning" and also has an achievement component. Tr. 4698, 4820. However, the only areas of domain assessed in the April 2002 test were matching and counting. That portion of the report noted that Student's cognitive abilities were significantly delayed. Ex. R-20, p. 372. The report also included the Vineland adaptive composite score of 57. Ex. R-20, pp. 372-373. The report also included the results of the Brigance which assessed Student's academic skills. Ex. R-20, pp. 374-375. The observations included within the report stated that Student played appropriately at her ability level with her peers in the special education classroom, engaged in pretend play and was very sociable. Ex. R-20, pp. 376, 380.

182. At the end of the meeting, the team, with exceptions, concluded that Student continued to meet state criteria for an educational diagnosis of mental retardation. Ex. R-92, p. 930; R-20, p. 381; R-21, p. 383; Tr. 80, 504; 705, 3004, 4701, 4812, 4852-4853. The team utilized the 2002 IQ test results, Student's daily classroom performance and other evaluative information, all of which showed that Student had significant delays in cognition with

commensurate deficits in adaptive behavior. Ex. R-20, p. 381; *see also* Ex. R-93, p. 974; Tr. 4853-4854. Mother, Mr. Hodgson, Marcie Terrill, Beverly Emery, Aimee Geringer and Ms. Knight all checked that they disagreed with the conclusion of the educational diagnosis of mental retardation. Ex. R-20, p. 382; Tr. 510, 3004-3006, 4810-4811. However, in written statements, ³² Ms. Geringer wrote that “I agree that Student is probably mentally retarded, but I feel we need additional information.” Ex. R-20, p. 382. Similarly, Ms. Emery wrote “I do not disagree that Student is mentally handicapped, however, I don’t believe that is the only handicapping condition that is interfering with her learning. I feel that further evaluation is necessary.” Ex. R-20, p. 382; Tr. 4826, 2730-2735, 2786-2788, 2806-2807, 3005-3006. Finally, Marcie Terrill wrote that “I agree that Student is probably mentally retarded, but I feel we need additional information to further determine how the Autistic tendencies could be interfering with her learning.” Ex. R-20, p. 382; *see also* Tr. 4850. Because of Ms. Prestage’s DSM-IV diagnosis of autism and at Parents’ and Mr. Hodgson’s request, however, the team decided to acquire additional information to determine if Student met Missouri’s initial eligibility criteria for autism or other disabling conditions. Ex. R-21, p. 383; R-92, p. 930; Tr. 510, 705. Mr. Hodgson specifically suggested that the District look at the categories of autism, other health impaired and/or multiple disabilities. Ex. R-21, p. 383; Tr. 1301. Mother acknowledged that Mr. Hodgson proposed OHI as a category of disability. Tr. 3007, 4807, 6197; *see also* Tr. 705.

183. At the conclusion of the meeting, the team also discussed the fact that Student’s IEP annual review was due on or before March 10, 2005. Ex. R-21, p. 383; Tr. 3008. The team

³² Parents were given a copy of the evaluation report at the end of the meeting and that report included the handwritten statements of Ms. Emery, Ms. Terrill and Ms. Geringer (Tr. 506-507) evidencing that the three did not disagree with that diagnosis. Ms. Emery, when questioned, specifically stated that, in her opinion, Student was mentally retarded and she never disagreed with the mental retardation diagnosis. Tr. 2733.-2735 Similarly, Nancy Mulford, Student’s regular second grade teacher, testified that she believed Student to be mentally retarded. Tr. 2233 (“I felt like Student was more moderate to severely retarded”). Molly Pomeroy testified that she believed that Student met the criteria for mental retardation. Tr. 4316.

discussed the possibility of holding that on March 7, 2005, but Mr. Hodgson indicated his unavailability and suggested that the meeting be delayed until Parents could obtain the additional information they were seeking. Ex. R-21, p. 383. However, District staff informed Parents and their advocate that, due to the need for state compliance, such a delay could not occur. Ex. R-21, p. 383; Tr. 513-514 (Mother acknowledging annual meeting requirement); *see* Missouri Department of Elementary and Secondary Education Special Education Compliance Program Review Standards and Indicators (2001) (standard 104700 – noting that annual IEP meetings can be no more than 365 calendar days apart). Mother did not indicate whether she would attend the March 7 meeting. Ex. R-2, p. 383; R-92, p. 930.

184. On or about March 7, 2005 and at approximately 3 p.m., Parents corresponded with the District and stated that they would not attend the scheduled IEP meeting for that date, Ex. R-92, p. 930, and also corresponded with the District regarding the team's decision of March 4 to continue Student's diagnosis as mentally retarded. Ex. R-22, p. 384; Ex. P-9; Tr. 85, 89, 512-513, 3008-3009. In that letter, Parents wrote that they believed that six of the eight team members were in disagreement with the diagnosis of mental retardation. Ex. R-22, p. 384.³³ In addition, Parents stated that, although the only requirement to make an educational diagnosis of autism was observation, to be reasonable they would permit the sensory profile and the CARS to be completed by Student's special education teacher. Ex. R-22, p. 384; Tr. 512, 3010.

185. Parents did not attend the March 7 meeting, but offered to meet March 10. Ex. R-22, p. 384. The District could not agree to a March 10 meeting due to scheduled parent/teacher

³³ Ms. Emery testified that Parents' letter did not accurately represent her position of March 4, 2005. Tr. 3009. She discussed with Parents that she did agree with mental retardation. Tr. 3009. However, Father testified that Ms. Emery, on occasions, told him and Mother that she (Ms. Emery) believed Student had autism.. Tr.4004. Ms. Emery also testified that, had the team changed Student's diagnosis to autism, she would not have anticipated any changes in Student's IEP. Tr. 3010-3013.

conferences. Ex. R-22, p. 384; Tr. 514. The meeting was then rescheduled for March 9, 2005. Ex. R-92, p. 930.

186. On or about March 7, 2005, and in response to Parents' letter, Brenda Williams, corresponded with Parents. Ex. R-23, p. 385. In that letter, Ms. Williams wrote that the staff was unaware of Parents formally requesting an IEP meeting for March 10 and reminded Parents that the team had discussed parent-teacher conferences on that date. Ex. R-23, p. 385; Tr. 514. Ms. Williams did offer March 9 as an alternative meeting date. Ex. R-23, pp. 385-386; Tr. 514.

187. On or about March 9, 2005, Student's IEP team convened to conduct her annual IEP review. Ex. R-24; Ex. R-93, p. 930; Tr. 86, 3013-3014; *see also* Tr. 4708-4709. Prior to the meeting, Parents informed the District that they would not attend. Ex. R-24, p. 392; Ex. R-92, p. 930; Tr. 515, 851, 4709. Parents, in fact, did not attend the meeting, the only IEP meeting that they did not attend at all relevant times. Tr. 86-87, 3014. The following participated: Marcie Terrill, Beverly Emery, Karen Harrach, Aimee Geringer and Brenda Williams. Ex. R-24, p. 387; Tr. 5036. The IEP's present level of performance included the results of the District's most recent reevaluation. Ex. R-24, p. 390. More specifically, the March 9 present level stated that Student was engaging in more interactive and pretend play. Ex. R-24, p. 390. The present level also noted that Student was easily distracted. Ex. R-24, p. 390. The present level also indicated that Student used a large-handled fork when eating and attempted to open her own milk carton. Ex. R-24, p. 391; *see also* Tr. 690-691, 3014-3015, 5037.³⁴ It also noted that Student enjoyed using the computer and had progressed from using the touch screen to a mouse. Ex. R-24, p. 391; *see also* Tr. 690-691. The IEP special considerations section stated that, at the time,

³⁴ At hearing, Ms. Emery testified about the milk carton goal in Student's IEP. Tr. 3015. Specifically, she testified that, on one occasion, she was in the lunchroom when Father was there with Student and he was feeding her and Ms. Emery said to Student "Why are you letting daddy feed you when you can do that yourself?". Tr. 3016. She and Father then discussed the need to allow Student to be more independent. Tr. 3016.

Student had no behaviors that impeded learning,³⁵ was not deaf or hard of hearing, and did not require assistive technology. Ex. R-24, p. 393; Tr. 3016-3017. The IEP included numerous accommodations and modifications for Student including adaptive art, music and computer, and a visual schedule and supports. Ex. R-24, p. 397. That component of the IEP noted also that Student required close proximity to instruction. Ex. R-24, p. 397; Tr. 3017. In comparison to Student's prior IEP, the March 2005 IEP deleted the use of the touch screen and enlarged cursor. See Ex. R-24, p. 397; Tr. 4713-4714.

188. The March 2005 IEP included goals and objectives in the following areas: reading, math, activities of daily living, language, pragmatic language, speech articulation, safety awareness, recreation and leisure, fine motor, reading and math. Ex. R-24, pp. 398-407; Tr. 3022-3026. In comparison to Student's immediately prior IEP, many of the goals and objectives in the March 2005 IEP were new, including those in the area of activities of daily living, fine motor, math, speech articulation, language, pragmatic language, and safety awareness. Ex. R-24, p. 398-407; *see also* Tr. 123, 3022-3026, 5037-5039. The language goals provided for the possible use of a multi-modal communication approach and the objectives included the use of picture icons. Ex. R-24, p. 404. At that time, the IEP did not include the use of an augmentative communication device. Tr. 3017. The March 2005 IEP provided for Student to receive special education services for more than 60% of the time and provided for related services of occupational therapy and speech-language therapy. Ex. R-24, p. 395; Tr. 395. It also provided for integration with her nondisabled peers during lunch recess and other activities. *See* Tr. 688-689. The March 2005 IEP was implemented as written during the time it was in place. Tr. 3026.

³⁵ At hearing, Mother testified that she disagreed with the statement that Student was not exhibiting behavior that impeded learning and stated that her behaviors, at that time, were getting worse. Tr. 108.

189. Mother could not recall why Parents did not attend the meeting. Tr. 517. Although they did not attend, Parents received a copy of the completed IEP after March 9. Tr. 86-87, 91, 516; *see also* Tr. 3014. At hearing, Mother testified that she could not recall if Parents wrote to the District after receiving the IEP to state their disagreement with anything contained therein or whether they requested to have the IEP changed. Tr. 517-518; *see also* Tr. 3016. She acknowledged that they did not file for due process to challenge it. Tr. 517. During her direct examination, she testified that the IEP did not adequately address Student's needs. Tr. 123. However, during cross-examination when asked whether she agreed with the services offered she testified that "I don't know that that was appropriate for her;" "can't say" if the 1065 minutes of special education instruction was appropriate; "I don't feel like I can say" whether Student needed more time in special education; "I don't know" whether Student needed less time in special education; and "I don't know" when asked if Student needed more time in regular education. Tr. 518. She conceded that between March 9, 2005 and the time the next IEP was prepared, she never asked to have Student's time in special education or regular education changed. Tr. 521-522.

190. Mother also testified regarding the IEP present level, goals/objectives and accommodations/modifications and other components of the IEP. With respect to the present level, Mother acknowledged that the page included the state requirements for what was required in that section. Tr. 527-528. With regard to the present level, Mother was unable to recall if anything in the March 2005 present level was an inaccurate description of Student at the time it was written. Tr. 687-688. She agreed with the statement that Student was functioning below her same age peers and testified that she continued to be at such a level. Tr. 688. She also acknowledged that the present level was silent with respect to behaviors such as spinning, hitting

or throwing. Tr. 689-690. Although she disagreed with the statement that Student was not exhibiting behaviors that impeded learning, Tr. 108, she could not remember if there were any behaviors of concern that were not described in the present level and acknowledged that she could have contacted the District if there were. Tr. 689, 692-693.

191. Mother was also questioned regarding the parent concerns listed in the present level. When asked if those were accurately stated, she testified that she could not remember if those were her concerns at the time. Tr. 691. She then testified that that section described some of Student's needs, but that she had additional ones. Tr. 692. When asked to describe those, she could not state any. Tr. 692.

192. Mother agreed that the accommodations and modifications that were included in the March 2005 IEP were ones that Student needed, but stated that they were not sufficiently specific. Tr. 693. When asked if the law required additional specificity, she did not know and could not recall if, after receiving the IEP, she contacted the District to request greater detail. Tr. 694-696. Mother also conceded that, as an educator, a teacher needed to be able to use professional discretion and have flexibility with the implementation of modifications. Tr. 694-696.

193. Mother testified that the IEP goals addressed some of Student's needs that she had at the time. Tr. 701. When asked if there were needs that were not addressed, she testified that "I'm sure there are, yes," but was unable to specify what those might be without talking to "her team and her husband." Tr. 701. After receiving a copy of the IEP, she could not recall if she contacted the District to request changes to the goals and did not immediately file for a due process hearing to challenge the IEP. Tr. 702.

194. Mother also testified that the 120 minutes per week of speech-language provided in the March IEP was not an appropriate amount of time because communication was a very important area of need for Student and, per Mother, she constantly asked for more 1:1 speech-language time. Tr. 522-523. She conceded, however, that any such requests were made verbally and not in writing and did not know if she had any written notes of such conversations. Tr. 522-524. Although she also testified on direct that she did not believe that the 60 minutes per week of occupational therapy offered was appropriate, she conceded that she never expressed any disagreement to the District to that effect. Tr. 527. She testified that she did not know if the 30 minutes per week of physical therapy was appropriate and did not express any disagreement to the District with respect to that. Tr. 527.

195. Mother also testified that, in her opinion, Student did not make adequate progress on the March IEP from March 9 through May 2005 when a new IEP was written. Tr. 123.

196. On or about March 18, 2005, Parents provided the District with a copy of Marilyn Weber's observation report. Ex. R-92, p. 932.

197. On or about March 23, 2005, the District conducted a new review of existing data based on Parents' request for additional reevaluation. Ex. R-25, pp. 409-418; Ex. R-93, p. 932; Tr. 703, 705, 3026-3027. The following were among those who participated in the development of the review: Mother, Marcie Terrill, Beverly Emery, Brenda Williams and Aimee Geringer. Ex. R-25, p. 418; Tr. 705, 2755. As part of that review, the team determined that additional information in hearing was needed and Parents stated that they would obtain current medical information for the District. Ex. R-25, p. 410. The team further determined that additional assessment was needed in the areas of health and motor and proposed the administration of the CARS and the Sensory Profile using District staff. Ex. R-25, p. 409; Tr. 2746-2747. The team

also determined that additional information was needed to determine the possibility of autism. As a result, the District proposed an observation of Student in multiple settings by a contracted autism consultant. Ex. R-25, p. 411; Tr. 707-708.

198. On or about March 23, 2005, the District provided Parents with a written notice that proposed additional evaluation in the designated areas and sought Parents' consent for those proposed assessments. Ex. R-25, p. 419; Ex. R-92, p. 932; Tr. 708-709, 3027. The District also provided Parents with a copy of the IDEA Procedural Safeguards. Ex. R-92, p. 932. Mother provided written consent to the reevaluation on or about March 30, 2005. Ex. R-25, p. 419. In providing that consent, however, Mother asked who would complete the CARS and Sensory Profile and also asked who would conduct the observations and what the multiple settings for those would be. Ex. R-25, pp. 420-421; Tr. 709, 2756-2761, 3027-3028.

199. On or about March 30, 2005, Mother corresponded with Brenda Williams and requested that Marcie Terrill be given the opportunity to write an explanation stating why she disagreed with the team's diagnosis of mental retardation. Ex. R-26, p. 422; Tr. 2657-2658; *see also* Ex. R-20, p. 382 (showing Ms. Terrill's written disagreement but also indicating that "I agree that Student is probably mentally retarded. . .").

200. On or about March 30, 2005, the District received Parents' written consent to reevaluate Student. Ex. R-92, p. 932; Tr. 710, 2755-2756.

201. On or about March 31, 2005, Brenda Williams corresponded with Parents in response to Mother' prior questions regarding the evaluation. Ex. R-27, p. 423; Ex. R-93, p. 932; Tr. 709-710, 2759.

202. On or about April 12 and 21, 2005, Dr. Rita Williams conducted the proposed observations in multiple environments. Ex. R-28, p. 424; Ex. R-92, p. 932; Tr. 4696, 4986-4989;

see also Tr. 2762-2763. Dr. Williams prepared a report of her observations that showed that she observed Student in several settings, including structured and unstructured ones. Ex. R-28, pp. 424-434. One of Dr. Williams' observations occurred at recess. During that observation, Dr. Williams observed that Student ran over to two students and held hands while running with another student, and talked and laughed with other students. Ex. R-28, p. 427. During another observation, Student greeted Dr. Williams, waved and said "hi." Ex. R-28, p. 428. During a lunchroom observation, Dr. Williams noted that Student was very observant of her surroundings, conversed with, hugged and teased her paraprofessional. Ex. R-28, p. 431. In addition to her observations, Dr. Williams used some instruments to determine Student's developmental level. Ex. R-28, p. 432. With the use of those instruments, Dr. Williams noted relative strengths for Student in interactive play and peer interaction. Ex. R-28, p. 432. In her conclusion, Dr. Williams noted that Student made eye contact, responded to the interaction of another person, maintained contact with peers during recess, showed affection, and showed interest in her peers. Dr. Williams' further noted that Student attempted to communicate with intent and was observed to appropriately relate to people and objects. Ex. R-28, p. 433. Dr. Williams recommended that the team administer a cognitive assessment and develop a communication system for Student. Ex. R-28, p. 434.

203. Parents were given a copy of Dr. Williams' report and Mother read it after receipt. Tr. 710.

204. On or about April 20 and 22, 2005, and at Parents' request, Molly Pomeroy assessed Student using the Assessment of Basic Language and Learning Skills (ABLLS). Ex. R-30, p. 436; Tr. 712, 3615, 4716. At that time, Ms. Pomeroy held a Bachelor of Arts degree. Ex. R-30, p. 436; Tr. 712. Ms. Pomeroy prepared a report of her results. Ex. R-30. As stated in the

report, Ms. Pomeroy conducted the assessment at the offices of PBM with known and unknown materials. Ex. R-30, p. 450; *see also* Tr. 4716. During the assessment, Student was compliant for most of the testing, although she engaged in one minor episode of noncompliant behavior. Ex. R-30, p. 450. In administering the ABLLS, Ms. Pomeroy assessed Student's social and group skills based on her interactions with peers attending the PBM school and parental report. Ex. R-30, p. 451.

205. Ms. Pomeroy's report showed that, in the "play and leisure" area, Student had mastered the following skills – explores toys in the environment, plays with toys, appropriate independent indoor leisure activities. Ex. R-30, p. 443. In that same area, Student had emerging skills in playing interactively with other children. Ex. R-30, p. 443 ; *cf.* Ex. R-93, pp. 972-973 (showing that one of the criteria for autism is a disturbance in the capacity to relate appropriately to objects and people and another is a deficit in the capacity to form relationships with people). In the area of social interaction, Ms. Pomeroy's report stated that Student had mastered the following – was appropriate when near peers and tolerated or responded appropriately to positive touches by peers, made eye contact and returned greetings and had an emerging skill in imitating peers. Ex. R-30, p. 443. In relation to class routines, Student had mastered the skills of physically transitioning to the next area of activity. Ex. R-30, p. 444; *cf.* Ex. R-93, p. 973 ("The [autistic] child may seek consistency in environmental events to the point of exhibiting rigidity in routines.").

206. At hearing, Mother was asked if Ms. Pomeroy's report indicated a diagnosis of autism. Tr. 713. In response to that question, Petitioners' attorney stated, "I don't think it [the ABLLS] is intended to be a diagnostic tool. . . ." Tr. 713. Petitioners then stipulated that Ms. Pomeroy's report did not have a diagnosis or conclusion of autism. Tr. 713.

207. In addition to her other testimony, Ms. Pomeroy testified about the ABLLS and its administration. Tr. 3615. She testified that the ABLLS is a criterion referenced test that measures “Student against Student.” Tr. 3615. The ABLLS includes a list of skills that are set forth in a developmental sequential fashion and it was administered to see where Student was functioning with respect to those skills. Tr. 3615-3619. As such, it did not generate standard skills or deviations. Tr. 3616. The version that Ms. Pomeroy administered to Student “tops out at seven years,” meaning that most seven year olds should be able to perform all the listed skills. Tr. 3619. That version, according to Ms. Pomeroy, is not as good as a newer revised version. Tr. 3619. Because the ABLLS is designed to be used to develop curriculum and to develop IEP present levels and goals, it can be given as frequently as needed to check a child’s progress. Tr. 3616.

208. The ABLLS permits the examiner to observe the skills or get information regarding those skills through an informant. Tr. 3849. Normally, prior to giving the ABLLS, Ms. Pomeroy sought the input of the student’s teachers if they were available, but did not do so in this case with Student’s teachers. Tr. 3850. Although Ms. Pomeroy prefers to observe the skills herself, she used parent report on some of the sections. Tr. 3854. Her report, however, does not specifically identify which of the skills noted was based on Parents’ report. Tr. 3854. Ms. Pomeroy conceded that if the informant information she was given was incorrect, that some of her conclusions in her report also are not correct. Tr. 3853.

209. Although most instructions on the ABLLS are given verbally, Ms. Pomeroy could not recall if she was made aware that Student might have vision or hearing issues that could impact administration. Tr. 3888. She conceded that would be important to know. Tr. 3888. She also could not recall if she used an FM auditory trainer system during the test administration. Tr.

3888. She did not review Student's IEPs and did not ask Parents to give her permission to speak to any of Student's teachers. Tr. 3857-3858. She also did not know what skills Student had at the time. Tr. 3866-3867. The ABLLS simply required her to record whether she observed the skill and/or what Student's parents told her. Tr. 3868. She conceded that, if Student already had the enumerated skills in her repertoire that she demonstrated for Ms. Pomeroy, then she generalized them from a prior instructor and setting. Tr. 3875, 3879-3880.

210. Ms. Pomeroy took approximately six hours to administer the ABLLS. Tr. 3887. During that time, Student was easily redirected and had only one instance of noncompliance. Tr. 3890.

211. Ms. Pomeroy provided no recommendations based on the ABLLS and was not asked to do so. Tr. 3897. She stated that her report did not contain adequate information for the development of IEP goals and objectives. Tr. 3863-3864. She did not know if Parents gave a copy of the report to Rainbow. Tr. 3883.

212. With respect to Student, the section of the ABLLS relating to social skills and social interaction was based on parental report and on Ms. Pomeroy taking Student into an environment at PBM with other children. Tr. 3629. Student had never been in that setting before and did not know the children. Tr. 3846. During the 25-30 minutes that Student was in the circle time with approximately 8-10 children, she sat nicely and attended to the group, was able to imitate her peers, used eye contact with peers and adults and was able to generalize the skill of returning greetings with unfamiliar people. Tr. 3862. She also was able to use the skills previously demonstrated for Ms. Pomeroy in that peer group setting. Tr. 3847. During that environment and according to Ms. Pomeroy, Student smiled and attempted to interact with those other children. Tr. 3629. Student looked around the room at the other children and teachers, was

interested in the environment, oriented if someone spoke to her and smiled. Tr. 3629. The ABLLS also showed that, in that setting, Student made good eye contact and, socially, appeared comfortable in the setting. Tr. 3629. Per Ms. Pomeroy, those characteristics are “not necessarily” inconsistent with autism. Tr. 3630; *but see* Ex. R-93 at 972 under the definition of autism (“autism means a developmental disability significantly affecting . . . social interaction”) and at 973 A. 2) (“There is a deficit in the capacity to form relationships with people.”)

213. In addition, Ms. Pomeroy testified that the ABLLS can be used to differentiate between mental retardation and autism. Tr. 3635. According to her, children with autism demonstrate “splinter skills” which she defined as “really high in one area and really low in another.” Tr. 3635. In contrast and, in Ms. Pomeroy’s opinion, a mentally retarded child has a “straight” level of functioning with “no big splinters.” Tr. 3635. In Ms. Pomeroy’s opinion, Student had splinter skills, Tr. 3636, but conceded that she was functioning considerably below her chronological age in all areas. Tr. 3635; *cf.* Ex. R-93, p. 973 (noting that child with autism may exhibit “areas of precocious skill development” “while other skills may develop at normal or extremely depressed rates”).

214. Becky Hughes also testified that she was familiar with the ABLLS and confirmed that it is not a diagnostic tool for autism but is, rather, a tool used to assess language skills and for developing goals and objectives. Tr. 5737. Indeed, as Ms. Hughes stated, as confirmed by every witness that was asked, there is no definitive objective test for diagnosing autism. Instead, a team has to determine that educational diagnosis through a review of medical records, observation, interview and past history and then conclude, based on all that information, whether the symptomology is present. Tr. 5737.

215. On or about April 21, 2005, Brenda Williams spoke with Mother regarding dates for a team meeting. On April 25, 2005, Mother reported to Ms. Williams that the week of May 9 would not work for her and Ms. Williams informed her that May 5 would work for school staff. Ex. R-92, p. 932.

216. On or about April 25, 2005, the District provided Parents with a notification of conference for a team meeting for May 5, 2005, to review evaluation information. Ex. R-29, p. 435; Ex. R-92, p. 933; Tr. 711, 2766-2767. Parents received and read that notification and knew, based upon it and prior experience, that they had the right to invite others and did so. Tr. 711-712, On or about May 2, 2005, the District provided Parents with a second notification of conference for a team meeting to review evaluation information to be held on May 5, 2005 at a different time. Ex. R-31, p. 453; Ex. R-93, p. 933; Tr. 713-714. Father signed the conference notification with a communication that he planned to attend the meeting at the rescheduled time. Ex. R-31, p. 453; Tr. 714.

217. On or about April 28, 2005, Parents provided the District with a copy of Molly Pomeroy's report regarding the ABLLS administration. Ex. R-92, p. 933; Ex. R-30, p. 436; Tr. 4716.

218. On or about May 2, 2005, Parents contacted Kristi Hinton to inform her that their team would not be able to meet on the proposed date of May 5 at 3:30 but would be able to meet on that date at 9:00 a.m. Ex. R-92, p. 933. In response, Ms. Hinton spoke with the building principal to arrange for substitutes for participating staff members. Ex. R-92, p. 933.

219. On or about May 5, 2005, Student's multidisciplinary team convened to review the results of the additional reevaluation that was conducted at Parents' request, to consider the results of additional outside evaluations submitted by Parents and to prepare a report that

reflected the results of all the evaluations conducted. Ex. R-32, pp. 454-473; Ex. R-92, p. 933; Tr. 614-615, 4704, 2790, 3029. After the meeting, Parents received a copy of the reevaluation report. Tr. 714. The following individuals were among those who participated in the meeting: Father; Marcie Terrill, Beverly Emery, Brenda Williams, Stephanie Dustman, Kristi Hinton, Ms. Knight, Molly Pomeroy, Patrick Farnan, and Rand Hodgson. Ex. R-32, p. 473; Tr. 714, 1200-1201, 4717. Tr. 714-715. Parents invited Ms. Pomeroy, Mr. Hodgson and Ms. Knight. Tr. 714-715.

220. The May 2005 evaluation report showed that Student's treating physician at that time indicated that "Student does have hearing loss" and that Parents had plans to obtain a full audiological exam over the summer. Ex. R-30, pp. 454-455; Tr. 3029-3030. The report also included the results of the CARS completed by the District with Ms. Emery as the informant. Ex. R-30, p. 455; Tr. 2768-2769, 2794-2795. Although Ms. Emery's scores showed that Student displayed mild to moderate characteristics of autism, the report reflected that the scores were to be interpreted cautiously since the CARS based scores on a student's chronological age rather than the student's developmental age. Ex. R-30, p. 456; Tr. 2770-2771, 3030, 4696. In that regard, Ms. Emery reported that, although Student might display some autistic characteristics, those also were consistent with her developmental age. Ex. R-30, p. 457; Tr. 2771-2776, 2780-2784, 3031-3032.

221. The report also included the results of the Sensory Profile administered by Stephanie Dustman, the District's occupational therapist. Ex. R-30, p. 459; Tr. 3032. That instrument showed that Student displayed some sensory processing issues, but the District assessment showed results that differed from that completed by Parents. Ex. R-30, p. 459; Tr. 2795-2805.

222. Because Parents refused to consent to an intelligence test, the report did not include a current IQ score. Ex. R-30, p. 461; Tr. 4697. However, the report included the prior results of an administration of the LAP-D, in 2002 (as discussed above) which showed that Student's cognitive abilities were 2.33 standard deviations below the mean. Ex. R-30, p. 461.

223. After reviewing the results of all information presented, the team agreed that Student met the state criteria for Other Health Impaired (based on medical diagnoses of Down's syndrome and autism) and Speech/Sound System Disorder. Ex. R-30, p. 472; Tr. 715, 3034, 4886; *see also* Tr. 2828-2822. As noted in the report, Student demonstrated limited strength and alertness, including a heightened alertness to environmental stimuli, and characteristics of Down's syndrome were observed daily by school staff across all settings. Ex. R-30, p. 472; Tr. 716, 3034-3035. The report further stated that, although Student displayed autistic tendencies in school, those were not consistently observed. Moreover, Dr. Williams' observations showed that Student's developmental delays could have resulted in the display of autistic type characteristics. Ex. R-30, p. 472. Parents, Rand Hodgson, Molly Pomeroy, and Ms. Knight signed that they were in agreement with the diagnostic conclusion. Ex. R-30, p. 473; *see also* Ex. R-92, p. 933; Tr. 2814, 3035-3036, 4220, 4069. That change in diagnosis did not have any impact on the services or goals of Student's subsequent IEPs. Tr. 3036.

224. According to Brenda Williams, the District's assessments supported the diagnosis of other health impaired and that conclusion was not a compromise. Tr. 4864-4865, 4703; *see also* Tr. 4842-4844. However, Father testified that he did not agree with the diagnosis but had to sign it to get one step forward. Tr. 4069-4070. The team had the requisite medical diagnoses of autism and Down's syndrome and the assessments showed the necessary adverse impact. Tr.

4703. As noted by Ms. Williams, “through discussions and review of information, everyone was in agreement that that best targeted Student’s disability. . . .” Tr. 4703.

225. At the meeting, all team members except Kristi Hinton signed that they were in agreement with the change of diagnosis to other health impaired. Ex. R-30, p. 472; Tr. 715-716, 3034-3036, 4864-4865. After the meeting, Mother was informed of the change and testified, at hearing, that she agreed with it. Tr. 716. When asked why she agreed to other health impaired if she thought Student was autistic, Mother stated that Parents were trying to come to a compromise with the school so that Student could get the services she needed. Tr. 1178-1179.

226. On or about May 5, 2005, the District provided Parents with a notice of action proposing to change Student’s educational diagnosis from mental retardation to other health impairment and speech disorder. Ex. R-33, p. 474; Ex. R-92, p. 934; Tr. 717, 3036, 4706. On or about May 9, 2005, Parents provided their consent for that proposed action to be carried out without waiting for 10 days. Ex. R-33, p. 474; Ex. R-92, p. 934; Tr. 717, 3035-3036, 4707. At hearing, Mother testified that she understood that the District was asking if Parents wanted the change made immediately. Tr. 718. She further testified that, after the change to other health impaired was made, Student’s educational diagnosis was neither mental retardation nor autism. Tr. 718. From at least May through July 2005, Parents took no steps to challenge the change in diagnosis to other health impaired. Tr. 718.

227. On or about May 6, 2005, the District provided Parents with a notification of conference for an IEP review meeting to be held on May 16, 2005. Ex. R-34, p. 475; Tr. 718, 4707. Parents indicated by their signatures that they planned to attend. Ex. R-34, p. 475; Tr. 718.

228. On or about May 16 and 24, 2005, Student's IEP team convened to review and revise her IEP. Ex. R-36, pp. 477-479; Ex. R-37; Ex. R-92, p. 934; Ex. P-23; Tr. 2366, 1172, 3037, 3430, 4719. The following individuals were among those who attended and participated in one or both of the multiple meetings: Father, Marcie Terrill, Beverly Emery, Kristi Hinton³⁶, Aimee Geringer, Stephanie Dustman, Ms. Knight, and Rand Hodgson, Ex. R-36, pp. 478-479; Tr. 719, 1173, 1322, 3044. The District prepared a conference summary that reflected the discussion and decisions that occurred at the multiple meetings. Ex. R-36, pp. 477, 4719. The conference summary reported that each of the two meetings lasted approximately two hours each. Ex. R-36, p. 477; Ex. R-93, p. 934; Tr. 3037. Those were not typical meetings for the District. Tr. 3038. The summary also reflected that the team agreed that the IEP present level that was developed was a valid representation of Student's overall performance. Ex. R-36, p. 377; Tr. 3038. The team spent a significant amount of time preparing the specific wording of the IEP goals and, at the conclusion of the process, all members of the team agreed with the wording of each goal. Ex. R-36, p. 477; Tr. 3038-3039, 3062-3063; *see also* Tr. 5048. Mr. Hodgson was the most active person involved in the writing of the goals and objectives. Tr. 3039. The team agreed to some of his suggestions. Tr. 3039.

229. Per the meeting notes (conference summary), Parents' primary concern at that time was communication and Parents agreed to begin the process of looking into an augmentative communication device. Ex. R-36, p. 477; Tr. 3039. The team also agreed to document Student's therapy times in the communication log, and to provide Parents with daily communication. Ex. R-36, p. 477. By the conclusion of the meeting, the team members agreed

³⁶ Ms. Emery testified that it was not typical for Kristi Hinton to attend IEP meetings. Tr. 3044. In Ms. Emery's opinion, Ms. Hinton attended because "these were a lot different than we had before and it was a lot of back and forth controversy with the advocate and everybody that the parents were bringing in . . . and I guess Kristi felt like she needed to be there." Tr. 3044. The meetings during that time were somewhat adversarial, but the IEP team was able to complete the IEPs. Tr. 3045.

upon all the accommodations and modifications included in the IEP. Ex. R-36, p. 477; Tr. 3040, 3045.

230. During the discussion of Student's need for paraprofessional support, Parents requested an individual paraprofessional for Student, but the team decided to provide her with paraprofessional support when she was outside her special education classroom. Ex. R-36, p. 477; Tr. 3040-3041. During her special education time, the team decided that she could be supported by the special education teacher and the classroom paraprofessional. Ex. R-36, p. 477.³⁷ The meeting notes also reflected that individual instruction would be implemented to support continued progress in meeting academic expectations. Ex. R-36; Tr. 3042. Ms. Emery did not think she needed that 1:1 support and believed that she would have benefited from group instruction. Tr. 3042. "[a]t the conclusion of this meeting, each team member agreed upon information contained in the IEP." Ex. R-36, p. 477; Ex. R-92, p. 934. Although Mother was not in attendance, Father conveyed that he would discuss the team's recommendations with her and Parents would let the District know of their decision within a short time. Ex. R-92, p. 934; *see also* Tr. 719-721 (showing that Mother testified that, subsequent to the meeting, Parents received a copy of the May 2005 IEP, that she discussed what had occurred with her husband, and she "was sure" that he shared with her that, at the conclusion, everyone signed in agreement with the content of the IEP).

231. The team prepared a revised IEP document that resulted from those two meetings. R-37, p. 480; Tr. 720-721. That IEP provided for Student to receive 1065 minutes per week of specialized instruction in academics, 90 minutes per week of speech therapy, and 60 minutes per

³⁷ Ms. Emery testified that, at that time, she agreed that Student needed a paraprofessional with her when she was outside the special education classroom. Tr. 3040-3041. However, when in her classroom, there was no great need for a paraprofessional because she "was able to handle things in the course of the day." Tr. 3041. In addition, Ms. Emery did not want to see Student become too dependent on a person. Tr. 3041.

week of both language and occupational therapy. Ex. R-37, p. 480; Tr. 1197, 3043. The IEP also provided for Student to receive 750 minutes per week of regular education. Ex. R-37, p. 480; Tr. 3043.

232. The present level of the IEP stated that, at that time, Student was using the bathroom independently. Ex. R-37, p. 484. The present level also stated that, although Parents reported that Student had difficulty with changes in her routine, school staff stated that she was adaptable with such changes. Ex. R-37, p. 484. The present level also noted that, when working in a group, Student benefited from the modeling of her peers. Ex. R-37, p. 484. The IEP also noted that, when playing with her special education peers, Student was engaged in more interactive as opposed to parallel play. Ex. R-37, p. 484, 486; Tr. 722. The present level further reported that Student could then, with a model, pick out the letters of her name and place in the correct order, had improved recognition of personal safety situations, and had made progress in moving from a touch screen to a mouse. Ex. R-37, pp. 484-486. The present level indicated Parents' concerns at the time as being with safety and the continued need for daily communication.³⁸ Ex. R-37, p. 486; *see also* Tr. 730-731 (reflecting Mother' testimony that it addressed "some of our concerns at the time" but that she could not recall if the parents contacted the District to say there were other concerns); 3047.

233. Mother testified that the May 2005 present level of performance generally was an accurate description of Student at that time, that it acknowledged Student's sensory needs, and she was unable to recall if Student displayed any behaviors other than those mentioned in the present level. Tr. 721-723, 725, 727. She also testified that the May 2005 IEP was the first IEP developed for Student after the change in educational diagnosis to other health impaired and that that change in diagnosis did not change Student's present level with respect to what she could

³⁸ Ms. Emery was already providing daily communication. Tr. 3048, 3055.

and could not do. Tr. 722. Mother further acknowledged that the present level showed that Student was, at that time, making progress communicating verbally with her peers. Tr. 723-724. Mother testified that Parents were responsible for Student's toileting gains but conceded that she did not address those needs during the school day at Buckner. Tr. 724.

234. The May 2005 IEP reflected the team's decision that Student, at that time, did not exhibit behaviors that impeded her learning or that of others. Ex. R-37, p. 488; Tr. 727, 3048. Mother, however, testified that she believed that Student did have such behaviors but, as she was not present at the meeting, did not know if Mr. Hodgson or Father asked for that component to be changed. Tr. 731. Parents did not communicate to the District that they wished for it to be changed. Tr. 732. At home, Student was spinning, rocking and humming. Tr. 727. District staff reported not observing those behaviors at school. Tr. 727.

235. The May IEP also reflected the team's decision that, at that time, Student was not hearing impaired. Ex. R-37, p. 488; Tr. 3048. Mother testified, however, that Student "always had a hearing loss." Tr. 1177.

236. The May 2005 IEP stated that Student had assistive technology needs addressed in the IEP and was eligible for extended school year. Ex. R-37, p. 488. The accommodations and modifications section of the IEP provided for, among other things, sensory rich experiences, extended time to process information, positive reinforcements, individual low sensory instruction and a daily communication log. Ex. R-37, p. 493; Tr. 734-735, 3048-3052, 5373, 5042. The IEP added the use of an adaptive keyboard. Ex. R-37, p. 493. Mother testified that the IEP provided for some of the accommodations and modifications that Student needed at the time, but conceded that, after receiving and reviewing the IEP, she did not ask for any additional ones. Tr. 735-736.

237. Mr. Hodgson and Ms. Knight suggested the addition of sensory rich experiences. Tr. 3048. After the addition of that language, Ms. Emery provided such things to Student. Tr. 3049. However, she saw little difference in Student with the addition of those sensory items. Tr. 3049. Mr. Hodgson also suggested the addition of “frequent positive reinforcement and praise.” Tr. 3050. However, because that was something that Ms. Emery already did, she did not feel that it needed to be added to the IEP. Tr. 3050. Mr. Hodgson also recommended the use of the low sensory, sterile environment. Tr. 3052-3053. According to Ms. Emery, Student did not like being in the sterile environment and that is when Student started having more behaviors. Tr. 3054. After the addition of that accommodation, Student would throw things at Ms. Emery, “run and hide and giggle.” Tr. 3054. In Ms. Emery’s opinion, Student liked being with the other children and felt like she was being separated from them when placed in that environment. Tr. 3054. In addition, at that time, Ms. Emery was asking her to perform more tasks that were harder for her. Tr. 3054.

238. The May 2005 IEP included goals in the areas of activities of daily living, math, reading, fine-motor, language, and speech. Ex. R-37, pp. 494-502; Tr. 3056. The goals were appropriate for Student at that time. Tr. 3054-3062. Many of the goals and/or objectives were new for Student and others were worded differently from prior IEPs. Ex. R-37, pp. 494-502; Tr. 3056-3062. Many of the wording changes were made at Mr. Hodgson’s request. Tr. 3056, 3061. Some of the changes were the result of Student’s progress. Tr. 3059. The language goals were to be implemented using a multi-modal approach. Ex. R-37, p. 499; Tr. 3059. Mother testified that the goals incorporated those areas that Student needed to work on. Tr. 736. Although she also testified that she “was sure” that there were areas of need not addressed in the goals, she could not be specific as to what those were and could not recall if Parents had requested changes

to the goals. Tr. 736-737. Mother also stated that many of the goals addressed Student's need to learn to generalize the skills being addressed. Tr. 728-730, 1298-1300.

239. Ms. Williams testified that, in her opinion, the May 2005 IEP was appropriate for Student. Tr. 4881. She further testified that the present level, goals and objectives, and accommodations and modifications were appropriate in light of Student's needs. Tr. 4881-4882. In her opinion, had Student's educational diagnosis remained mentally retarded or changed to autism, the same IEP would have resulted. Tr. 4882-4883.

240. The District implemented the May 2005 IEP and prepared written progress reports with respect to the May 2005 IEP goals. Ex. R-37, pp. 494-502; Tr. 499, 1276, 3063. Those reports showed that Student was making progress with respect to the goals and objectives of the IEP and mastered some. *See* Ex. R-37, pp. 494-502; Tr. 738-742, 1276, 5048; *see also* Tr. 746. The District had data to support the reported progress. Tr. 5048. Parents received those progress reports and, after receiving, did not contact the District to say that they disagreed with the reported progress. Tr. 1277. Mother also acknowledged that she could not say who, the Parents or the District, were responsible for that progress. Tr. 1278. Mother also testified that the progress reports included additional information regarding the benchmarks/objectives and that she did not recall requesting additional data on those. Tr. 738-742.

241. On or about May 24, 2005, Student's IEP team determined that she was eligible for extended school year services from May 31, 2005 through July 1, 2005 in the areas of speech, language and occupational therapy. Ex. R-37, p. 491; Tr. 732-734, 3048.

242. On or about May 16, 2005, the District provided Parents with a notice of action proposing to remove Student's physical therapy services based on her improvement in her gross motor abilities. Ex. R-35, p. 476; Tr. 3043.

243. On or about May 27, 2005, Parents informed Brenda Williams that Student would not fully attend ESY during the 2005 summer, but agreed that she would attend only for occupational and speech-language therapies. Ex. R-92, p. 934.

244. On or about July 19, 2005, Parents had Student's hearing audiological assessed at Children's Mercy Hospital. Ex. R-39, p. 506; Tr. 374; 747-748, 1164, 1208-1209. The report generated showed that Student had a newly identified hearing loss in her right ear, had normal hearing in the left ear, and was not a candidate for a hearing aid. Ex. R-39, p. 506; Tr. 374; Tr. 748-749, 1251-1254.³⁹ Mother testified, however, that as of the time of her testimony, Parents were looking into the possibility of hearing aids. Tr. 748-749.

245. During the 2005-06 school year, Student attended second grade at Buckner. Ex. R-44, p. 523, Tr. 2903-2904, 3064. That was Student's last year in the District. Tr. 3064, 4723. Ms. Emery continued as her special education teacher, Nancy Mulford served as her regular education teacher, Sherryl Kelly was her speech-language pathologist, Stephanie Dustman was the supervising occupational therapist, Cindy Grimmatt was the COTA, and Brenda Williams continued as the process coordinator. Ex. R-44, p. 523. Tr. 1280, 2233, 2903, 3064-3065.

246. Brenda Williams testified that, during the year, a shift occurred in Parents' relationship with the District. Tr. 4723. However, Ms. Williams never questioned the District's ability to meet Student's needs, in spite of that changed relationship. Tr. 4723-4724.

³⁹ Brenda Williams testified that Parents took Student every six months for an audiological exam and that, during the four years she served as Process Coordinator at Buckner Elementary, the District consistently asked Parents to provide information from those exams. Tr. 4686. Mother acknowledged that Parents took Student to an ear, nose and throat doctor every six months since the age of two. Tr. 1253-1255. Prior to July 2005, that physician did not suggest that Student be taken to an audiologist to determine if she had a hearing loss. Tr. 1254. Toward the end of that four-year period, the District received a report stating that Student had a hearing loss in one ear. Tr. 4686. At that time, the District purchased an FM system for Student. Tr. 4686. Moreover, although Mother testified that Student "had a hearing impairment all along," she subsequently conceded that Children's Mercy Hospital was the first to diagnose it in July 2005. Tr. 1251-1253. Parents never asked the District to change Student's educational diagnosis to hearing impaired. Tr. 1255. Mr. Hodgson never suggested that they do so. Tr. 1256.

247. On or about August 16, 2005, Mother stopped Beverly Emery at Buckner and informed her of the newly confirmed identified hearing loss. Ex. R-92, p. 936. In response, Ms. Emery suggested that the District obtain an auditory trainer for Student's use. Ex. R-92, p. 936.

248. On or about August 18, 2005, Mother stopped Beverly Emery at school and expressed concerns about Student's paraprofessional situation. Ex. R-92, p. 936. More specifically, Mother inquired about who would be eating with Student and who would be with her at recess. Ms. Emery informed Mother that the District would provide a substitute paraprofessional while the regular paraprofessional was out due to a family situation. Ex. R-92, p. 936.

249. On or about August 18, 2005, Brenda Williams contacted Parents to obtain information regarding Student's audiological evaluation that was conducted over the summer. Ex. R-92, p. 935. On or about August 19, 2005, Mother brought Ms. Williams a copy of the audiological evaluation. Ex. R-92, p. 935; Tr. 1164, 1166, 1209; *see also* Tr. 750. Ms. Williams gave a copy of the report to the District's speech-language pathologist so that she could follow-up and order an auditory trainer for use at school. Ex. R-92, p. 935.

250. After being informed about the hearing loss, the District pursued an audiological exam and the audiologist, Chana Edwards, participated in Student's IEPs. Tr. 4690. In addition, the District obtained an FM system to assist Student with hearing. Tr. 3064, 4690.

251. On or about August 22, 2005, Mother requested that Ms. Emery provide her with a copy of Student's daily schedule. Ex. R-92, p. 940; Tr. 3067. In response, Ms. Emery sent a copy of that schedule in Student's planner. Ex. R-92, p. 940; *see also* Ex. P-27.

252. On or about August 24, 2005, Mother contacted Ms. Emery to see when Student's speech therapy would be starting. After checking with the speech-language pathologist, Ms. Emery communicated that information to Parents. Ex. R-92, p. 940.

253. In August 2005, the District's communication/access logs that Ms. Emery kept showed an unusual amount of communication with Parents. Tr. 3067. In Ms. Emery's opinion, the communication frequency was because Mother wanted to make sure that everything on the IEP was being implemented as quickly as possible. Tr. 3068. Ms. Emery dates Mother's increased concerns and communication from the time that the District started the evaluation process during the 2004-2005 school year. Tr. 3068. However, according to Ms. Emery, her relationship with Parents remained a good one. Tr. 3069.

254. On or about August 25, 2005, Father went to Buckner to discuss with Brenda Williams issues related to Student's IEP. Ex. R-92, p. 935. He asked about when Student's therapies would begin. Ex. R-92, p. 935. He also asked about the Touchscreen (which was no longer in the IEP) and keyboard and Ms. Williams informed him that she would get back to him after she spoke to staff regarding those issues. Ex. R-92, p. 935. During the conversation, Father shared that he and his wife would be requesting an IEP review after speaking with their advocate. When Ms. Williams asked about the topic of the meeting, he shared that they would like to discuss issues related to hearing. Ms. Williams then informed him that staff was aware of the hearing loss in the one ear and the District was seeking to obtain an auditory trainer. Ex. R-92, p. 935. After the conversation with Father, Ms. Williams spoke to Stephanie Dustman to discuss the keyboard and Ms. Dustman informed her that she was working to obtain one from a lending library. Ex. R-92, p. 935. Ms. Williams then left a message for Parents to provide them with updated information. Ex. R-92, p. 935.

255. On or about August 26, 2005, Stephanie Dustman called Parents and left a message regarding the adaptive keyboard that had been requested for Student's use, (Ex. R-92, p. 937) which was a prescribed modification/accommodation of the May 2005 IEP. Ex. R-37, p. 493.

256. On or about August 26, 2005, Parents stopped in Ms. Emery's classroom and appeared upset.⁴⁰ They questioned Ms. Emery about where the adaptive keyboard was and why the computer teacher was not following the IEP accommodations. They also expressed concern about the use of a substitute paraprofessional the day before and Mother stated that they wished to have a personal paraprofessional for Student. Ex. R-92, pp. 937, 940-941; Tr. 3069. Parents then requested an IEP review meeting for the next week. Ex. R-92, pp. 937, 940-941.

257. On or about August 26, 2005 and via an e-mail to Ms. Emery, Parents requested an IEP meeting to discuss new information obtained over the summer and to discuss accommodations and modifications. Ex. R-92, p. 941; Tr. 3069-3070.

258. On or about August 29, 2005, Parents were informed that their requested meeting date of September 1 was not available for an IEP meeting and the District requested additional possible dates. Ex. R-93, pp. 942-943.

259. On or about September 1, 2005, the District borrowed an adaptive keyboard for Student's use. Ex. R-92, p. 942; Tr. 3071. On that same date, Ms. Emery met with Student's other teachers to discuss the IEP accommodations and modifications required for Student. Ex. R-92, p. 942.

⁴⁰ Mother was upset because she observed Student sitting at the back of the computer room with her paraprofessional, and because the touch screen and adaptive keyboard had not yet been installed on the computer. Ex. R-92, p. 942.

260. In September 2005, Brenda Williams and Mother communicated via e-mail in an effort to determine a mutually convenient time to hold an IEP meeting to discuss Student's newly confirmed hearing loss. Ex. R-40, p. 517; Ex. R-42, p. 520; Tr. 752. Mother indicated that they were waiting to hear from their advocate, Mr. Hodgson, before agreeing to a date. Ex. R-40, p. 517; Tr. 752; *see also* Tr. 3070. Ultimately, Mother indicated that an October date worked best. Ex. R-42, p. 520.

261. On or about September 2, 2005, Ms. Williams spoke to Mother regarding dates for an IEP meeting. Ex. R-92, p. 943. During that conversation, Mother indicated that she would prefer to wait until mid-September. Ex. R-92, p. 943. After Ms. Williams informed her that the dates of September 14-15 would not work for the Buckner team, Mother stated that she would have to speak to her advocate and provide optional dates. Ex. R-92, p. 943. Ms. Williams also informed Mother that the District had received an adaptive keyboard and that meetings had been held with staff regarding the accommodations and modifications in Student's IEP. Ex. R-92, p. 943.

262. On or about September 6, 2005, the District had the adaptive keyboard installed in Ms. Emery's classroom. Ex. R-92, p. 942. The keyboard obtained was a loaner for six weeks to see if it would work for Student. Ex. R-92, p. 942.

263. On or about September 6, 2005, Brenda Williams left a message for Parents regarding possible IEP meeting dates, updated them regarding the loaned adaptive keyboard, and further informed them that, if that keyboard was found appropriate, the District would reorder and, if not, would try a different format. Ex. R-93, p. 943.

264. On or about September 8, 2005, Mother asked Ms. Emery when Student received speech therapy and Ms. Emery sent a schedule showing when Student received her services. Ex.

R-92, p. 942; Tr. 3071. On that same date, Ms. Emery asked Mother when she and her team could convene for an IEP meeting and Mother responded by saying she had been unable to contact Mr. Hodgson regarding his available dates. Ex. R-92, p. 942. On that same date, Brenda Williams spoke to Mother regarding IEP dates, and Mother informed her that she had been unable to contact Rand Hodgson to get his available dates. Ex. R-92, p. 944.

265. On or about September 9, 2005, Brenda Williams spoke to Father about possible IEP meeting dates and he informed her that they would have to get back to her. Ex. R-93, p. 944.

266. On or about September 9, 2005, the District had Dr. Chana Edwards, an educational audiologist with the Multi-District Deaf/Hard of Hearing Program, conduct a technology evaluation due to Student's recently diagnosed hearing loss. Ex. R-39, pp. 505, 508-516; Tr. 749. Dr. Edwards recommended that Student receive annual audiological evaluations, that a classroom trial with an amplification system be conducted, and that Student be preferentially seated. Ex. R-39, p. 508.

267. On or about September 13, 2005, Mother e-mailed Brenda Williams regarding IEP meeting dates, informed her that the dates the District was available would not work for Rand Hodgson, and that Parents were having difficulty making contact with Mr. Hodgson. Ex. R-93, p. 944; *see also* Tr. 752 (where Mother acknowledged that the difficulty in scheduling IEP meetings at times resulted from her attempts to get in touch with Mr. Hodgson).

268. On or about September 13, 2005, Ms. Emery made a necklace for Student to serve as a communication device. Ex. R-92, p. 945; Tr. 3071. The necklace held laminated pictures of Student in various settings that Student could use to communicate her wants and needs when out of the special education classroom. Ex. R-92, p. 945; Tr. 3072. Prior to sending Student to

recess with the necklace, Ms. Emery worked with her to teach her how to use it. Tr. 3072. Ms. Emery went with Student to recess to demonstrate to Student and her peers how it should be used. Ex. R-92, p. 945; Tr. 3072. When Ms. Emery was at recess, she observed Student and her peers using the necklace. Tr. 3073. However, Nancy Mulford⁴¹, Student's regular education teacher for the 2005-2006 school year, testified that she did not notice Student use the necklace with her peers (Tr. 2298) although Student was with Ms. Mulford only about 35 minutes a day (Tr. 2265) which included recess. Tr. 2264.

269. At some point during the 2005-2006 school year, Ms. Emery began stating that Student needed a communication device. Tr. 3073-3074, 3143. In the course of working with Student, Ms. Emery realized that Student needed something for communication outside the special education classroom. Tr. 3143. As a result, she did some research to see what was available. Tr. 3143. However, as set forth below in these findings, Ms. Knight had been discussing the possible use of a communication device since Student's kindergarten year.

270. On or about September 20, 2005, Ms. Emery spoke with Mother regarding Student's behavior when Student refused to stay in the "safe spot." Ex. R-92, p. 945; Tr. 3074. The safe spot was a strategy that was used as part of the District's BIST approach. Tr. 3074. In the District, teachers are to use certain language with students for consistency. If a student misbehaves, the student is sent to a safe spot. Tr. 3074. In Ms. Emery's room, there were several safe spots including carpet squares in the room. Tr. 3075. If the safe spot does not work, the student is sent to a buddy room. Tr. 3074. The buddy room was a somewhat enclosed area in another classroom. Tr. 3075. Ms. Emery modified the BIST approach for her students, and

⁴¹ Ms. Mulford has a bachelor's of science in elementary education degree, plus a master's of science in education and mental retardation plus 32 hours. She is certified in elementary education K-9 and certified in special education, K-12, for mental retardation and learning disabilities. Tr. 2225. Ms. Mulford was in her 30th year of teaching at District at the time she testified (January 15, 2008). Tr. 2224.

allowed them two safe spots prior to being sent to the buddy room. Tr. 3074-3075. If the buddy room did not work, the student went to the recovery room and then to the principal if warranted. Tr. 3075. The recovery room was another room to which an adult would take the student. Tr. 3075-3076. Depending on the student, an adult would conduct interventions in the recovery room. Tr. 3076. Ms. Emery generally did not send her students to the recovery room because she felt it generally was not appropriate for them. Tr. 3076.

271. During the 2005-2006 school year, Ms. Emery observed that Student had more behaviors compared to the three prior years. Tr. 3076. Student was becoming more obstinate, especially when she worked with her in the sterile environment or “office.” Tr. 3077. At times, Ms. Emery found her modified BIST approach worked for Student. Tr. 3076. At times, Student would run from the safe spot and laugh and go to another part of the classroom. Tr. 3077. As Ms. Emery stated, “kind of typically what you would think a little kid would do when you’re teaching them to stay in a time-out or something.” Tr. 3077. In Ms. Emery’s opinion, those increased behaviors were cause, in part, because District staff was asking more of her. In addition, and because of the IEP changes, Student was being removed more from the group. Tr. 3077. Ms. Emery also concluded that some of the behaviors were a result of Student wanting to communicate more and she was “indicating a lot that she would do it herself.” Tr. 3077. In fact, “she was wanting to be more independent.” Tr. 3077. Ms. Emery used the communication/access logs to document some of the more severe behaviors. Tr. 3078-3080; *see, e.g.*, Ex. R-92, pp. 945, 946.

272. On or about September 21, 2005, Dr. Chana Edwards provided Kristi Hinton with the paperwork necessary to obtain an FM amplification system for Student at school. Ex. R-41, pp. 518-519.

273. On or about September 21, 2005, Ms. Emery began using an auditory trainer to address Student's hearing loss. Ex. R-92, p. 945.

274. On or about September 22, 2005, Brenda Williams spoke with Mother and Mother reported that she had been unable to contact Mr. Hodgson regarding his available dates. Ex. R-92, p. 944. On or about September 23, 2005, Mother left a message for Ms. Williams regarding dates. Subsequent to that, Mother and Ms. Williams exchanged communications regarding meeting dates. Ex. R-93, p. 946.

275. On or about September 30, 2005, Ms. Williams confirmed an IEP meeting date of October 18, 2005 with Mother. Ex. R-92, p. 946. On that same date, the District provided Parents with a notification of conference for an IEP review meeting to be held on September 30, 2005. Ex. R-43, p. 522. On or about October 17, 2005, the District provided Parents with a notification of conference for an IEP review meeting to be held on October 17, 2005. Ex. R-43, p. 521; Tr. 752.

276. On or about October 5, 2005, Ms. Emery again spoke to Mother regarding Student's behavior when Student refused to complete her work. Ex. R-92, p. 945; Tr. 3079-3080.

277. On or about October 18, 2005, Student's IEP team convened to review and revise her IEP. Ex. R-44, p. 523; Ex. R-92, p. 947, 949; Ex. P-30; Tr. 2362, 3080, 3138, 4883-4884, 5379. The following individuals were among those who attended and participated in the meeting: Mother, Nancy Mulford, Beverly Emery, Kristi Hinton, Brenda Williams, Stephanie Dustman, Dr. Chana Edwards, Ms. Knight and Rand Hodgson. Ex. R-44, pp. 523-524; Tr. 751-752, 1200, 2284, 2362, 3082, 4092, 5049. Due to additional information regarding Student's hearing loss, the team agreed to minor changes to the IEP including the addition of an FM

amplification system and modifications to the present level to reflect the hearing loss. Ex. R-44, pp. 526, 535; R-92, pp. 947, 949; Tr. 1210, 1256-1258. Mother testified that Student had no educational needs that resulted from the hearing loss that were not reflected in the October 2005 or subsequent IEPs. Tr. 1258-1259. Although she further testified that she did not know if the IEP was being followed in that regard, she conceded that she had no personal knowledge regarding implementation and was just speculating. Tr. 1259. The parental concerns remained the same from the prior IEP. Ex. R-44, p. 529. The accommodations and modifications page was changed to show the use of an FM system during instructional activities, but not for lunch, recess or other physical activities. Ex. R-44, p. 535; Tr. 752, 3092.⁴² The goals of the IEP remained the same as did the services to be provided with one exception. The October 2005 IEP was changed to show the addition of audiological evaluations and a supplementary aid and service. Ex. R-44, p. 523; Tr. 3082. The accommodations and modifications page was modified to reflect the use of a daily communication log, planner or agenda. Ex. R-44, p. 535; Tr. 1411-1412. Mother testified that the planner was sent home daily. Tr. 1412; *see also* Ex. R-95. The October 2005 IEP provided for 1150 minutes per week in special education and 150 total minutes per week of speech-language therapy. Tr. 523,753, 5050; Ex. R-44; Tr. 3081-3082.

278. The special considerations page also was modified, at Parents' and Mr. Hodgson's request, to state that Student exhibited behavior that impeded learning. Ex. R-44, p. 530; Tr. 156, 1199, 1327, 2363-2364, 3089-3090. At that time, Ms. Emery did not believe that it was necessary to indicate that on the IEP because she believed Student was simply going through the developmental stages that all children go through and her behavior was no different from some of her other students. Tr. 3090. In addition, she testified that the behaviors impeded

⁴² Ms. Emery implemented the use of the FM system and testified that Student seemed to attend better with it. Tr. 3092. Ms. Mulford also testified that the FM system helped. Tr. 2294-2295.

Student's learning only on the day that something more significant occurred which was not even once a week. Tr. 3090. Per Ms. Emery, from October 2005 through February 2006, Student's behaviors were similar to what they were earlier that school year. On occasion, she would have some problems, but Ms. Emery was unable to recall a lot of significant behaviors. Tr. 3101. Ms. Emery was able to use classroom strategies with Student regarding those behaviors. Tr. 3136-3137.

279. The October 2005 IEP does not include the use of an electronic augmentative communication device. Tr. 3138. Ms. Emery opined that Student made progress on the IEP goals and objectives contained in the October 28, 2005 IEP. Tr. 3139.

280. When the team met in October 2005, Ms. Emery had documented in the access sheets, Ex. R-92, two more severe behaviors. Tr. 3083-3085. She may have documented other behaviors in the daily communication log. Tr. 3084. When Student had a pretty severe behavior, Ms. Emery would telephone Parents. Tr. 3084. Ms. Emery also testified that, at times, Student had such behaviors, but did not display them at other times. Tr. 2363-2364, 2369, 3085 - 3088; *see also* Ex. R-95. She further testified that, at that time, the behaviors did not rise to the level of requiring a behavior intervention plan. Tr. 2369-2370, 2374, 2385; *see also* Tr. 1199. At hearing, Mother acknowledged that the accommodations and modifications page included numerous strategies that could be viewed as behavioral strategies to address those behaviors. Tr. 1330-1333.

281. The October 2005 IEP was the first IEP developed after the team changed Student's diagnosis to other health impaired and Mother indicated that, after that, Student's needs had not changed. Tr. 760.

282. Brenda Williams testified that, in her opinion, the October 2005 IEP was appropriate for Student. Tr. 4883-4884; *see also* Tr. 3093-3097. In her opinion, the question of Student's educational diagnosis did not change that position. Tr. 4884.

283. The District collected data that showed the implementation of the October 2005 IEP goals and objectives as well as the progress that Student made with respect to those. Ex. R-44, pp. 538-539, 546-571; Tr. 758, 3093-3097, 3139, 5051-5052. Those progress reports showed that Student made progress on her IEP goals and objectives and mastered some. Ex. R-44, pp. 536-571. The progress reports included baseline data for many of the goals and/or objectives. *See Id.* At that time, Ms. Emery was keeping more data on Student's goals and used that to indicate the percentages that Student had achieved. Tr. 3098-3099; *see also* Ex. R-44, 550-571. The progress reports regarding the October 2005 IEP goals and objectives reflected only progress from October 2005 through May 2006, as Student did not return to the District after May 2006 and, thus, the October 2005 was not implemented for a full school year. Tr. 5050.

284. Ms. Emery sent the progress reports to Parents as required by the IEP and testified that Parents never communicated to her that they disagreed with the notations of progress. Tr. 3094.

285. From mid-October to the first part of November, Ms. Emery was absent due to a death in the family. Tr. 2580-2581, 3101, 3104; Ex. R-92 at 950. During that time, Ms. Emery's classroom paraprofessional, Kelli McSwain was the classroom teacher. Tr. 2581, 3101. The District then hired a certified teacher to be in the classroom as the substitute paraprofessional. Tr. 3336-3337 At that time, Ms. McSwain was a qualified substitute. Tr. 310, 3336. During her absence, Ms. McSwain continued to write in Student's daily planner. Tr. 3103-3104.

286. On or about October 28, 2005, Mother contacted Brenda Williams to express concern that the adaptive keyboard that had been acquired through loan had been returned to the loan program. Ex. R-92, p. 948. On or about October 31, 2005, Parents came to the District to speak to Ms. Williams regarding the same topic. Ex. R-92, p. 948. At that time, Ms. Williams informed Parents that the loaner keyboard was returned because the District was purchasing one for Student's use and Stephanie Dustman had contacted the company to track that order. Ex. R-92, p. 948. In response, Parents, understandably, expressed that they were upset with the delay and indicated that they would make calls regarding the District's compliance. Ex. R-92, p. at 948.

287. On or about November 4, 2005, the District received the FM system it purchased for Student's use. Ex. R-92, p. 950.

288. On or about November 16, 2005, Ms. Emery spoke to Mother regarding Student's behavior. Ex. R-92, p. 949; Tr. 3080.

289. On or about November 17 and 21, 2005, Ms. Dustman, the occupational therapist, observed Student to gather information about Student's behavior and sensory issues and to assist in planning activities regarding same. Ex. R-92, p. 950.

290. On or about January 17, 2006, Mother contacted Ms. Emery to see if Kristi Hinton had contacted her regarding a meeting to discuss an augmentative communication device. Ex. R-92, p. 949; Tr. 2846-2847.

291. On or about January 18, 2006, Ms. Emery contacted Mother to discuss Student's behavior when Student was resistive and misbehaved in Ms. Mulford's regular education classroom. Ex. R-92, p. 949; Tr. 2847.

292. On or about January 24, 2006, Ms. Emery again contacted Mother to discuss Student's behavior when Student refused to come in from recess. Ex. R-92, p. 949. On that occasion, Ms. Emery contacted Principal Farnan to assist her. Ex. R-92, p. 949. The District attempted to use the "safe room" with Student, but she refused to sit or stay there. Ex. R-92, p. 949. During a conversation with Mr. Farnan, Mother expressed that she was concerned because Student could not communicate her wants and needs and raised the issue of getting an augmentative communication device. Ex. R-92, p. 949.

293. On or about January 31, 2006, Mother expressed concern to Ms. Emery regarding an upcoming field trip. Ex. R-92, p. 952. Ms. Emery informed her that the classroom paraprofessional would be with Student the entire time. Ex. R-92, p. 952.

294. On or about February 2, 2006, Parents sent a message to Brenda Williams regarding the field trip and paraprofessional coverage. Ex. R-92, p. 950. Ms. Williams also explained that a paraprofessional would accompany Student and, if necessary, someone would be individually assigned to her. Ex. R-92, p. 950. On that same date, Student went on a field trip with Ms. Emery's class. Ex. R-92, p. 950.

295. On or about February 4, 2006, the District sent Parents a misconduct notice regarding Student's behavior. Ex. P-32, p. 256; Tr. 168-169. That was one of two times that Parents were given such notices. Tr. 171-172.

296. On or about February 6, 2006, Mother discussed her concerns about Student's behavior with Brenda Williams. Ex. R-92, p. 950. More specially, Mother indicated that she was concerned with the steps being followed when Student was having a difficult day. She also stated that Student was walking in circles prior to leaving for school that morning and noted that appeared to be a pattern on the days that were tough for Student. Ex. R-92, p. 950. In response,

Ms. Williams informed her that the team was open to brainstorming strategies at a meeting to be held that week. Ex. R-92, p. 950.

297. On or about February 7, 2006, Mother called Ms. Emery's room very upset when she saw Student walking in the hall at Buckner without adult assistance. Ex. R-92, p. 952. Tr. 3041. At snack time, Student left the special education classroom to get her snack which was in Ms. Mulford's room and immediately returned to the special education classroom upon retrieving the snack. Ex. R-92, p. 952. Tr. 3041.

298. On or about February 10, 2006 and at Parents' request, Student's IEP team convened to discuss an augmentative communication device and the increase in Student's behaviors. Ex. R-92, p. 952, 54; R-46, p. 583; Tr. 761; 3106-3108, 3140, 3434, 4724-4725. Ms. Emery did not believe there was a need to reconvene the team to discuss behavior. Tr. 770-773, 3108. The following individuals were among those who attended and participated: Parents, Nancy Mulford, Beverly Emery, Kristi Hinton, Brenda Williams, Ms. Knight, Marilyn Weber and Rand Hodgson. Ex. R-46, p. 588; Tr. 761, 770, 776, 2302, 3111-3112. At the meeting, the team discussed the adaptive keyboard and the possibility of a new computer to handle the program. Ex. R-46, p. 583; Ex. R-92, pp. 952, 954. The team agreed that an assistive technology evaluation should be conducted and Parents provided consent for same. Ex. R-46, p. 583; Ex. R-92, p. 953; Tr. 4679-4680. Because of Student's increased behaviors, Parents requested a functional behavioral assessment and the team designated Becky Hughes.⁴³ The team also discussed the use of the recovery room and the need to add a personal paraprofessional to Student's IEP. Ex. R-46, p. 583; R-92, pp. 952-953; Tr. 3435-3436. At the time, Ms. Emery did not believe that Student required a personal paraprofessional. Tr. 3109. With respect to

⁴³ Beverly Emery testified regarding Student's behaviors at the time. She testified that she agreed that there had been an increase in behaviors. Tr. 3434.

behaviors, staff discussed that Student's behaviors appeared to be avoidance in nature and typically occurred in the afternoon during teacher instruction and on the first day that she returned to school after the weekend. Ex. R-46, p. 583; Ex. R-47, p. 587; Tr. 776. Staff noted that they were incorporating sensory activities during academic instruction to assist Student. Ex. R-46, p. 583.

299. On or about February 10, 2006 and as a result of the team meeting and Parents' request, Student's IEP team decided to amend the October 18, 2005 IEP to add to the special considerations page that Student was now exhibiting behaviors that impeded her learning or that of others and to add a personal paraprofessional as a new service. Ex. R-46, p. 584; Tr. 762, 3109, 4071⁴⁴. Parents and Kristi Hinton signed their respective agreement to those amendments. Ex. R-46, p. 584; Tr. 762.

300. Mother also testified that, during the 2005-2006 school year, Student was restrained, placed in time-out, and, in her opinion, the District spent more time dealing with her behaviors than with educating her. Tr. 151-152, 763. When asked about what behaviors Student was exhibited that impeded learning, she stated that she was unable to provide any specifics. Tr. 763. She testified that, at times, Ms. Emery came to her classroom to tell her about behaviors, but was unable to say with what frequency. Tr. 768. Mother also testified that she was called on one occasion to deal with Student's behavior at Buckner. Tr. 769. Mother further stated that she had the daily communication planners used for Student. Tr. 769. Those planners were admitted into evidence. Ex. R-95.

301. On February 10, Student's multidisciplinary team agreed to prepare an evaluation plan to reflect the team's decision that an assistive technology evaluation and a functional

⁴⁴ Brenda Williams testified that, at the time, Student was not exhibiting any significant behaviors and was not exhibiting behaviors on a day-to-day basis. Rather, those behaviors were sporadic in nature and, in the District's opinion, the behaviors were consistent with Student's delayed developmental level. Tr. 4728-4730.

behavioral assessment should be conducted. Ex. R-47, pp. 585-587; Tr. 3109-3111, 436-437. On February 10, 2006, the District prepared a notice of action proposing the limited reevaluation and seeking parental consent to same. Ex. R-47, pp. 589-591. Parents provided written consent for the reevaluation on that same date. Ex. R-47, p. 589; Tr. 3112.

302. As part of the functional behavioral assessment, Ms. Emery and her paraprofessionals completed documentation on forms provided by Brenda Williams. Tr. 3113-3116; Ex. R-96. They were attempting to document all behaviors that they were seeing, but continued to use the planner and access sheets for such documentation as well. Tr. 3116. Those forms were later used in the development of Student's behavior intervention plan. Tr. 3116. Based on that data, Ms. Emery again concluded that Student's behaviors resulted from her frustration that she was being asked to do more and she could not communicate. Tr. 3116. She also concluded that Student demonstrated more behaviors when she was required to work 1:1 with Ms. Emery. Tr. 3117-3118. At the time, Ms. Emery was using sensory activities with Student and did not observe that impacted her behaviors. Tr. 3118. At this time, Ms. Emery did not believe that a formal behavior plan was necessary to address or manage Student's behaviors. Tr. 3119.

303. When asked whether she viewed Student's behaviors as part of her disability, Ms. Emery testified that she looked at them as part of the developmental milestones that young children go through and "she was doing what children at that age, developmental age do." Tr. 3119. More specifically, Ms. Emery testified that two-to-three year old children act out like that, by running away and laughing and giggling and that is where Student was developmentally. Tr. 3119-3120.

304. On or about February 10, 2006, Ms. Emery spoke to Mother regarding Student's behaviors of avoidance and escape. Ex. R-92, p. 954.

305. On or about February 13, 2006, Mother signed an authorization that permitted the District to release information to the Rehab Institute for purposes of the assistive technology evaluation. Ex. R-58, p. 592.

306. On or about February 13, 2006, the District provided the Rehab Institute with information about Student pursuant to the parental authorization, Ex. R-58, p. 593, and, on that same date, Brenda Williams spoke to the Rehab Institute to schedule Student's assistive technology evaluation. Ex. R-92, p. 953; Tr. 4680-4681. At that time, Student's IEP did not require the use of an augmentative device.

307. On or about February 23, 2006, Brenda Williams corresponded with Parents and enclosed a copy of the IEP amendments. Ex. R-49, p. 600.

308. On or about February 27, 2006, Student's personal paraprofessional, Tori Kelburn, began in that position. Ex. R-92, p. 954.

309. On or about February 28, 2006, Parents, Brenda Williams and Beverly Emery went with Student to the Rehab Institute to participate in Student's assistive technology evaluation. Ex. R-92, p. 954; Ex. R-48, pp. 599-597; Tr. 780, 2843-2844, 3112.⁴⁵

310. On or about March 22, 2006, Mother stopped Beverly Emery at Buckner School and asked if she had heard anything about an augmentative communication device. Ex. R-92, p. 954; Tr. 2848-2849. As of that date, Student's IEP did not require the use of an augmentative communication device. Tr. 3112.

311. On or about March 24, 2006, the District received the Rehab Institute's assistive technology assessment report. Ex. R-92, p. 953; Ex. R-48, pp. 598-599; Tr. 778. Parents were

⁴⁵ Mother testified that she "was not impressed" with the evaluation. Tr. 780.

provided with a copy of that report. Tr. 778. In addition, the Institute informed Brenda Williams that Student's name had been placed on a waiting list for a trial period with the "Mighty Mo" communication device. Ex. R-92, p. 953.

312. The Rehab Institute report noted that Student presented with Down's syndrome, a language disorder and severe apraxia. Ex. R-48, p. 594; Tr. 2856.⁴⁶ The Rehab report stated that Student's speaking needs could not be met with natural communication or low technology speaking aids. Ex. R-48, p. 594. In addition, the report stated that, based on the severity of her apraxia, it was not anticipated that Student would have functional verbal skills in the near future. Ex. R-49, pp. 594-595. Although the Rehab Institute was not able to formally assess Student's cognitive skills, the examiners noted that she demonstrated the necessary concept of cause and effect. Ex. R-48, p. 595. The report noted that Student's hearing was within functional limits and she followed auditory directions well even with the reported hearing impairment in one ear. Ex. R-48, p. 595. As part of the evaluation, the examiner tried different assistive devices with Student and recommended a trial period with a "Mighty Mo" before the team decided what system should be used. Ex. R-48, pp. 595-596; *see also* Tr. 780.⁴⁷ Finally, the report provided contact information for David Baker at the ETC Loan program so that the District could obtain a loaner device as part of its continuing evaluation. Ex. R-48, p. 956; Tr. 3112-3113.

313. Per Mother, Student was diagnosed with apraxia by Ms. Knight. Tr. 779. Mother testified that she understood apraxia to be a motor planning deficit. Tr. 779.

314. The District called one of its speech-language pathologists, Heather Duensing, to testify regarding apraxia. Tr. 5566. At the time of her testimony, Ms. Duensing was in her

⁴⁶ There is nothing in the report that indicates Student might have autism. *See* Ex. R-48, p. 594.

⁴⁷ Mother testified that the Rehab Institute recommended the use of an augmentative communication device for Student. Tr. 780. She also testified that she did not know if the Tango device that they preferred was then available. Tr. 780. She further testified that they had been asking for such a device for some time, but acknowledged that she had no documentation of that request. Tr. 781.

seventh year as a Process Coordinator for the District School District. Tr. 5566-5567. In that role, she works with coordinating special education teams and works with IDEA compliance issues. Tr. 5566-5567. Prior to that, she worked as a speech-language pathologist with the District for five years. Tr. 5567. Ms. Duensing has bachelor's and master's degrees in the area of speech pathology. Tr. 5568. She also holds the Certificate of Clinical Competence in that area and is certified by the state of Missouri to work as a speech-language pathologist in the school setting. Tr. 5568.

315. At the time of her testimony, Ms. Duensing had not met Student nor had she ever implemented any of her IEPs. Tr. 5568-69. During the time that Student was not in attendance in the District, she participated in two of her IEP meetings in 2007 at Dr. Patty Smith's request. Tr. 5569-5570.

316. Ms. Duensing received training in apraxia during both her undergraduate and graduate programs. Tr. 5571. During her experience as a school speech-language pathologist, Ms. Duensing worked with children who had a medical diagnosis of apraxia. Tr. 5571. According to Ms. Duensing, verbal apraxia is a neurologically based disorder that is medically diagnosed. Tr. 5572, 5578. As she stated, "children with apraxia may experience difficulty with the volitional control of nonspeech movement and speech production." Tr. 5572. In essence, such children have difficulty with the motor planning of nonspeech movement which could include moving the tongue from side to side and puckering the lips. Tr. 5572. Apraxia also impacts oral motor movement which is the movement of the lips, tongue, etc. that assists with speech articulation. Tr. 5587-5588. If you request an apraxic child to perform oral motor skills, the child may struggle or be unable to follow those commands. Tr. 5572. An individual can have verbal apraxia and not have other disabilities and there are individuals with normal

intelligence who have that disorder. Tr. 5577. To Ms. Duensing's knowledge, there is no correlation between apraxia and Down's syndrome or mental retardation. Tr. 5586-5587. She did not know if there was any correlation between apraxia and autism. Tr. 5586-5587.

317. In addition to verbal apraxia, an individual also can have limb apraxia. Tr. 5574. Global apraxia affects both areas. Tr. 5574. Apraxia can be treated with therapy. Tr. 5573, 5577. An individual's cognitive ability could impact that person's ability to improve where the apraxia exists. Tr. 5588. Moreover, most special education and regular education teachers would not have adequate training to work with an apraxic child. Tr. 5598.

318. A child with verbal apraxia will be impacted in the educational setting. Tr. 5578. The apraxia will impair the child's communication with others, including with peers. Tr. 5578. Apraxia also can impact academic achievement, including in the areas of reading and writing. Tr. 5586. If a child is apraxic, that child's expressive language (verbal output) generally will be lower than their receptive language (what you understand). Tr. 5586. Apraxia does not impact receptive language. Tr. 5586.

319. On or about March 27, 2006, Mother communicated to Ms. Emery that she and her husband were very concerned that they had not yet heard anything about the augmentative device. Ex. R-92, p. 954; Tr. 2851. She also informed Ms. Emery that she had contacted Rockhurst and was informed that Student was not on a waiting list. Ms. Emery suggested that Mother contact Brenda Williams regarding those concerns. Ex. R-92, p. 954; Tr. 2851-2852.

320. On or about March 27, 2006, Brenda Williams contacted David Baker regarding the waiting list for the assistive technology loan program. Ex. R-92, p. 953. On or about March 29, 2006, Ms. Williams received a message that confirmed that Student was on the waiting list for a loaner augmentative communication device. Ex. R-92, p. 953. On March 30, 2006, Ms.

Williams telephoned Parents to update them regarding that assistive technology. Ex. R-92, p. 953.

321. On or about March 28, 2006, Becky Hughes, the District's autism/behavioral consultant and special education teacher for the District, observed Student at school to conduct the functional behavioral assessment⁴⁸ proposed by the team. Ex. R-50, pp. 601-603; Ex. R-92, p. 955; Tr. 782, 790, 5727, 5969. The District provided Parents with a copy of that report. Tr. 782. During that process, Ms. Hughes observed Student across multiple settings and subjects throughout her school day. Ex. R-50, p. 601; Tr. 5727. During those times, Student's personal paraprofessional was present. Ex. R-50, p. 601. In her written report, Ms. Hughes noted that, during observation, Student displayed many positive behaviors and skills including appropriate waiting behavior, the ability to independently follow verbal directions, and appropriate behavior during transitions. Ex. R-50, p. 601. In the area of social behaviors, Student exhibited appropriate turn taking, watched her peers for cues, engaged in appropriate social greetings, and gave a friend a hug. She also demonstrated communicative intent. Ex. R-50, p. 601. During the observation, Student engaged in a few behaviors during the day, but those required only minimal intervention to resolve. Ex. R-50, p. 601. As noted in her report, Student consistently made positive behavioral choices when given choices, reminders and simple redirection. Ex. R-50, p. 603; Tr. 785. Ms. Hughes included several recommendations in her report including the need to break tasks into small steps, the use of a visual schedule throughout the school day, the use of mini schedules and assistive technology. Ex. R-50, p. 503.

322. Ms. Hughes received her bachelor's degree in mental retardation from the University of Missouri, Tr. 5710, and her master's degree in autism and Asperger's syndrome

⁴⁸ Ms. Hughes testified that she did not know if a functional analysis observation is different from a functional behavioral assessment, and believed them to be the same. Tr. 5811-5812.

from the University of Kansas ten years prior to her testimony. Tr. 5709, 5746, 5756, 5967. In addition, she has attended other conferences and workshops regarding autism. Tr. 5709, 5747-5756, 5968. While in the District, she has taught special needs children in grades kindergarten through fifth. Tr. 5710. She has experience teaching children with autism, multiple disabilities, mental retardation, and Down's syndrome. Tr. 5710, 5712-5713. She is certified by the state of Missouri to teach children with mental retardation and severe disabilities. Tr. 5711. As Ms. Hughes testified, the state of Missouri does not offer teaching certification in the area of autism or behavior. Tr. 57122. During her sixteen years in the District, she has always taught at Elm Grove Elementary School. Tr. 5711, 5760. All of the children placed in her classroom functioned in the mentally retarded range. Tr. 5713.

323. Ms. Hughes also has training, through her graduate program and hands-on training, in behavior and functional behavioral assessment. Tr. 5712. Her education, training and experience also have taught her the characteristics of autism, mental retardation and Down's syndrome. Tr. 5713. Ms. Hughes testified that children with Down's syndrome always have delays in cognitive ability. Tr. 5714. Children with Down's and mental retardation sometimes have difficulty with transitioning and children with autism typically display that difficulty. Tr. 5714-5715. Children with Down's sometimes have difficulty with vision and sometimes have difficulty with adaptive behavior. Tr. 5715-5716. Children with autism and mental retardation also typically have delays in adaptive behavior. Tr. 5716. However, in contrast to children with autism who almost always have socialization difficulties, children with mental retardation have fewer delays in that area. Tr. 5716. Children with all three disabilities typically have receptive language abilities that are higher than their expressive language skills and demonstrate difficulties with generalization. Tr. 5716-5717. In sum, Ms. Hughes testified that children with

those three disabilities have common characteristics. Tr. 5718. The biggest difference between children with autism as compared to children with Down's and mental retardation is in the area of socialization. Tr. 5718-5721. When serving as a member of a multidisciplinary team to determine a child's IDEA disability, Ms. Hughes looks primarily at socialization, the ability to empathize and whether the child displays communicative intent to see if that child has autism. Tr. 5722. She also testified that children with autism frequently display precocious skills in some areas which is a skill above the child's age level. Tr. 5722. In sum, the characteristics of Down's and autism overlap. Tr. 5806.

324. Although Ms. Hughes never taught Student, she had the opportunity to observe her in March of 2006 when she conducted her functional assessment. Tr. 5711-5712.

325. Prior to her testimony, Ms. Hughes reviewed many of Student's educational records, including Ms. Pomeroy's evaluation reports. Tr. 5723-5724, 5726. Based on those documents and her observation of Student in March 2006, she does not believe that Student meets the Missouri IDEA criteria for autism because she does not display the necessary characteristics. Tr. 5724-5726, 5765-5767; *see also* Ex. R-93. More specifically, Ms. Hughes testified that Student "definitely had communicative intent. She sought people out, tried to speak with them, she tried to interact with them. She understood nonverbal communication, she openly watched other people to see what they were doing. That is very atypical of children with autism. Tr. 5728. In addition, she testified that, unlike children with autism, Student, at her developmental level, "appropriately related to people, events and objects." Tr. 5729. Per Ms. Hughes, the developmental level is the level at where a child is cognitively functioning, as opposed to that child's chronological age. Tr. 5729. When Ms. Hughes observed Student, she was functionally generally at the developmental level of a two-to-four year old child. Tr. 5729-

5730. Ms. Hughes also testified that Student did not display any precocious skills. Tr. 5730-5731. Instead, except for the socialization area which was below her chronological age, Student's developmental levels were "flat." Tr. 5731. Thus, she did not display disturbances in rate and sequence as required by Missouri criteria. Tr. 5731-5732. Finally, during her observation, Ms. Hughes did not observe Student responding to sensory stimuli, even though the District's occupational therapist showed that Student did have disturbances of responses to sensory stimuli. Tr. 5732, 5765-5766. However, as Ms. Hughes testified, individuals other than those with autism may have such disturbances. Tr. 5733.

326. Ms. Hughes also testified about functional behavioral assessment (FBA). Tr. 5739. Ms. Hughes has received training, through her graduate program and experience, in conducting functional assessments. Tr. 5740. According to her testimony, IDEA does not contain any guidelines regarding how to conduct an FBA. Tr. 5740, 5823. An FBA is conducted to determine why behaviors occur.

327. When Ms. Hughes conducts an FBA, she goes into the school environment and observes the child in different settings and looks for both inappropriate and appropriate behaviors. Tr. 5741. If the child displays inappropriate behaviors, she looks at what was happening before and after the behavior and the consequences that occur. Tr. 5741.

328. When Ms. Hughes observed Student at school, she was conducting an FBA. Tr. 5874. Prior to her observations, she knew that Student had exhibited only sporadic behavioral concerns. Tr. 5741. Prior to her observations, she spoke to Beverly Emery and had copies of the functional analysis sheets that Ms. Emery prepared. Tr. 5787, 5799, 5826-5827. She and Ms. Emery conversed about why and when Student's behaviors were occurring. Tr. 5828. She also had information about the antecedents to Student's behaviors from Ms. Emery. Tr. 5826-5827.

Ms. Hughes also testified that there are methods to determine antecedents other than through observation. Tr. 5975. In addition, there are times when antecedents cannot be determined because the antecedent is too remote in time or occurs outside the school setting. Tr. 5975. Further, it is not necessarily important to know the antecedent to behavior because people do not always respond in the same way. Tr. 5832. For Student, according to Ms. Hughes, she and Ms. Emery were able to identify the antecedents as the afternoon, individual work time and fine motor tasks. Tr. 5834. However, as developed in the following paragraph, it is apparent that Ms. Hughes received this information from Ms. Emery as it was not based upon her own observation.

329. On the day Ms. Hughes observed Student, she saw only minimal things that just required redirection and did not see anything that suggested that Student required a behavior intervention plan. Tr. 5741-5744, 5845. Because she felt she had the information she needed, she saw no need to return. Tr. 5834.⁴⁹ Although she did not believe that Student needed a behavior plan, she participated in Student's team to develop such a plan and a written plan ultimately was prepared. Tr. 5742-5744. That behavior plan was not based solely on her input. Parents and their advocate participated in the development of a draft plan which was finalized in May 2006. Tr. 5992-5993. At that time, Parents and Mr. Hodgson were in agreement about the plan. Tr. 5992-5993.

330. On or about March 30, 2006, Ms. Emery spoke to Mother regarding Student's behavior. Ex. R-92, p. 955.

⁴⁹ The majority of the Panel questions the wisdom of this decision. The purpose of Ms. Hughes' assessment was to assess/analyze Student's increasing behaviors. Since such behaviors were not evident during her observation, it is understandable why Ms. Hughes was not able to, and did not, determine why Student's targeted behaviors identified by the IEP team were occurring.

331. On or about April 10, 2006, Ms. Emery spoke to Mother regarding Student's behavior. Ex. R-92, p. 955. During that conversation, Mother questioned why the District did not follow through with a plan of the safe seat/buddy room first, then the recovery room, and then a call to Parents. Ex. R-92, p. 955.⁵⁰ During that conversation, Mother also stated that she was not comfortable with the school's social worker, Ms. Hunter, and again asked about the augmentative communication device. Ex. R-92, p. 955; Tr. 2853.

332. On or about April 11, 2006, Ms. Emery attempted to utilize an informal plan requested by Parents when Student engaged in a behavior. Ex. R-92, p. 955; *see also* Tr. 2379-2382, 3187-3189. Ms. Emery took Student to the recovery room when she refused to cooperate. Ex. R-92, p. 955. Mother also went to the recovery room and had no success with Student there. Ex. R-92, p. 955. Ms. Emery and Mother finally called Father to assist. At that time, Parents chose not to take Student home as was the plan preferred by Parents. Rather, according to Ms. Emery, because they had a meeting to attend and Student was scheduled to go to her grandparents' home to see their horses, they decided to leave her at school so there was no disruption in her routine. Ex. R-92, p. 955; Tr. 3187-3189.⁵¹

333. On or about April 12, 2006, Ms. Emery spoke to Mother regarding Student's behavior and, during that conversation, Mother asked again about the augmentative communication device. Ex. R-92, p. 955. On that same date, Brenda Williams again called David Baker regarding the status of obtaining the "Mighty Mo" on loan. Ex. R-92, p. 957. As of that date, Student's IEP did not include a behavior intervention plan or an augmentative device. Tr. 773.

⁵⁰ At this time, no such system was written into Student's IEP.

⁵¹ When testifying about this incident, Ms. Emery stated concerns about Parents' lack of follow-through. Tr. 2378-2382. She did not share that opinion with Parents out of concerns that they would be offended. Tr. 2384.

334. On or about April 12, 2006, the District provided Parents with a notification of conference for an IEP review meeting to be held on April 19, 2006. Ex. R-51, p. 604; Tr. 876, 790-791.

335. On or about April 18, 2006, Brenda Williams again checked on the status of the loaner augmentative communication device. Ex. R-92, p. 957.

336. On or about April 19, 2006, Student's IEP team convened to review and revise her IEP. Ex. R-92, pp. 956-957; Ex. P-37; Tr. 791, 2305, 3141. Participants were: Parents, Nancy Mulford, Bev Emery, Kirsti Hinton, Patrick Farnan, Brenda Williams, Sheryl Kelley, Stephanie Dustman and Becky Hughes. At that meeting, the team reviewed the success of the paraprofessional, and discussed Becky Hughes' observations, assistive technology, and a proposed behavior plan. Ex. R-92, p. 957. Because the team was unable to complete the IEP process, the team discussed reconvening in May to complete the IEP. Ex. R-92, p. 957; Tr. 3141.

337. At that time, Student's IEP still did not include the use of an augmentative communication device. Tr. 4681. According to Ms. Williams, once the team agreed to include such a device in June 2006, the District had no delay in obtaining the device. Tr. 4681. However, prior to June, the ETC loan program delayed somewhat providing a loaner device. Tr. 4681. As Brenda Williams testified, the ETC loan program has assistive technology devices that districts can obtain for a trial period to see if a particular device is appropriate for a student. Tr. 4681-4682. She further noted that an IEP team does not write such a device into the IEP without a trial, again to ensure appropriateness. Tr. 4682. In the spring of 2006, the Tango device Parents were seeking was not available. Tr. 4682. In the same time period, Ms. Williams spoke to David Baker regarding training for such a device during the summer of 2006 and she was

making arrangements for such training prior to Student's withdrawal from the District. Tr. 4683-4684. Once Student was withdrawn, there was no need to follow through with that training. Tr. 4684.

338. Ms. Williams also testified that, although she thought it was appropriate for Student to have an augmentative communication device, she thought the use of the necklace with icons was more appropriate for her. Tr. 4683.

339. On or about April 24, 2006, Ms. Emery talked to Mother regarding Student's behavior. Ex. R-92, p. 956; Tr. 2854. On that date, Mother went into Ms. Emery's classroom while Student was in the "safe seat" and later called Ms. Emery to see if Student had gone to recess. Ex. R-92, p. 956. Ms. Emery explained that Student did not go to recess, because she did not want to. Ex. R-92, p. 956. Mother again went to Ms. Emery's classroom and questioned if Ms. Emery had tried sensory activities with Student. Ex. R-92, p. 956. Ms. Emery assured Mother that she had used sensory activities and further told Mother that she seldom observed behaviors in the morning, when Student worked with other children. Ex. R-92, p. 956. Rather, as Ms. Emery explained, she only observed Student engaging in avoidance behavior when she worked 1:1 with Student in the afternoon. Ex. R-92, p. 956.

340. On or about May 1, 2006, the District provided Parents with a notification of conference for an IEP review meeting to be held on May 9, 2006 and to complete the meeting that began on April 19, 2006. Ex. R-92, p. 957; Ex. R-52, p. 605; Tr. 786.

341. On or about May 1, 2006, Brenda Williams left a message for David Baker about obtaining the loaner augmentative communication device. Ex. R-92, p. 957; Tr. 2856.

342. On or about May 3, 2006, Mother asked Ms. Emery if anything had been heard regarding the augmentative communication device and, on that same date, Brenda Williams

again left a message for David Baker about obtaining the loaner device. Ex. R-92, pp. 956, 959; Tr. 2854.

343. On or about May 4, 2006, Brenda Williams finally spoke with someone regarding the loan program and she was informed that two devices were available. Ex. R-92, p. 959. Ms. Williams informed the loan program that the District would like to try the “Mini-Mo”⁵² and the loan program informed her that it would be put in the mail. Ex. R-92, p. 959.

344. On or about May 9, 2006, Student’s IEP team reconvened to attempt to complete the IEP that the team began to develop on April 19, 2006. Participating in that meeting were: Mother, Kristi Hinton, Patrick Farnan, Nancy Mulford, Bev Emery, Brenda Williams, Becky Hughes, Sheryl Kelley, Rand Hodgson and Stephanie Dustman. Ex. R-92, pp. 956, 959; Ex. R-58, p. 656; Tr. 792, 3141. At that meeting, the team discussed a proposed behavior plan and the IEP present level of performance. Ex. R-92, pp. 956, 959; Tr. 219-221, 5743. Parents and Mr. Hodgson had input into the behavior plan. Tr. 3125. The behavior intervention plan was finalized and put into place for Student at that meeting. Ex. R-58, pp. 654-655; Ex. R-92, p. 956; Tr. 3124-3126, 5868-5872, 5743, 5769-5770. At the conclusion of that process, there was no disagreement regarding the behavior plan. Tr. 3125, 5743. Once again, the team was unable to complete the IEP process on that date, so an additional meeting was scheduled for May 22. Ex. R-92, p. 959. In the interim, Parents stated that they would take the draft completed thus far and would get back to the team with a list of recommendations and changes by the following Friday afternoon. Ex. R-92, pp. 956, 959.

345. Mother testified that the behavior plan was discussed in April 2006 and was to be implemented immediately after the April meeting without finalization of the IEP. Tr. 223.

⁵² The Rehab Institute recommended a “Mighty-Mo” (Ex. R-48, p. 596). It is not clear from the record the difference between the two, if any, and whether District purposely chose a Mini-Mo. It is also not clear from the record whether the “Mini-Mo” is synonymous to “Mighty-Mo.”

According to that testimony, the team agreed at the April meeting that the District would provide an area in the recovery room for Student to have a safe area to go and meet her sensory needs once her behavior started to rise. Tr. 223. Per Mother, that room was never made available and there were problems with implementation of the behavior plan after its completion. Tr. 223. As a result and per Mother, Student's behaviors were not improving, although she would have a good day "every once in a while." Tr. 225. Mother further stated that she could see across the hallway from her classroom into the recovery room. On one occasion, when Student was in there acting out, she asked another teacher to cover her classroom and went to assist Ms. Emery with Student and determined that the plan was not being followed. Tr. 223-224. As a result, she called Father who left work and came to school where Parents contacted Kristi Hinton. Tr. 224. Per Mother's testimony, Ms. Hinton was apologetic. Tr. 224-225.

346. Mother testified that, after the functional behavioral assessment was completed, the team wrote the behavior intervention plan. Tr. 1396-1397, 1402-1403; *see also* Ex. R-58, p. 623; Ex. R-92, p. 956. She acknowledged that the behavior plan was dated May 2006 and ultimately became part of the June 2006 IEP. Tr. 1397-1398. Mother could not recall if the parents agreed to the behavior plan at the time it was prepared and could not say whether she and her husband and Mr. Hodgson would have notified the District of any disagreement with the plan. Tr. 1397. Moreover, she could not remember if Student's behaviors increased, decreased or stayed the same after the implementation of the May 2006 behavior plan, but stated that school was almost over at that time. Tr. 1397-1398.

347. The documentary evidence presented indicated that the only written behavior plan that was prepared, was prepared and finalized at the May 9, 2006 meeting. Ex. R-58, pp. 654-

655. The behavior plan developed in May 2006 specifically states that “a separate time out will be implemented within the Special Education classroom, if needed.” Ex. R-58 p. 655.

348. After the May 9, 2006, IEP meeting, Ms. Emery began implementing the behavior plan. Tr. 3125. After that date, she did not change the manner in which she was documenting Student’s behaviors through the planner or access sheets. Tr. 3126. After the behavior plan was implemented, Ms. Emery documented no behaviors until the end of the school year, approximately two weeks later. Tr. 3126-3129; Ex. R-95 at 1124-1126; Ex. R-92, p. 956-962. In Ms. Emery’s opinion, that was not sufficient time in which to determine if the behaviors plan was effective. Tr. 3134-3135. Student did not return to the District in August 2006 for further implementation. Tr. 3135.

349. On or about May 9, 2006, the District received the loaner augmentative communication device from David Baker. Ex. R-92, pp. 956, 959; Tr. 2854, 3126. The District requested and received a “Mini Mo” device. Tr. 2865-2871, 3143-3145. According to Ms. Emery, she used that device with Student on the playground but it was too heavy for her to carry, so the paraprofessional had to carry it for her. Tr. 3144. In addition, it was difficult to program. Tr. 3144. Ms. Emery concluded that Student did not understand what the device was for. Tr. 3144. Ms. Mulford testified that she, too, believed that the “Mini Mo” was too heavy and bulky and Student did not have access to it during the time she was with Ms. Mulford. Tr. 2264. At the same time, Ms. Emery and/or the paraprofessional were using the icon necklace with Student at recess and Student did appear to understand the purpose of that because she would show her peers the picture of what she wanted to do. Tr. 3145. Ms. Mulford testified that while Student sometimes came to her classroom with the necklace, she did not observe Student using the necklace with her peers. Tr. 2298.

350. On or about May 10, 2006, Mother sent Kristi Hinton some information regarding the Tango augmentative device which she and her husband were planning to purchase as soon as the device became available. Ex. R-53, pp. 606-613; Tr. 787.

351. At hearing, Parents acknowledged that, as of the dates of hearing, they still had not purchased the Tango. Tr. 787-788. Mother testified that Parents had a Tango on loan at one period, but could not recall whether that was in 2006 or 2007. Tr. 88. She then testified that Ms. Knight obtained one for them through a loan program, but could not remember when that was. Tr. 788. Mother also testified that Student had the use of Parents' loaner Tango for some time while at Rainbow. The documentary evidence showed that a Tango was only utilized for approximately one week during the time Student attended Rainbow. The evidence was undisputed that Rainbow did not purchase or provide a Tango or other augmentative communication device for Student while she attended there. In spite of the lack of use of an augmentative communication device while at Rainbow, Mother testified that Student made progress in terms of her communication while there.

352. On or about May 12, 2006, the District received from Parents a list of requests and clarifications regarding Student's IEP. Ex. R-92, pp. 959, 961; Ex. R-54, pp. 614-615; Ex. P-38; Tr. 793-794, 800, 1211, 1214-1216. The letter was written in conjunction with the ongoing development of Student's IEP. Tr. 1505. Per Mother's testimony, Parents prepared the document because they wanted the team, "ours and the school team," to discuss the matters listed in the document and "figure out the best way to meet Student's needs." Tr. 794. In that document, Parents requested additional information regarding the augmentative communication device and other matters. Ex. R-54, p. 614; Tr. 1210. In addition, Parents requested that Student have more 1:1 time and requested clarification and/or changes in Student's IEP goals. Ex. R-54,

p. 614. Per this document, Parents' priorities at that time were to increase Student's ability to communicate using an augmentative communication device and to get her behaviors under control so that her learning could occur within her capabilities. Ex. R-54, p. 615.

353. On or about May 12, 2006, Brenda Williams left another message for David Baker at the ETC program. Ex. R-92, p. 960.

354. On or about May 16, 2006, Brenda Williams received an e-mail from the ETC Loan Program regarding training sessions for the Mini-Mo. Ex. R-92, p. 960. That e-mail also included information about the Tango device which would not be available until late summer 2006. Ex. R-92, p. 960. Ms. Williams then corresponded with Mother via e-mail to update her regarding the status of the communication device. Ex. R-92, p. 960.

355. On or about May 16, 2006, Mother was not at work at her position as a Buckner teacher. Ex. R-92, p. 961. On that date, Student was supposed to go home on the school bus and not stay for a bowling night. However, there was a mistake in communication. When Mother came to pick up Student at school, the paraprofessional informed her that Student did not go to bowling. Ex. R-92, p. 961. The paraprofessional apologized to Mother. Ex. R-92, p. 961.

356. On or about May 17, 2006, Parents corresponded with the District's Superintendent, Dr. Larry Ewing. Ex. R-55, p. 616; Ex. R-92, p. 961; Tr. 802, 1221. At that time, the IEP that was being developed had not been completed. Tr. 1507. In that letter, Parents stated that they did not feel that Student was receiving a free appropriate education. Ex. R-92, p. 961. In addition, Parents wrote that they were "hereby giving you our ten day notice that we will be withdrawing Student and placing her in a more appropriate educational setting. In addition, we may be seeking District reimbursement." Ex. R-55, p. 61; *see also* Ex. R-92, p. 960.

357. At hearing, when asked what prompted their May 17 letter in light of the fact that Student's IEP process had not been completed and the team had had no opportunity to discuss the May 12 list of requests and clarifications, Mother testified that Parents' decision to send the May 17 letter was not based solely on their May 12 list. Tr. 812. As stated by Mother, the letter was based on "years of limited progress," years of the IEP not being implemented, and Student's behaviors. Tr. 803-804. Parents' concerns over their daughter's education, particularly during the 2005-2006 school year had been expressed prior to this May 17, 2006 letter as depicted by their communication to the District as set forth above. Mother acknowledged that, in that letter, Parents did not state where they were planning to place Student and, indeed, did not place Student at Rainbow on May 17 but allowed her to complete the year at Buckner. Tr. 810, 1221.

358. Mother also testified that, in the spring of 2006, she was concerned that, during the 2006-2007 school year, the District was going to shift Student's program to Ms. Malotte's special education classroom at Buckner and she did not like the way things were done in that classroom. Tr. 807.

359. Father testified that, prior to placing Student at Rainbow, Parents did not ask the District to place her there. Tr. 4097. Their intention was to put Student there for the summer and try Rainbow. Tr. 4097. As he stated, Rainbow was a "scary place at first" and "some of the kids were pretty loud." Tr. 4097.

360. On May 17, District contacted Mother to request a continuation of the IEP process. Tr. 1507; Ex. R-56, p. 617.

361. On May 17, Mother informed Beverly Emery that the parents could not meet on May 22 as agreed to finalize the IEP process that began in April. Ex. R-92, p. 961.

362. On or about May 17, 2006, Brenda Williams sent e-mail correspondence to Mother stating that, although Parents had informed the District that Student no longer would be attending the District, the District would like to continue with completion of the IEP process and requested available dates to meet. Ex. R-56, p. 617.

363. On or about May 18, 2006, Brenda Williams e-mailed Mother to request dates in order to complete Student's IEP process. Ex. R-92, p. 960; *see also* Ex. R-56, p. 618. On that same afternoon, Ms. Williams spoke to Mother about possible dates for that meeting and Mother informed her that May 30 would work. Ex. R-92, p. 960.

364. On or about May 19, 2006, Ms. Williams e-mailed Mother about scheduling the IEP meeting for May 30. Ex. R-92, 960.

365. On or about May 22, 2006, Ms. Williams again e-mailed Mother regarding IEP meeting dates and Mother informed her that she would have to first speak to the advocate, Rand Hodgson. Ex. R-92, p. 962; Ex. R-56, p. 619-620.

366. On or about May 24, 2006, Ms. Williams again e-mailed Mother regarding meeting dates and was informed that Parents had been unable to contact Mr. Hodgson. Ex. R-92, p. 962.

367. May 25, 2006 was the last day of school for the 2005-2006 school year. Ex. R-92, p. 962; Tr. 1449. On that date, Ms. Williams spoke to Mother regarding meeting dates and was again informed that they had not been able to get in touch with Mr. Hodgson. Ex. R-92, p. 962; *see also* Ex. R-56, p. 621.

368. On or about May 25, 2006, Mother requested, through Beverly Emery, that Student not participate in "switch day" and requested that Student remain in Beverly's room instead. Ex. R-92, p. 958.

369. On or about May 31, 2006, the District provided Parents with a notification of conference to complete Student's IEP review on June 14. Ex. R-92, pp. 958, 962. The meeting date subsequently was changed to June 13, 2006. Ex. R-92, p. 958.

370. On or about June 5, 2006, Mother called Kristi Hinton to reschedule the IEP meeting. Ex. R-92, p. 962.

371. On or about June 7, 2006, the rescheduled meeting was confirmed for June 13, 2006. Ex. R-92, p. 962. On or about June 7, 2006, the District provided Parents with a notification of conference for an IEP review to be held on June 13, 2006. Ex. R-57, p. 622.

372. On or about June 13, 2006, Student's IEP team convened to complete the IEP process begun on April 19. Ex. R-92, pp. 958, 962; Ex. R-58, p. 623; Ex. P-40; Tr. 221, 792, 813, 1213, 2370, 2422, 3141. An IEP was finalized on that date. Tr. 221. The following individuals were among those who attended and participated in the meeting: Father, Brenda Williams, Beverly Emery, Kristi Hinton, Patrick Farnan, Stephanie Dustman, Becky Hughes and Rand Hodgson. Ex. R-58, pp. 623-624; Tr. 2353, 2370, 2422, 3142, 3437.⁵³ The District showed Brenda Williams as a regular education teacher. According to Ms. Mulford, Ms. Williams was not a regular education classroom teacher and, to Ms. Mulford's knowledge, could not remember Ms. Williams providing regular education services to any students at District. Tr. 2236-2237. However, as stated above, Ms. Williams did have certification as a regular education teacher. Ms. Mulford, Student's regular education teacher for the 2005-2006 school year, was not invited to attend. Tr. 2236.

373. The June 13 IEP offered Student 1490 minutes per week of specialized instruction in academics, 150 minutes per week of speech-language therapy, 60 minutes per week of occupational therapy, and 325 minutes per week in regular education. Ex. R-58, p. 623; Tr.

⁵³ At that time, school was out and teachers were not under contract. Tr. 2353.

1201, 1490, 3146-3147. Parents and Mr. Hodgson agreed with those services. Tr. 3147. The IEP provided for a District placement, although the specific location had not yet been determined,⁵⁴ and Parents did not request a private placement or a placement at Rainbow Center during the meeting. *See* Ex. R-58, p. 623; Tr. 3153, 4839. The present level noted that Student had educational diagnoses of other health impaired and speech, a medical diagnosis of autism and a hearing loss in the right ear. Ex. R-58, p. 625. The present level also stated that Student continued to make progress in communication, attempted to initiate conversation with peers, pretended to talk on the phone, often hugged her friends and, when working in groups, modeled others. Ex. R-58, pp. 625-626; Tr. 3438-3439. The present level also indicated that Student independently used the bathroom and transitioned through the hall with the paraprofessional. Ex. R-58, p. 625. It also stated that Student participated in sensory breaks and seemed to work better in a small group, rather than a 1:1 setting. Ex. R-58, p. 626. The present level also noted that the District's functional behavioral assessment showed that Student displayed non-compliant and avoidance behaviors during 1:1 time but had made improvement in behavior during 1:1 with the use of reinforcement, choices and visual charts. Ex. R-58, p. 626; *see also* Tr. 3439-3441.

374. The IEP also noted that Student was to be mainstreamed for lunch, recess, music, physical education, field trips, and assemblies and had paraprofessional support for those activities. Ex. R-58, p. 626. The IEP provides for Student to have the use of an auditory trainer and states that the loaner augmentative device was obtained for a trial period, during which

⁵⁴ During the several months process of developing the June IEP, there was discussion about which building Student would attend if she returned to the District. Tr. 3153. Among the alternatives discussed was Student going to Ms. Hughes classroom at Elm Grove Elementary or Ms. Bold's classroom at Fire Prairie Middle School. Tr. 3153-3154. Ms. Hughes' classroom is similar to Ms. Emery's. Generally, the children in Ms. Emery's class ultimately go to Ms. Bold's classroom. There also was some discussion about Student staying at Buckner. However, at the time Student was getting older and bigger and Ms. Emery generally had younger children. Tr. 3154. As a result, it was becoming inappropriate for Student to remain there. Tr. 3154. By the conclusion of the June 2006 IEP meeting, Ms. Emery thought Student would best be served by being in Ms. Hughes' classroom. Tr. 3156.

Student was able to use the device with adult help. During that trial period, Student used the device at recess to ask another student to play. Ex. R-58, p. 626; Tr. 3151.

375. The present level included the results of the most recent reevaluation and noted that, since the prior IEP, Student continued to make consistent progress toward meeting her goals. Ex. R-58, pp. 627-628; Tr. 3152. The present level described Student's current level of functioning in readiness, self-help and motor skills and in communication, fine-motor and other areas. Ex. R-58, pp. 627-629. In the area of communication, the present level stated that Student had mastered nearly all of the goals in that area. Ex. R-58, p. 629. In addition, the present level stated that Student had successfully used icons on a necklace to communicate. Ex. R-58, p. 629. In the behavioral area, the present level noted that Student was easily distracted and required daily repetition. Ex. R-58, pp. 629-630. The parent concern section indicated that Parents wanted to implement a communication device. Ex. R-58, p. 630. By the conclusion of the process, Ms. Emery testified that Parents and Mr. Hodgson were active participants in the development of the present level and no team members were in disagreement with it. Tr. 3150.

376. The IEP special considerations page stated that Student was deaf or hard of hearing, had behaviors that impeded learning, needed assistive technology and was eligible for ESY services. Ex. R-58, pp. 631, 637; Tr. 4896-4897. The IEP also offered numerous accommodations and modifications, including sensory rich experiences, the use of an adaptive keyboard, a daily communication log, an FM system, priming and, for the first time, an augmentative communication device. Ex. R-58, p. 636; Tr. 199-200, 813-816, 3142-3143, 3156-3157, 4899, 5381. That portion of the IEP provided many of the specific items requested by Parents in their May 2006 letter of concerns. *See* Ex. R-58; Tr. 816. In addition, many of the

accommodations and modifications were included at Mr. Hodgson's request, even though most were already being done in Ms. Emery's classroom. Tr. 3157-3161.

377. The June IEP contained goals in activities of daily living, behavior, math, reading, fine-motor, writing, functional communication, receptive, expressive and pragmatic language. Ex. R-58, pp. 638-653; Tr. 5053-5054. Parents and Mr. Hodgson had input into the writing of the goals and objectives and there was a great deal of discussion about how to word them. Tr. 3164-3166, 5054-5055. At the conclusion of the process, Parents and Mr. Hodgson did not express any disagreement with the goals and objectives suggesting that all members of the team agreed that they were appropriate for Student. Tr. 3164-3170, 5056. Many of the goals were new and others were revised. *See* Ex. R-58, pp. 638-653. Because some of the goals were to be implemented in multiple settings and/or with multiple people, the goals addressed Student's generalization difficulties. *See* Ex. R-58, pp. 638-653. Mother, however, testified that the IEP did not reflect the need to address generalization. Tr. 1216. She further testified that Parents' concerns were not adequately addressed in the IEP. Tr. 1220.

378. The June IEP included the behavior plan that was developed in May. Ex. R-58; Tr. 2370-2371, 2385, 3170. According to Ms. Emery, the behavior plan was attached and in writing so that no one would misunderstand about what and how behavioral supports would occur. Tr. 2386. She further testified that the behavior plan that was generated was what Parents wanted. Tr. 2376-2377. At the time, she did not think a behavior plan was necessary and that the one that was developed simply included the strategies that already were in place. Tr. 3444.

379. Ms. Emery also testified that the present level of the IEP was accurate with respect to Student's behavior and was intended to convey that, at least one time per day, Student

was not compliant. Tr. 3442. She also testified, however, that Student generally was not engaging in “big” or significant behaviors. Tr. 3442.

380. Ms. Emery also testified that the June 2006 meeting was the first occasion where Parents mentioned to her that they were concerned about Student’s progress. Tr. 3443. This testimony, however, is questionable in light of the many communications (as set forth above) between Parents and Ms. Emery in regard to Parents’ ongoing concerns. At that meeting, Parents and their advocate did not request that the District place Student at Rainbow. Tr. 3147. In addition, Parents did not communicate to the team that they were considering placing at Rainbow. Tr. 3147.

381. On or about June 15, 2006, the District provided Parents with a notice of action refusing their request that the IEP accommodations and modifications page be changed from “close proximity to instruction” to “one-on-one instruction.” Ex. R-59, p. 658; Tr. 814, 3171.⁵⁵

382. Student did not attend the District’s proposed ESY program during the summer of 2006. Tr. 3163.

383. Student ceased attending the District R-I School District after May 25, 2006. Accordingly, the District was never given an opportunity to implement the IEP that was developed for Student in April, May and finalized in June 2006. Tr. 2094, 3143, 3163, 4838-4839, 5054.

384. According to Mother, Parents were forced to remove Student from the District and place her elsewhere. Tr. 226. As she stated, “As we look back on it now, we should have done it much earlier. She wasn’t learning, wasn’t making the progress, her behaviors were interfering with her learning. . . . the trust was lost. Nothing was – they would never come –

⁵⁵ Throughout the time that Student attended the District, this was the first notice of action where the District refused a parent request.

they would hardly ever come through with anything.” Tr. 226. When asked to describe specifically what the District failed to do, she stated that “Well, that was throughout the entire time at Buckner. . . we were promised – you know, we were told we would have computers that worked that probably didn’t work more than they did work.” Tr. 227. She also mentioned that there were days when the paraprofessionals were absent and substitutes were not hired, and the communication device. Tr. 227.

385. On or about June 26, 2006, Kristi Hinton corresponded with Parents regarding the newly developed IEP. Ex. R-60, p. 659. In that letter, Ms. Hinton noted that, during the June 13 IEP meeting, Parents indicated that Student would be attending a private placement over the summer of 2006, but Parents did not inform the team as to where the private placement was. *Id.*⁵⁶ In addition, Ms. Hinton noted in her letter that, when asked, Parents chose not to provide the district with information as to whether, or how, the District was denying Student a free appropriate public education. Ms. Hinton then requested that information so that the District could address any issues. Ex. R-60 at 659. Finally, Ms. Hinton wrote that, since everyone was in agreement with the finalized IEP developed on June with the exception of the refusal of one-on-one instruction, the District could not determine why the parents believed that the District was denying FAPE. *Id.*

386. On or about June 27, 2006, Parents first placed Student at the Rainbow Center in Blue Springs, Missouri. Ex. P-82, p. 604; Tr. 229, 236, 279, 340, 1223. During that summer program, Student attended four days a week for three hours a day. Tr. 1502. Prior to that attendance, Student had never been to the Rainbow and it was a new environment for her. Tr. 1503-1504. Rainbow did not provide for a transition program to that setting, even though Parents

⁵⁶ Mother testified that she could not remember when she informed the District that Student was attending or going to attend Rainbow, but “we never hid it.” Tr. 1223. She further stated that “I don’t know that we were ever asked.” Tr. 1224.

believed that Student had difficulties with transition. Tr. 1504. Mother testified that she could not recall if Student initially had difficulties at the time she began attending. Tr. 1504.

387. After the summer of 2006 and before August 2006, Parents did not return to the District and ask for Student's team to change her placement to Rainbow. Tr. 4098.

388. Mother described the Rainbow Center as a private school for children with communicative disorders and stated that "it's constantly one on one." Tr. at 229. According to her testimony, Rainbow has 59 staff members and the same number of students, and she was impressed with that ratio. Tr. 230. Mother also testified that Rainbow had a behavior therapist who set up a behavior plan for Student with her parents and that Student had speech therapy every day with a speech therapist. Tr. 229-30.

389. During the 2006-2007 and 2007-2008 school years, Student attended Rainbow. Tr. 340. She began attending there on or about August 29, 2006. *See* Ex. P-82, p. 604; Tr. 280. Other than the summer of 2006, Student did not attend any other summers. Tr. 4507.

390. Petitioners called Marilu Herrick, the Executive Director of Rainbow, to testify regarding the institution. Tr. 4434, 4505. Ms. Herrick had testified in an IDEA due process hearing on one prior occasion on behalf of the parent. Tr. 4498-4499.

391. Ms. Herrick has a bachelor's of science degree in education and received a master's degree in speech pathology and audiology in 1976. Tr. 4434-4435, 4456-4457. She is certified to teach in the areas of learning disabilities and emotionally disturbed and has 35 years of experience working with children with severe disabilities. Tr. 4434. Her last experience working in the public schools was before 1975 and, therefore, before the passage of the IDEA. Tr. 4456-4457.

392. Ms. Herrick testified that the Rainbow Center began in 1977 as an offshoot of her work as a private speech-language pathologist. Tr. 4436-4438. As a result of her work, Ms. Herrick testified that she saw a need for a more intensive approach to language and learning disability issues where families had a choice regarding services. Tr. 4438. The program began as a day program for three children who had severe speech and language and reading disabilities. Tr. 4439. That program eventually became the Rainbow Center for Communication Disorders and gradually began to focus on students with more severe disabilities, including those who were cognitively and behaviorally challenged. Tr. 4439, 4467. At the time of Ms. Herrick's testimony, Rainbow was a private day school with the capacity to serve 60 children from ages 3 through 21. Tr. 4442-4444. All of the children who attend there are disabled, although they – on occasion – have some opportunity to be with people without disabilities in community access programs. Tr. 4446, 4461, 4481 Ms. Herrick did not know how frequently Student participated in community access programs or whether any nondisabled children were involved when she did. Tr. 4473; *see also* Tr. 1251 (wherein Mother testified that Student has had no opportunity to integrate with nondisabled peers at Rainbow).

393. According to Ms. Herrick, Rainbow is certified by the state of Missouri and had to go through an approval process for that. Tr. 4440, 4459-5560. As part of that process, Rainbow was required to provide the credentials of its staff. Tr. 4459-5560. Ms. Herrick stated that she was not aware of the approval process with respect to the requirements of updating information on staff. Tr. 4464. She was not aware that the only two teachers for whom the state had certification information were no longer employed at Rainbow. Tr. 4464. Of the 90 total staff, eight are certified teachers and the remainder are paraprofessionals or qualified substitutes.

Tr. 4461. Ms. Herrick was unable to say how many of that 90 work in the day program that Student attends. Tr. 4461.

394. Ms. Herrick also testified that, of the eight classrooms in the day program, not all the classroom teachers are certified; one is only a substitute teacher. Tr. 4462. However, she testified that Student's then current teacher, Kathy Devore, was a certified special education teacher although Ms. Herrick did not know the area of her certification. Tr. 4462. Ms. Devore did not testify at hearing. Ms. Herrick also did not know if Ms. Devore's certification was provided to DESE as part of the required approval process. Tr. 4463. Ms. Devore began teaching at Rainbow only in August 2007. Tr. 4464. When asked about her prior experience, Ms. Herrick stated that she knew Ms. Devore had taught kindergarten for several years, but did not know if that was in a private or public school. Tr. 4464. She also did not know if Ms. Devore had any prior experience teaching special education. Tr. 4465. Ms. Herrick could not say who Student's certified special education teacher(s) was in the 2006-2007 school year or whether those individuals remained employed at Rainbow, but stated that all were special education certified. Tr. 4465. At the time she testified, Ms. Herrick stated that Student's speech-language pathologist was Jennifer Lay. Tr. 4465-4466. Her speech-language pathologist during the 2006-2007 school year, Pamela Shalto, was not employed at Rainbow during the 2007-2008 school year. Tr. 4465. The occupational therapist that served Student during the 2006-2007 school year was not employed by Rainbow in 2007-2008. Tr. 4466.

395. The Rainbow program that Student attended has the capacity for a maximum of 75 students. Tr. 4500. The typical class size is 6-9 students. Tr. 4450. During the school day, some children are able to receive 1:1 instruction. Tr. 4450.

396. Most of the children who attend Rainbow have been placed by public schools and most of those children have significant behavior problems. Tr. 4447, 4467, 4470. Of the sixty children who attended at the time of her testimony, only two were placed by parents. Tr. 4470. Ms. Herrick stated that Rainbow's goal was to reintegrate children into the public school setting. Tr. 4442. However, she could provide no statistical information regarding the number of students who had been successfully reintegrated into the public schools nor could she say what percentage of publicly placed children eventually returned to the public schools. Tr. 4469-4470. Ms. Herrick occasionally referred to mainstreaming children. Tr. 4468. When asked to define that term, she stated that she meant a public school program even while acknowledging that public schools have multiple placement options. Tr. 4468. Ms. Herrick was unable to state the differences between a Rainbow and public school program. Tr. 4482. She stated that Rainbow has a strong philosophy of positive reinforcement and students' programs are "very individualized." Tr. 4449. She also testified that Rainbow has a behavior team that consists of two people who specialize in behavior. Tr. 4491. The behavior team meets two times a month for 45 minutes. Tr. 4493. Ms. Herrick did not know if Student was ever the subject of the behavior team. Tr. 4493. Rainbow also operates an 8 week summer program. Tr. 4402.

397. With respect to Student, Ms. Herrick stated that she did not know when Parents first applied for Student to attend Rainbow, but was aware that Student began attending there during the summer of 2006. Tr. 4486. She, however, was involved with the application and enrollment process when Student first came. Tr. 4486. Generally, when a public school district requests a student's placement, the district sends the student's records and paperwork and Rainbow reviews that and makes arrangements to meet and observe the child in the school setting. Tr. 4451. Ms. Herrick could not recall if she met Student before Rainbow admitted her

and could not recall when she first met her. Tr. 4489-4490. Rainbow did not conduct an observation of Student because according to Ms. Herrick, they thought Mr. Hodgson supplied a lot of information regarding Student, including that Student had behavior issues and did not want to go to school. Tr. 4487, 4489. Ms. Herrick did not know if Rainbow requested documentation of that information. Tr. 4489. She also did not know how many times Mr. Hodgson had met Student before she began attending and did not know if Mr. Hodgson was the one who recommended Rainbow. Tr. 4487, 4489.

398. With Student, a different process than was typical was used. Tr. 4454. Ms. Herrick could not recall if Parents brought the District IEP or evaluation, was unable to say what served as the basis for Student's programming in the beginning and did not know if District information was used.. Tr. 4480, 4486. Ms. Herrick thought Student's educational diagnosis was autism and, "of course, she has down's syndrome." Tr. 4476. She testified that she could not say who at Rainbow determined a child's disability label. Tr. 4474. Rainbow never conducts evaluations or reevaluations and never changes a student's IDEA diagnosis. Tr. 4474-4475, 4479. Such a practice tells the Panel that Rainbow does not believe that a student's program is driven by his/her educational diagnosis. In Student's situation, Rainbow personnel met with Parents and with Student. Tr. 4452-4453. Parents generally toured the building and were allowed to "stand in the doorway" and watch the classes. Tr. 4496. According to Ms. Herrick, Parents brought their concerns and frustrations to the process and Rainbow, Parents and Mr. Hodgson worked together to develop a plan. Tr. 4452-4453. Ms. Herrick could not recall if she encouraged Parents to go back to the District to negotiate a program with the public school, although she usually does that with parents. Tr. 4471-4472. As she stated, "They were not really interested in having us be their advocate to the district." Tr. 4471-4472.

399. Ms. Herrick has not served as Student's teacher at Rainbow but has infrequently observed her there. Tr. 4486-4487, 4494. At the time of her testimony, she had not recently observed Student at Rainbow. Tr. 4487. She did state that Rainbow attempts to group children by receptive language level and not necessarily by age, but did not know what Student's receptive level was. Tr. 4512. Although Ms. Herrick did not serve as Student's teacher, she testified, on direct examination, that Student had made meaningful progress at rainbow but was not clear regarding the source of that opinion. Tr. 4456, 4494. She testified that she had observed Student having behaviors at Rainbow. Tr. 4495. She also testified that Student was saying "bye" to people at Rainbow but did not know whether Student was doing that at the District. Tr. 4474. Ms. Herrick testified that Rainbow staff use charts, data and other things to determine if a student is achieving her objectives. Tr. 4475. She did not know if Rainbow staff had shared Student's raw data with Parents. Tr. 4475. Ms. Herrick testified that Parents had never requested Rainbow to provide Student with an augmentative communication device. Tr. 4489-4490.

400. At Rainbow, Student is not in the same physical classroom all day. Tr. 4511. Ms. Herrick testified that the Rainbow teachers were allowed to decorate the classrooms. Tr. 4484. When asked what Student's classrooms looked like, she could not answer the question and responded by saying she would have to look. Tr. 4484. Student's class has from 6-9 students and six staff. Tr. 4484. Some of the students have 1:1 paraprofessionals. Tr. 4484. Student has 1:1 support, but the other children are in the vicinity or close by in another part of the room when Student receives instruction. Tr. 4483. Some of the other students in Student's room have autism and other developmental disabilities. Tr. 4483. Some are verbal and others act out behaviorally. Tr. 4483.

401. Father's testimony confirmed Ms. Herrick's opinion that Student made meaningful progress at Rainbow. Student's attitude toward school changed from not wanting to go to school at Buckner to loving school at Rainbow. (Tr. 3977-3978) While at Rainbow, Student was taught how to nod her head to indicate yes or no, learned how to identify her money, was counting up into the thirties by fives or "something," was learning life skills, gained a few more understandable words (maybe three, four or five), and her sign language got a little bit better. Tr. 4118-4121. Although not the standard for assessing whether Student showed meaningful progress at Buckner, while at Buckner, Student could only count to five sometimes, while at Rainbow, she was doing multiples of five in less than a year. (Tr. 3455). The Panel holds that Student made meaningful educational progress at Rainbow. Dr. Allee holds, contrary to the other two Panel members, that even though progress was made at Rainbow, it was not provided in the least restrictive environment and therefore did not provide a FAPE.

402. During the 2007-2008 school year, Rainbow charged parents \$2,200 per month. According to Ms. Herrick, she did not recall the 2006-2007 school year tuition. Parents, in fact, paid \$2,200 a month, but Ms. Herrick did not know how Parents paid. Tr. 4501-4502, and 4495.

403. Rainbow had contracted with public schools to provide services and currently had contracts with 20 public school districts to provide services for students who would otherwise go to those public schools. In the past, Rainbow had contracted with District to provide services for at least one student living within the District. Tr. 4500-4501.

404. During the 2006-2007 school year and beginning in mid-to-late September 2006, Dr. Patty Smith served as the an interim Director of Student Supports Services within the District, while Kristi Hinton was on medical leave. Tr. 881; 6766.⁵⁷

⁵⁷ Although Ms. Hinton returned to that position in a less than full-time capacity in August 2007, Dr. Smith stayed involved for purposes of the hearing. Tr. 881-883.

405. On or about August 30, 2006, the Rainbow Center developed its first IEP for Student. Ex. P-45; Ex. R-66, p. 680; Tr. 239. Mother attended that IEP meeting. Tr. 239-240. No one from the District was invited to or participated in the meeting. Mr. Hodgson also attended. Ex. R-66, p. 680; Ex. P-45.

406. The August 30 Rainbow IEP provided Student with 1680 minutes per week of specialized instruction, with only 60 minutes per week of speech-language therapy⁵⁸ and 60 minutes per week of occupational therapy. Ex. R-66, p. 701. The IEP included goals and objectives in the following areas: behavior, functional math, functional reading, occupational therapy, speech-language therapy, and community access/P.E. Ex. R-66, pp. 688-700. The IEP also included certain accommodations and modifications including preferential seating and a sensory program. Ex. R-66, pp. 704-705. The IEP required Student to participate in the state's MAP-A program. Ex. R-66 p. 707.⁵⁹ The August 30 Rainbow IEP did not provide for the use of an augmentative communication device or for extended school year. Ex. R-66 pp. 680-707.

407. Per Mother, Rainbow implemented the August 30, 2006 IEP and prepared progress reports. Tr. 240-241; *see also* Ex. P-46, pp. 361-370. According to Mother's testimony, those progress reports accurately reflected Student's progress while at Rainbow. Tr. 241. From June 2006 to January 30, 2007, Student did not have the use of an augmentative communication device for her use at Rainbow. Tr. 340.

408. On or about November 3, 2006, Rainbow Center prepared an addendum to Student's August 2006 IEP. Ex. R-47, pp. 371-400; Tr. 241. Per Mother, Rainbow prepared that

⁵⁸ In the June 2006 IEP, Student's District IEP provided for 150 minutes per week of speech-language therapy. Ex. R-58, p. 623. Moreover, Mother testified that Student required 1:1 daily speech-language therapy from a qualified pathologist. Tr. 524-526.

⁵⁹ The state MAP-A test is the state's alternative test for children whose cognitive abilities are at the lowest 1%. Tr. 1059-1060, 6015. Dr. Smith testified that, in her opinion, Student was a proper candidate for that instrument. Tr. 1060.

addendum because they wanted to have an opportunity to take data and get to know Student better so that they could write appropriate goals. Tr. 241-242. The Panel finds that the amended IEP appears to contain essentially the same program as the August 30 Rainbow IEP. *See* Ex. R-66, pp. 680-707. The amended IEP was then implemented at Rainbow. Tr. 242. No one from Rainbow testified with respect to specific implementation of any of Student's IEPs and services while she has been attendance there.

409. On or about November 15, 2006, Parents corresponded with Dr. Patty Smith, Beverly Emery and others and asked to schedule an IEP meeting for Student to discuss her progress. Ex. R-61, pp. 660-661; Tr. 1034. That was the first time, according to Dr. Smith, that she had heard of or became aware of Student. Tr. 1034, 6766. Upon receiving the letter, Dr. Smith tried to determine what building Student was in to set up an IEP meeting, but found out that Student was not attending the District. Tr. 1034-1035. At that time, Ms. Smith testified that she did not know where Student was attending school. Tr. 1034-1035.⁶⁰ Rhonda Weir, the District's process coordinator for Buckner at this time, initially testified that she did not believe this statement to be true as Dr. Smith was asked at a prior process coordination meeting whether Parents had filed a due process request. Tr. 6722. Subsequently, in cross-examination, Ms. Weir testified that she guessed, or didn't know, that there was a difference between knowing Student hearing her name. Tr. 6744.

410. On or about November 20, 2006, Dr. Smith corresponded with Parents regarding their request to hold an IEP meeting for Student. Ex. R-62, p. 662; Ex. P-48; Tr. 243, 1227-1228, 1035-1036, 6016, 6034-6035; *see also* Tr. 6782. In that letter, Dr. Smith informed Parents that, she had checked the District's information systems, and determined that Student did not

⁶⁰ Mother testified that she could not remember if Parents had informed anyone at the District prior to November 20, 2006 that Student was attending Rainbow. Tr. 243-244.

have a current IEP in the District. Ex. R-62, p. 662; Tr. 1036. Because Student was not currently enrolled in the District, Dr. Smith informed Parents that an IEP meeting could not be held as requested. Ex. R-62, p. 662; Tr. 245, 1228, 1036. Dr. Smith, however, offered to meet with Parents to discuss Student and informed them that, once Student was enrolled, the District could schedule an IEP meeting. Ex. R-62, p. 662; Tr. 246-247.⁶¹ Dr. Smith did not receive a response to her letter until January 2007. Tr. 1037.

411. On or about January 4, 2007, Parents formally enrolled Student at Buckner Elementary although Student never attended there or any other school within the District subsequent to that enrollment. Ex. R-92, p. 963; see also Tr. 247; 884, 1037, 6016-6017. The enrollment form did not state where Student was attending school. Tr. 1038. At that time, Parents informed the District that Student would stay at Rainbow until her District team developed an IEP for her. Ex. R-92, p. 963; *see also* Ex. R-63, pp. 663-664.

412. After Student was enrolled and after a first meeting with Parents, Dr. Smith generally familiarized herself with Student's education records and set up an IEP meeting for Student. Tr. 573-574, 1038-1039.

413. On or about January 4, 2007, the District provided Parents with a notification for an IEP meeting to be held on January 10, 2007. Ex. R-92, p. 963; Ex. R-64, p. 665; Tr. 1038-1039, 2478, 6107. At that time, Dr. Smith believed that the purpose of the meeting was to get Student back into the District. Tr. 1040. During the subsequent IEP meetings, Dr. Smith continued to assume that Parents were seeking an IEP for the District and not for Rainbow. Tr. 1042.

⁶¹ Dr. Smith testified that, at that time, a public school district had no responsibility to develop an IEP for a student who was not attending (enrolled in) the District. Tr. 1037.

414. On or about January 8, 2007, Father signed a release authorizing Rainbow to provide information to the District. Ex. R-65, p. 666; Tr. 1040, 1233-1236, 6107-6118.

415. On or about January 10, 2007, the District held an IEP meeting for Student even though Student was not attending the District's schools. Ex. R-92, p. 963; Ex. R-67, p. 709; Tr. 249, 824, 1040, 2479. The following individuals were among those who attended: Stephanie Dustman, Sarah Vyroster (a regular education third grade teacher), Beverly Emery, Becky Hughes, Principal Patrick Farnan, Ms. Knight, Rand Hodgson, Father and Dr. Smith. Ex. R-67, p. 709; R-68, p. 711; Tr. 1041, 1048, 1053, 2417, 2479, 5776-5778, 5969, 6023-6024. Mother did not attend because she was recovering from medical complications. Tr. 249; Ex. R-67, p. 709. Parents provided the District with some documents from the Rainbow Center. Ex. R-66; Tr. 1041-1044, 1236-1237, 6018-6023. At that meeting, Dr. Smith did not understand that the District would be considering Rainbow as a placement. Tr. 625.

416. The District kept and maintained notes of the meeting. Ex. R-67, p. 709; Tr. 1045, 2482.⁶² Dr. Smith ran the meeting and noted that Parents had requested it. Ex. R-67, p. 709. Father then informed the team that Student was attending the Rainbow Center and was doing well there; he noted that "her behaviors are gone." Ex. R-67, p. 709; Tr. 625, 629, 1041-1042, 1046. Mr. Hodgson then stated that they had brought copies of the Rainbow IEP, but the team determined that the IEP was not complete. Ex. R-67, p. 709; Ex. R-92, p. 963; R-66. That Rainbow IEP included progress reports with checkmarks indicating progress, but no data to show to what degree. Ex. R-66, pp. 668-670; Ex. R-67, p. 709; Tr. 1045. Mr. Hodgson indicated that Rainbow would provide a more complete IEP. Ex. R-67, p. 709; Tr. 1045. He further stated that, historically, Student had been included (while at the District), but that her behaviors had

⁶² Dr. Smith testified that the District provided Parents with a copy of the meeting notes and that Parents never communicated that the notes were inaccurate. Tr. 1051. She further testified that the notes accurately reflected what occurred at the meeting. Tr. 1051.

increased to the point where inclusion had decreased and Student was just 1:1 with Ms. Emery. Ex. R-67, p. 709; Tr. 1047.⁶³ Mr. Hodgson then explained that the concerns at Rainbow concerning Student were communication and behavior. Ex. R-67, p. 709; Tr. 1045-1046. Ms. Knight then stated that a communication device was being tried at Rainbow and Mr. Hodgson followed up on that statement by saying Parents had just decided to order the Tango device. Ex. R-67, p. 709; Tr. 1048.⁶⁴ Parents' concerns were then discussed. Ex. R-67, p. 709; Tr. 578. Per Father and his representatives, Student's sensory issues and behavior were decreasing at Rainbow. Ex. R-67, p. 710. The Buckner staff indicated that they needed more information from Rainbow before the team could begin drafting an IEP and Mr. Hodgson indicated that Rainbow's behavior therapist needed to be interviewed. Ex. R-67, p. 710; Tr. 1045-1046. Mr. Hodgson also stated that a behavior plan was in place at Rainbow, but was not available for the meeting. Ex. R-67, p. 710; Tr. 1052. Dr. Smith then asked if the team that met in June 2006 had considered a placement at Elm Grove Elementary and was informed that it had been discussed, but that Parents had not visited there. Ex. R-67, p. 710. Dr. Smith concluded the meeting by stating that, once the District received the Rainbow information, the team would reconvene. Father responded by saying that Student would remain at Rainbow until another meeting was held. Ex. R-67, p. 710; Tr. 1052. During the meeting, neither Father nor Mr. Hodgson requested that the District write an IEP for Student's placement at Rainbow. Tr. 1052. An IEP was not developed for Student on that date. Tr. 1046.

417. On or about January 10, 2007, Ms. Weir corresponded with Parents and provided them with a copy of the June 13, 2006 IEP. Ex. P-49, R-69, p. 712; Tr. 246, 1053, 6024; *see also* Tr. 2479-2480. Ms. Weir also informed Parents that the District would be in contact with

⁶³ Dr. Smith testified that that information was not accurate. Tr. 1047-1048.

⁶⁴ At other points during the hearing, the evidence established that the Tango was not utilized at Rainbow until on or about January 13, 2007. Ex. R-70, p. 714; *See also* Ex. P-52.

Rainbow to gather information and would then reconvene Student's IEP team. Ex. P-49; Tr. 247.

418. On or about January 17, 2007, the District telephoned Marilu Herrick at Rainbow and requested Student's records. Ex. R-92, p. 963.

419. On or about January 24, 2007, the District again contacted Rainbow and asked for Student's records so that a meeting could be scheduled. Ex. R-92, p. 963. During that contact, the District scheduled a telephone conference with Rainbow staff. Ex. R-92, p. 963; Tr. 655.

420. On or about January 25, 2007, Mother telephoned Dr. Smith to see when an IEP meeting could be held and was informed that the District still had not received the requested information from Rainbow. Ex. R-92, p. 963.

421. On or about January 30, 2007, District staff held a telephone conference with Rainbow staff. Ex. R-70, pp. 713-714; Ex. P-53; Tr. 644-646, 923.⁶⁵ The District kept and maintained notes of the telephone conference. Tr. 646-647, 646, 1054-1056. At the beginning of the telephone conference, Dr. Smith asked the Rainbow staff to share how Student was doing at that school. Ex. R-70, p. 713. She then explained that the District still had not received a complete Rainbow IEP, behavior plan and progress reports for Student. Ex. R-70, p. 713; R-92, p. 963; Tr. 1055-1056. Marilu Herrick informed the District staff that the information would be provided. Ex. R-70, p. 713. Rainbow staff then informed the District staff that Student was easily distracted and that, at Rainbow, staff worked with her individually and in small groups of 7-8. In response to a question regarding the use of the Tango communication device, Rainbow staff indicated that they had just borrowed it the last week and Student used it then. Ex. R-70, p. 714; *see also* Ex. P-52. Rainbow staff also stated that they were working on Student's two

⁶⁵ At some point, the District left a telephone message at Rainbow in the hopes that District staff could observe there. Tr. 622. However, according to Dr. Smith, because Rainbow did not return the call, staff was not able to observe at Rainbow. Tr. 622-623. Apparently, no additional efforts were made to observe at Rainbow.

behaviors of not staying on task and non-compliance and that Student was more non-compliant on some days compared to others. Ex. R-70, p. 714. On most days, Student had four incidents of non-compliance. Ex. R-70, p. 714. Rainbow staff also discussed the sensory strategies that they used and mentioned that she had a “one-on-one.” Ex. R-70, p. 714. At the conclusion of the telephonic meeting, Dr. Smith asked that the Rainbow IEP with progress notes, behavior plan and MAP-A information be provided as soon as possible. Ex. R-70, p. 714; Tr. 1058.

422. On or about January 30, 2007, Dr. Smith telephoned Parents to let them know that the requested Rainbow records had not been received. Ex. R-92, p. 964; Tr. 1060.

423. On or about January 30, 2007, Rainbow prepared an additional addendum to Student’s August 30, 2006 IEP. Ex. P-55; Tr. 1260. The Rainbow IEP did not provide for an FM system. Tr. 1264-65. The Rainbow IEP specifically indicated that Student did not need the use of any assistive technology, including the use of an augmentative communication device. Ex. P-55, p. 440; Tr. 1266-1267. According to Mother, Student had the use of the Tango augmentative device during part of the time she was at Rainbow, but conceded that, during the 2006-2007 school year, it was for less than one month. Tr. 1268; *see also* Ex. P-52 (showing that Student received Tango for one-week trial in January 2007). At another point in her testimony, she testified that Student probably had the Tango more than half the time at Rainbow, or close to it. Tr. 1269. In spite of that limited access to the Tango, Mother testified that Student was able to make progress and benefit educationally without the Tango. Tr. 1268-1269. Mother was unaware of whether any Rainbow staff was trained on the Tango and could not recall if she asked for such training. Tr. 1269-1270. Mother also agreed that the Rainbow IEP stated that Student had no time in regular education. Tr. 1291. She also acknowledged that it stated that

Student required a functional curriculum, but did not ask Rainbow what that meant. Tr. 1291-1292.

424. Mother also was questioned regarding the goals in the Rainbow IEP. She acknowledged that the word “generalization” was not mentioned in any of the goals and that Rainbow could better explain those goals. Tr. 1297. Mother also was questioned regarding her previous testimony regarding the need for baseline data. She testified that Ms. Knight and Mr. Hodgson had told her about baseline data. Tr. 1321. When questioned regarding her definition of baseline data in relation to the Rainbow IEPs, she testified that “No, you’ll have to ask someone else.” Tr. 1307. When asked about specific goals and whether they were clearly worded, she agreed that a goal stating “more than 50%” could require anything from 51 to 100%. Tr. 1307; *see also* Tr. 1307-1309. Mother further testified that the Rainbow IEP called for the use of PECs as a communication system and that she was not opposed to that. Tr. 1271.

425. On or about January 31, 2007, Dr. Smith corresponded with Parents to inform them that the District still had not received the requested information from Rainbow. Ex. R-71, p. 715; Tr. 1060. Dr. Smith also sent Parents a notification of conference scheduling another IEP meeting for February 5, 2007 so that the team could begin developing an IEP. Ex. R-71, p. 715-716; Ex. R-92, p. 964; Tr. 1061.

426. In or around January or February 2007, the District received a document from Rainbow labeled “Student Sensory Summary” dated January 31, 2007. Ex. R-72, p. 717; Tr. 1062, 6025-6026.

427. On or about February 2, 2007, the District contacted Rainbow to check on the status of the information requested and was told that it would be mailed on that date. R-73, p. 718, Tr. 6026, 6038.

428. On or about February 5, 2007, the District convened an IEP meeting for Student at Buckner Elementary School to develop an IEP. Tr. 249, 1061, 1064, 1230, 2488-2489; Ex. R-74, p. 719; R-74, pp. 721-722; Ex. P-57. Immediately before the meeting, Dr. Smith telephoned Rainbow to get information on Student's behavior goals and strategies, the functional behavioral assessment that Mr. Hodgson previously stated existed, and data regarding sensory activities. Ex. R-92, p. 964; Ex. R-73, p. 719; Ex. R-74, pp. 720, 724; Tr. 1063, 6039-6041.

429. The District took notes of the February 5, 2007 meeting. Ex. R-74, pp. 721-722; *see also* Ex. P-49; Tr. 2490.

430. The following individuals were among those who participated in the February 5 IEP meeting : Mr. Hodgson, Ms. Knight, Mother, Sarah Vyroster, Stephanie Dustman, Beverly Emery, and Dr. Smith. Ex. R-74, p. 721; Tr. 1064, 2417, 2490, 2495. Parents and their invitees had an opportunity to, and did, participate in the meeting. Tr. 1064-1065. The meeting notes reflected that the District had just received the entire current Rainbow IEP, with January 30, 2007 updates, before the meeting. Ex. R-74, pp. 721,723; Tr. 1066-1067. At the beginning of the meeting, Dr. Smith reviewed the telephone conference that was held on January 30. Ex. R-74, p. 721. The team also discussed the Tango communication system that Rainbow borrowed from Parents. Ex. R-74, p. 721; Tr. 1067-1068. Ms. Knight explained that, on or about January 30, 2007, Rainbow borrowed the Tango from Parents and used it for about a week. Ex. R-74, p. 721; Tr. 1068; *see also* Ex. P-52. Mr. Hodgson shared new updates from Rainbow, including a chart with a sensory diet, a behavior intervention plan, and charts with behavioral information. Ex. R-74, p. 721; *see also* Ex. R-72, p. 717. Mother informed the team that the behavior plan was from the summer of 2006 and the sensory plan was new. Ex. R-74, p. 721. After a discussion of the Rainbow information, Dr. Smith passed out charts of data regarding Student's

progress while at District and mentioned that she was excited to see the progress Student had made while in attendance at the District. Ex. R-74, p. 721; *see also* Ex. R-74, pp. 742-757; Tr. 2491-2493. However, the accuracy of these charts, as described below, is questionable.

431. The team, at Dr. Smith's direction, then turned to the completion of a present level of performance. Ex. R-74, p. 721. At that time, Mr. Hodgson stated that Rainbow prepared "easy" goals to get a consistent foundation and baseline. Ex. R-74, p. 722. A conversation between Dr. Smith and Mr. Hodgson then ensued. At the conclusion of that conversation, the team agreed that Mother and Ms. Knight would review the draft IEP that the District had prepared and the data charts. Mr. Hodgson then discussed behavioral issues that existed at Rainbow and informed the team that Rainbow had collected "loads" of behavior data and completed a functional behavioral assessment. Ex. R-74, p. 722. Dr. Smith informed the team that the District would compile all information and draft a present level and goals. In the interim, Mother agreed to visit Elm Grove Elementary School and Mr. Hodgson stated that the family would provide more information to the District by Monday, February 12. Ex. R-74, p. 722. Because the team was not able to finalize the IEP, another meeting was scheduled for February 15, 2007. Ex. R-74, p. 722; Tr. 1064-1065, 1074, 1230.

432. Dr. Smith testified extensively about the data charts that she shared at the meeting. Ex. R-74, pp. 742-757, Tr. 1069-1072, 1719, 2193-2213, 6007-6011, 6061-6082. Dr. Smith testified that, because she was only in the District on a part-time basis and did not know Student, she asked her staff to pull together information and data about Student so that she could get a better view of her in preparation for the upcoming meeting. Tr. 1018-1019, 1719-1721, 2100-2103, 6007-6008.⁶⁶ In making that request, she asked staff to provide her with information

⁶⁶ As Dr. Smith testified, the IDEA contains no requirement that data be taken or that it be taken daily. Tr. 6011. She specifically does not recommend the collection of daily data because a teacher would then spend too much time

on Student's progress or the lack thereof. Tr. 1070. She testified she did not ask staff to make up information that would show Student had made progress while at the District nor did she direct anyone to withhold data. Tr. 6008, 6082. However, Rhonda Weir, process coordinator, who was initially in charge of gathering information concerning Student's progress while at Buckner, testified that she felt "possibly" that she was being asked to create documentation to show Student's success and she couldn't do that. Tr. 6749-6750.

433. The graphs at Ex. P-58 resulted from Dr. Smith's request and were given out to all team members, including Parents, at the February 5 meeting. Tr. 1721-1722, 6008-6009. Dr. Smith saw the charts for the first time at the same time Parents did. Tr. 6073. Dr. Smith did not prepare the charts and graphs that resulted from the staff's data collection. Tr. 1070. Rather, Christine Williams, Dr. Smith's assistant, was given the data by other staff, put that data into an Excel spreadsheet and the computer then generated the graphs. Tr. 6010, 6061. The graphs were generated so it would be easier for Dr. Smith to have a more readable form to see Student's progress. Tr. 2198. Dr. Smith testified that had there been data showing a lack of progress, that data would have been included. Tr. 6065. Dr. Smith testified some of the charts showed that Student's progress was "up and down." Tr. 6066. However, given responses to questions posed by Parents' attorney (Tr. 6065-6066) and review of the charts themselves, it appears that there was a diminimus showing of "downs". In reviewing the charts, the only goal which appears to show failure is the goal relating to identifying colors. Ex. P-58, p. 491. Indeed, in the area of occupational therapy, Ms. Dustman testified that the only data showing success attempts was plotted and that data was missing. Tr. 5536, 5537, 5556, 5558. In addition, there is at least one date in the graphs that is a date when school was not in session. Tr. 5538 and 5539.

on data collection and not enough on teaching. Tr. 6011. Dr. Smith further testified that IDEA does not require a goal to reference data days or consecutive data days to be measurable. Tr. 6010.

434. The dates on the charts/graphs simply reflected the timelines that Ms. Williams put in and were placed there so it would be easier for Dr. Smith to read the graphs. Tr. 6009. Some, but not all, of those timelines correlated to Student's quarterly progress reports. Tr. 6090; Ex. P-58, pp. 481, 496. According to Dr. Smith, the charts also simply reflected the progress data that staff collected, and came from the occupational therapist, the classroom teacher, the IEP present levels and other IEP information. Tr. 1069, 2193-2198, 2213; *see also* Tr. 2446-2467, 5362-5366, 5447-5452, 5607, 5634, 5656. Again, the accuracy of these charts were brought into question by Ms. Weir and Ms. Dustman.

435. Based on her review of the information provided, Dr. Smith concluded that Student had made progress while at the District and she shared that conclusion with the other IEP team members at the February meeting. Tr. 1071. Mother reacted by questioning why Parents had not seen such data before. Tr. 1072. In response to Mother's reaction, Dr. Smith explained that she had asked for its preparation. Tr. 1071, 1721. Tr. 1071.

436. When Parents requested to see Student's education records after the filing of due process, the data and charts were all contained in those records that were in Dr. Smith's office for parental review. Tr. 2212.

437. During the February 5, 2007 meeting, Parents did not request that the District either place Student at Rainbow through the IEP process nor did they request that the District pay for Rainbow. Tr. 1064. Dr. Smith understood that Parents were seeking an IEP that placed Student in the District. Tr. 1064.

438. On or about February 6, 2007, Dr. Smith corresponded with Parents regarding the February 5 IEP meeting. Ex. R-75, pp. 758-762; Ex. R-92, p. 964; Tr. 923, 1074. In that letter, she informed Parents that, based on a phone call to Rainbow, she was informed that a functional

behavioral assessment had not been done there. Ex. R-75, p. 758; Tr. 1074-1075, 1080-1081; See Ex. R-74, pp. 721-722. In addition, she informed Parents that the Rainbow occupational therapist had called to let her know that Rainbow did not collect data on sensory activities and, that through observation, a sensory summary had just been completed. Ex. R-75, p. 758; *see also* Ex. R-74, pp. 721-722. In the letter, Dr. Smith also informed Parents that another Rainbow staff member also had contacted her and explained that the behavior graphs that had already been provided indicated the behavior data that was collected and also discussed Student's behavior plan. Finally, in her letter, Dr. Smith also reminded Parents that they had agreed to contact the District prior to the scheduled meeting on February 15 with their comments and suggestions. Ex. R-75, p. 758; Tr. 1075. Dr. Smith enclosed a paraphrased summary of the January 30, 2007 telephone conference with Rainbow. Ex. R-75, p. 758; Tr. 924, 1076.

439. On or about February 6, 2007, the District received additional information from Rainbow that reflected a January 30, 2007 IEP amendment (the same date as the telephone conference with Rainbow), some behavioral data including an undated behavior intervention plan, and a sensory summary. Ex. R-76, pp. 763-807; Tr. 1077-1079, 1081-1084, 6012, 6027; *see also* Ex. R-92, p. 964. There was nothing in that information or in any other information received from Rainbow that reflected that Rainbow had reevaluated Student and changed her diagnosis from other health impaired to autism. Tr. 6012.

440. On or about February 9, 2007, the District sent Parents a draft IEP as previously agreed. Ex. R-77, pp. 808-823; Ex. R-92, p. 964; Tr. 1090, 6028-6029. The draft was prepared based on the information from the telephone conference with Rainbow and the information discussed at the prior meetings. Tr. 1090-1092.

441. On or about February 12, 2007, Parents sent the District a letter regarding the February 5 IEP meeting and a list of their concerns. Ex. R-78; R-92, p. 964; Tr. 1092-1093. Those concerns were considered by the IEP team at the next meeting and changes to the IEP were made as a result thereof. Tr. 1093. In the letter, Parents mentioned a visit to Elm Grove school. Tr. 1093. Elm Grove is another elementary building within the District. Tr. 1094. At a prior meeting, Dr. Smith asked if the team had ever discussed Elm Grove as a building location for Student because Elm Grove had another special education classroom that addressed Student's type of disability. Tr. 1094. In contrast to Ms. Emery's classroom, the Elm Grove classroom has a more functional curriculum. Tr. 1094. A functional curriculum focuses more on living skills whereas another classroom might be more academically based. Tr. 1094-1095. In part, Dr. Smith thought a functional curriculum might be more appropriate for Student because the Rainbow IEP that had been provided showed the use of a functional curriculum there. Tr. 1095. Ultimately, Parents did visit Elm Grove. Tr. 1096.

442. On or about February 15, 2007, the District received a response from Rainbow staff regarding the January 30, 2007 telephone conference between District and Rainbow questioning the accuracy of the District's rendition of the telephone conference. The written response also recited successes Student was experiencing at Rainbow. Said response clarified and further refined what Rainbow staff had said on January 30 from Rainbow's perspective. Ex. R-79, p. 836; Ex. R-92, p. 964. Ex. P-54; Tr. 647-652, 924-925, 1096, 6029-6030. After receiving the response, Dr. Smith discussed it with staff. Tr. 1097. Although the District did not prepare a written response, it responded at the next IEP meeting. Tr. 648-650.

443. On or about February 15, 2007, the District convened Student's IEP team in an attempt to finish her IEP. Ex. R-80, p. 839; R-92, p. 965; Ex. P-62; Tr. 1098-1099, 2495. A

draft IEP was presented for review. Ex. P-62; Tr. 886, 1231, 2495. The following were among those who participated: Parents, Rand Hodgson, Ms. Knight, Patrick Farnan, Heather Duensing, Susan Edwards, Stephanie Dustman, Sarah Vyroster, Beverly Emery, and Dr. Smith. Ex. R-80, p. 839; Tr. 1099, 2497, 2505, 5589. No one from Rainbow was present.⁶⁷

444. The meeting began with Dr. Smith reviewing Parents' February 12 letter and the team discussed the parent concerns from that letter. Ex. R-80, p. 839; Tr. 1100. The team also had a discussion about the data charts previously provided by Dr. Smith. Ex. R-80, p. 839. Further, the team discussed the adaptive keyboard and computer and Ms. Knight stated that she had been requesting an augmentative communication device since Student was in kindergarten. Ex. R-80, p. 839; Tr. 1101.⁶⁸ Contrary to Ms. Knight's testimony, Ms. Emery stated that such a device was only discussed beginning in the fall of 2005. Ex. R-80, p. 839. The team also discussed Student's behavior and the personal paraprofessional. Ex. R-80, p. 839; Tr. 1101. After discussing Student's time at Rainbow, the team reviewed parts of the IEP and further changes were made. Ex. R-80, p. 840. The meeting then turned to a discussion of placement and which school building Student would attend if she returned to the District. Ex. R-80, p. 840; *see also* Tr. 262.⁶⁹ At the conclusion of the meeting, Mr. Hodgson stated that they were open to

⁶⁷ District's notes concerning said meeting reflect that Ms. Knight was in attendance and gave input (Ex. R-80, p. 839) although the draft IEP itself (Ex. R-82 and Ex. P-62) does not reflect her attendance.

⁶⁸ Ms. Knight testified that she recommended the use of an augmentative communication device for Student. Tr. 6561. Specifically, she testified that she began talking about it as an option with Parents before Student entered kindergarten, but, at that time, "we decided to let's keep going with speech." Tr. 6561; Tr. 6590-6591. More specifically, she testified that Parents kept wanting speech, so "we did a lot of oral communication with her." Tr. 6590-6591. When she brought it up to Parents, they said they would consider it, but, during the meeting, the team decided to focus on speech. Tr. 6591. She then testified that she talked about it with the District speech therapists during Student's first year of kindergarten. Tr. 6562, 6588-6589. In addition, per Ms. Knight, "I just didn't want to proclaim to be a perfectionist on aug com devices. It was always laid on the floor as an option of communication." Tr. 6589-6590. Per Ms. Knight, the District therapist thought that they should wait and try PECs (a picture exchange communication system) first and that "we" were okay with that. Tr. 6562. Ms. Knight agreed that PECS is a form of augmentative communication. Tr. 6590.

⁶⁹ At some point, the team discussed Student staying at Buckner but moving into Ms. Mallotte's room. Ex. R-80, p. 841; Tr. 262-263, 1104-1105. The meeting notes reflected that Mother was opposed to that idea. Ex. R-80, p. 841; *see also* Tr. 262-263, 1105-1106. Mother testified that she did not want Student in that classroom. Tr. 265.

placement but would request Rainbow. Ex. R-80, p. 840; Tr. 1101. Dr. Smith ended the meeting by stating that the team would look at different scenarios including Buckner, Elm Grove⁷⁰ and public outside agencies. Ex. R-80, p. 841; Tr. 1107.⁷¹ The IEP was not completed on that date. Tr. 886, 1100, 1231, 5589. At that time, neither the IEP present level nor goals had been finalized. Tr. 1102-1103.

445. Ms. Emery testified that, in February 2005, Student was exhibiting some behaviors but, in her opinion, those could be addressed by strategies other than a behavior intervention plan. Tr. 2500-2503. The draft IEP that was presented did include a draft behavior management plan. Ex. P-62.

446. On or about February 21, 2007, Dr. Smith corresponded with Parents and mentioned a visit that she made with Parents to Elm Grove Elementary. Ex. R-81, p. 843; Tr. 1108. In that letter, Dr. Smith raised the idea of Student attending the Fire Prairie building due to her age and requested that Parents contact her about a visit to that school. Ex. R-81, pp. 843-844; Tr. 1108. Dr. Smith also stated that Student's IEP team believed that Student needed an effective communication device which could be discussed at the next IEP meeting. Ex. R-81, p. 844; Tr. 1113. Dr. Smith enclosed a revised draft IEP with her letter. Tr. 1113-1114; Ex. R-81, p. 844; R-82. That revised draft stated that Student's primary disability was other health impaired. Tr. 1114. The draft also included a behavior plan and the draft, at that point, according to Dr. Smith, reflected team discussions and consensus achieved to that date. Tr.

⁷⁰ Per Mother, students who were more severe than Student went to Elm Grove Elementary. Tr. 265. She testified that she visited the program there one day and "it was awful." Tr. 265.

⁷¹ Mother also testified that Fire Prairie Middle School was another possible option and, in her words, was the District's final offer. Tr. 268. According to Mother, she was told that the classroom there would have a maximum of 10 students. Tr. 268. Dr. Smith thought that Ms. Bolds was the special education teacher in that classroom and that she was qualified to teach Student. Tr. 269. However, according to Mother, Ms. Bolds had "BD" certification and was not an autism specialist. Tr. 269.

1115-1116. Parents never communicated in writing that they disagreed with any aspect of the draft IEP. Tr. 1117.

447. After her visit to Elm Grove, Dr. Smith took steps to see if other options existed within the District besides Buckner and Elm Grove Elementary. Tr. 1109. She personally visited Fire Prairie School and spoke to the staff there. Tr. 1109-1110. Based on the visit, Dr. Smith concluded that that would be an appropriate building for Student where she would be with same age peers. Tr. 1110-1111. Had she returned to that building, Amy Bolds would have been her likely special education teacher. Tr. 1111. In Dr. Smith's opinion, Ms. Bolds would have been an appropriate teacher for Student. Tr. 1111. Ms. Bolds held cross-categorical, mentally handicapped and behavioral certification. Tr. 1111-1112. Had Student returned to the District at Elm Grove Elementary, Becky Hughes would have been her likely special education teacher. Tr. 1112. In Dr. Smith's opinion she, too, would have been an appropriate teacher for Student. Tr. 1112. Ms. Hughes had the proper certification, was good with behavior and with students functioning at a level similar to Student. Tr. 1112.

448. On about February 22, 2007, Dr. Smith spoke to Mother regarding a visit to Fire Prairie on February 28. Ex. R-92, p. 965.

449. On or about February 28, 2007, Mother called and cancelled the scheduled visit to Fire Prairie. Ex. R-92, p. 965; Ex. R-83, p. 872, Tr. 6030. The visit was rescheduled for March 5. Ex. R-93, p. 965; Ex. R-83, p. 872. Later, on February 28, 2007, Father called and cancelled the March 5 visit. Ex. R-92, p. 965.

450. On or about March 2, 2007, Mother called and stated that she could visit Fire Prairie on March 5. Ex. R-92, p. 965.

451. On or about March 5, 2007, Dr. Smith visited Fire Prairie with Mother, Student's Grandmother, Amy Bolds (the anticipated teacher), and the principal, Tim Gallagher. Ex. R-92, p. 966; Tr. 1117.

452. On or about March 13, 2007, Dr. Smith called Parents regarding the IEP meeting scheduled for March 16, 2007. Ex. R-92, p. 966; Ex. R-83, p. 872.

453. On or about March 16, 2007, Dr. Smith corresponded with Parents regarding the need to hold an IEP meeting to finalize Student's IEP and indicated that she had not yet heard from them. Ex. R-84, p. 873; Ex. R-92, p. 966; Tr. 1117-1118, 6031-6032.

454. On or about March 21, 2007, Mother left a message for Dr. Smith stating that she had not spoken to Rand Hodgson regarding meeting dates and that Father still wanted to visit Fire Prairie. Ex. R-92, p. 966; Tr. 1118. On that same date, Dr. Smith corresponded with Parents and proposed three new possible dates for the IEP finalization meeting. Ex. R-84, p. 874; Ex. R-92, p. 966; Tr. 1118. Dr. Smith also stated that, since she had not heard back from Parents, she assumed that they had no concerns with the revised IEP. Ex. R-84, p. 874; Tr. 1118. Parents did not provide any written correspondence in response to Dr. Smith's assumption. Tr. 1118.

455. On or about March 22, 2007, Father called to arrange a visit to Fire Prairie. Ex. R-92, p. 966.

456. On or about March 26, 2007, Mother called Dr. Smith to inform her that the advocate, Mr. Hodgson, was out of town. Ex. R-92, p. 966.

457. On or about March 27, 2007, Mother telephoned Dr. Smith and requested an IEP meeting on April 3. Ex. R-92, p. 967.

458. On or about March 28, 2007, Mother cancelled the IEP meeting on the basis that Mr. Hodgson was not available that date and requested to meet on April 2. Ex. R-92, p. 967. Dr. Smith returned the call and agreed to schedule the meeting on the parent requested date. Ex. R-92, p. 967.

459. On or about March 29, 2007, the District provided Parents with a notification for an IEP meeting for April 2. Ex. R-85, p. 875; Ex. R-92, p. 967; Tr. 568-569, 1119. The purpose of the meeting was to review and revise the IEP. Ex. R-85, p. 875; Tr. 569-572.

460. On or about April 2, 2007, the District reconvened Student's IEP team and finalized Student's IEP. Ex. R-85, p. 876 *et seq.*; Tr. 889-890, 1119; Ex. R-92, p. 967; Ex. P-64; Tr. 251, Tr. 545. The following were among those who attended and participated: Mr. Hodgson, Ms. Knight, Parents, Tim Gallagher, Sarah Vyrostek (a regular education teacher), Heather Duensing, Stephanie Dustman, Beverly Emery, and Dr. Smith. Ex. R-85, p. 877; Tr. 251, 831, 1120, 2191-2192. At that time, Student continued to attend Rainbow. Tr. 252.

461. Dr. Smith testified that, as of April 2, the team was prepared to discuss placement options. Tr. 1119. In addition, although the IEP had been through drafts and revisions, the District still remained willing to modify the present level, goals and other IEP components. Tr. 1119-1120. In fact, at Parents' and staff requests, the team did discuss and clarify some of the items that had previously been finalized. Tr. 1120-1121.

462. The District prepared an agenda for the April 2 meeting, Ex. R-85, p. 876, Tr. 1119, and kept notes of the meeting. R-85, pp. 877-878; Tr. 1120, 1740-1742. At the beginning of the meeting, Dr. Smith initiated a conversation regarding the Tango device. Ex. R-85, p. 877; Tr. 1121. Mr. Hodgson, speaking for Parents, stated that Rainbow had purchased the Tango and that it would arrive that week which was in conflict with the testimony of others. Ex. R-85, p.

877; Tr. 1121-1122. Mr. Hodgson also stated that the Tango needed to be tested for about 6 weeks. The team then discussed the Rehab Institute assistive technology evaluation. Ex. R-85, p. 877.

463. The team then turned its discussion to Student's placement⁷² and Dr. Smith noted that the team was required to place Student in the least restrictive environment. Ex. R-85, p. 877; Tr. 1125. The team then discussed a special education room at Elm Grove and the Fire Prairie Middle School program and teacher. Ex. R-85, p. 877. Dr. Smith informed the team that Amy Bolds had a strong background in autism, mental retardation and behavior and noted that the classroom was very organized. Ex. R-85, p. 877. Mother expressed concerns that, when she observed, the students were doing paper and pencil tasks and Father stated that the students in that classroom were more advanced than Student. Ex. R-85, p. 877. At the conclusion of the discussion of a Fire Prairie placement, Mr. Hodgson stated that the team was clear that Student would have 325 minutes per week in a regular education environment. Ex. R-85, p. 878. Ms. Knight then asked if everything would be in place before Student arrived. Ex. R-85, p. 878. Mr. Hodgson also brought the conversation around to a discussion of what things needed to be in place for Parents' comfort and how much time would be needed. Ex. R-85, p. 878; *see also* Tr. 977. In conclusion, Dr. Smith summarized that the District would purchase a Tango and train staff in its use, conduct a room assessment regarding sensory issues, hire a 1:1 paraprofessional for Student, check to see on the need for a touch screen, obtain an FM system, and obtain an Intelkeys keyboard. Ex. R-85, p. 878; Tr. 1128-1129. Mr. Hodgson requested that only the pages of the draft IEP that were modified be sent to Parents. Ex. R-85, p. 878; Tr. 1137. When the meeting ended, Parents indicated that they would contact Dr. Smith that afternoon with their decision. Ex. R-85, p. 878. They did not do so. Tr. 1138.

⁷² As Dr. Smith testified, placement is not school building specific. Tr. 1125.

464. Mother described her recollections of the meeting. She shared with the team how well Student was doing at Rainbow. Tr. 252. She also testified that, in her opinion, Fire Prairie was not an appropriate location for her daughter. Tr. 257. Based on her visit to the Fire Prairie classroom with Dr. Smith where she observed children doing paper and pencil work, she concluded that the classroom was not an environment in which Student could learn. Tr. 257-258. She further testified that, although Dr. Smith explained that students would do other things during the day, she was concerned that the classroom was not set up for Student to sit and spin around in circles if she needed to do that. Tr. 258. Mother also testified that the size of the classroom was a concern for her, but she could not remember the number of students who were present. Tr. 259. Mother also stated that, at the end of that meeting, Dr. Smith “commended me for what I was doing,” and told her she was a great parent. Tr. 260. She also stated, however, that Dr. Smith then stated that, if she thought her health was bad at that time, she should wait until there was a due process hearing. Tr. 260. Mother took that comment as a threat. Tr. 260.

465. By the end of the meeting, Student’s IEP team had finalized her IEP. Ex. R-86; Tr. 1130.⁷³ That IEP proposed a placement that included 1490 minutes per week of specialized instruction in academics, 150 minutes per week in speech-language, and 60 minutes per week of occupational therapy. Ex. R-86, p. 879; Tr. 938, 1130. The IEP also called for Student to spend part of her day in regular education. Ex. R-86; Tr. 939-940, 979; Tr. 1127. Those services were to be provided at Fire Prairie Middle School in the District. Ex. R-86, p. 879.

466. The present level of the IEP noted Student’s withdrawal from the District and parent placement at Rainbow. Ex. R-86, p. 881; Tr. 894-95 It also noted her history while at the District. Ex. R-86, p. 881. The present level further stated that the District obtained a loaner

⁷³ At that time, the District had purchased a new IEP software system which changed the format of the IEP documents. Tr. 634.

“Mini-Mo” on May 9, 2006 for a trial period to see if it would meet Student’s needs and that Student was able to use that device with adult assistance. Ex. R-86, p. 882. In addition, she was able to use the device in other settings. Ex. R-86, p. 882. The finalized IEP also included the summary of data that Dr. Smith requested in January-February 2007. Ex. R-86, p. 884; Tr. 3448-3452. The April 2007 IEP special considerations page stated that Student exhibited behaviors that impeded learning and was deaf or hard of hearing. Ex. R-86, p. 890; Tr. 895-896. That statement was based on data and information from Parents, the District and from Rainbow. Tr. 677-680, 1786.

467. The IEP included goals and objectives in behavior, math, reading comprehension, language, articulation, activities of daily living, and fine motor. Ex. R-86, pp. 891-898. The IEP also included numerous accommodations and modifications including close proximity to instruction, use of augmentative communication, sensory rich experiences, personal paraprofessional support, adaptive keyboard, mini choice and reinforcement charts, large handled utensils, positive reinforcement, low sensory instruction, an FM system, and a daily communication log. Ex. R-86, p. 892-A; Tr. 941. Finally, the April 2007 IEP included a behavior intervention plan. Ex. R-86, p. 893-A; Tr. 3448.

468. At the April 2007 meeting, the team considered a placement at Rainbow. Tr. 626-631, 934. As Dr. Smith testified, when looking at placement, the team must consider the continuum of placements and make a decision based on the FAPE and least restrictive environment requirements. Tr. 935. She testified that, in April 2007, she did not know that the team had found anything favorable about Rainbow although she did relate that Parents and Rand Hodgson shared about good things happening at Rainbow. Tr. 935-936. Dr. Smith also testified that, in comparing the Rainbow IEP with the District’s April 2007 IEP, she did not see a great

deal of difference. Tr. 1786. She also stated that Rainbow was not doing anything that the District had not done or was not willing to do. Tr. 1786.

469. Dr. Smith also testified that, at the meeting, Tim Gallagher, the Fire Prairie principal, discussed with the team what Student's day would look like if she attended there. Tr. 943-944. She also testified that there was no need to prepare a transition plan for Student's return to the District. Tr. 947-948.

470. Dr. Smith also testified that prior to the meeting no one from Rainbow had said that Student was autistic and the District never received any information from Rainbow that they had reevaluated Student and changed her educational diagnosis to autism. Tr. 949-951.

471. Dr. Smith further testified that, by the conclusion of the meeting, in her opinion, there was complete consensus regarding Student's placement in the District at Fire Prairie even though Parents indicated that wanted to take the afternoon to think about it. Tr. 1125-26.

472. The District never had the opportunity to implement the April 2007 IEP because Student never returned to the District. Tr. 1131. Dr. Smith testified that the IEP was appropriate for Student and was compliant with all IDEA requirements. Tr. 1131-1133. The majority of the Panel believes, and so holds, that the April 2, 2007 IEP was appropriate for Student and was IDEA compliant in all respects. Said IEP addressed virtually all of the Parents' concerns, was extensive and comprehensive, and among other things, called for augmentative communication device,⁷⁴ continued to offer minutes of speech language far in excess of that being provided by Rainbow and contained a comprehensive behavior intervention plan ("BIP"). While a behavior intervention plan was part of the May 13, 2006 IEP, Student was only in the District a couple of weeks thereafter so it is impossible to gauge the success of that behavior intervention plan. In

⁷⁴ As set forth below, District was going to provide a "Tango", the augmentative communication device of Parents' choice.

any event, the BIP which was part of the April 2, 2007 IEP was even more comprehensive. It appears to the majority of the Panel that in the formulation and aftermath of this IEP that Parents were attempting to select specific teachers and a specific location as their main concerns related to those issues.

473. On or about April 3, 2007, Mother telephoned Dr. Smith with questions regarding Fire Prairie Middle School. Ex. R-92, p. 967; *see also* Ex. R-88, p. 902; Ex. P-68; Tr. 975, 1139, 1143. According to Dr. Smith, she asked if Parents could be involved in the hiring of the classroom paraprofessional and had questions regarding the classroom. Tr. 1143-1144.

474. On or about April 3, 2007, Dr. Smith corresponded with Parents as a follow-up to the April 2 IEP meeting. Ex. R-87, p. 895-A; Ex. P-64; Tr. 254-256, 886-887. In that letter, Dr. Smith indicated that she had yet to receive a phone call from Parents regarding whether they wanted her to proceed with ordering the Tango and to begin interviewing for a paraprofessional. Ex. R-87, p. 895-A; Tr. 1138-1139. Dr. Smith also responded to Parent's question regarding transportation. Ex. R-87, p. 895-A. Dr. Smith enclosed a notice of action with that letter in which the District refused placement at Rainbow Center as not being Student's least restrictive environment. Ex. R-87, p. 896-A; Tr. 1142. Dr. Smith also enclosed just those pages from the April 2007 IEP that were added or changed as a result of the meeting pursuant to Mr. Hodgson's request. Tr. 887, 890-891, 1137, 1143.

475. On or about April 4, 2007, Parents corresponded with Dr. Smith about the telephone conversation of April 3. Ex. P-68; Ex. P-64; R-88, p. 902; Tr. 254-256, 261, 886-887, 975-976, 1144. In that letter, Parents discussed the teacher that Student would have if she returned, the training that would be provided, the classroom location, and the paraprofessional as well as other matters. Ex. R-88, pp. 902-904. Parents also acknowledged that they had been

informed that Dr. Smith already had contacted the company regarding the Tango and mentioned that, if the District started immediately, it would take four weeks to have everything, including the personal paraprofessional, the Tango and the training, fully in place. Ex. R-88, p. 903. Parents then expressed that, in their opinion, Student should remain at Rainbow for at least the remaining few weeks of the 2006-2007 school year and for extended school year and wanted to know if the District would pay for that and develop a transition plan for Student to District. Ex. R-88, p. 904; *see also* Tr. 975-978; *see also* Ex. R-92, p. 967.

476. On or about April 5, 2007, Dr. Smith corresponded with Parents in response to their letter of April 4 and addressed each of the matters raised. Ex. R-89, pp. 905-906; Tr. 1145. In that letter, Dr. Smith provided Parents with information about the teacher that Student would have at Fire Prairie if she returned and mentioned that school districts were not mandated to have autism specialists. Ex. R-89, p. 905. Dr. Smith also confirmed that Student's IEP provided for a 1:1 paraprofessional, but that parents were not included in the process to interview and select such an individual. Ex. R-89, p. 905; Tr. 1145-1146.⁷⁵ Dr. Smith also stated that Parents could visit the Fire Prairie School by making arrangements with the principal. Ex. R-89, p. 905.

477. Dr. Smith wrote that the District welcomed Student to begin at Fire Prairie at any time. More specifically, she wrote that "[it] was you and your advocate that requested that everything (hiring a para, transportation, purchasing the communication device, etc.) be in place prior to her coming to school." Ex. R-89, p. 906; Tr. 972. Finally, Dr. Smith stated that, in her opinion, it would be best for Student to begin at Fire Prairie as soon as possible and noted that Parents did not raise the issue of transition at the IEP meeting. Ex. R-89, p. 906. Dr. Smith also

⁷⁵ Mother testified that she did not recall asking to be part of the hiring process, but "just wanted to be included." Tr. 1244-1245. She also testified that Dr. Smith had told them that they would be included. Tr. 1246. During cross, she testified that she merely wanted the District to share with her who they were thinking of hiring or what "traits" that person might have. Tr. 1245. She conceded that, as a parent, she had no legal right to be involved in the hiring decision or specifying the criteria regarding the person who might be hired. Tr. 1246-1247.

informed Parents that the District would not pay for Rainbow for the remainder of the school year or for the summer. Ex. R-89, p. 906. As part of that letter, Dr. Smith enclosed notices of action refusing the parent requests to be involved in choosing a paraprofessional for Student, to drop in without notice to observe Student, and to pay for Student to attend Rainbow for the rest of the year and the summer. Ex. R-89, pp. 907-909; Tr. 1146-1147. Dr. Smith never received a response to her letter. Tr. 1146.

478. On or about April 10, 2007, the District's Board of Education approved the purchase of the Tango for Student at a cost of \$6,924.00. Ex. R-90, p. 910; Tr. 970-971, 1147. The District did not purchase the device, however, because Dr. Smith was still waiting to hear from Parents about when Student would return. Tr. 1148, 1742-1743.

479. On or about April 16, 2007, Dr. Smith telephoned Parents regarding their failure to respond to her April 5 letter. Tr. 1743-1744; Ex. R-91, p. 914. Father returned that call and said that Parents had not yet made a decision. Tr. 1743-1744. After April 16, Dr. Smith never received any communication from Parents saying whether Student would return. Tr. 1149, 1743-1744.

480. On or about April 24, 2007, Parents initiated this IDEA due process proceeding by writing to the Missouri Department of Elementary and Secondary Education ("DESE"). Ex. R-94, pp. 981-982; Ex. R-92, p. 968; Ex. P-73; Tr. 271, 1135-1136. In that request, Parents alleged that they did not believe that Student was receiving a free appropriate public education from the District R-I School District and that they were willing to mediate. Ex. R-94, p. 981. In addition, in that request, Parents stated that they were looking for a private placement and seeking reimbursement for an appropriate education. Ex. R-94, p. 981; Tr. 271.

481. The chronological series of events following Parents' filing of the request for due process/complaint is set forth in Article B. Procedural Background and Timeline Information above.

482. On or about May 25, 2007, Rainbow provided Parents with an additional progress report regarding Student. Tr. 272; Ex. P-79, pp. 578-592.

483. On or about May 31, 2007, and at Parents' request for a report regarding Student's behavior, Rainbow prepared data regarding Student's behavior. Ex. P-80; Tr. 272-273, 841. In Mother's opinion, that report accurately reflected the behavioral data collected by the Rainbow Center from November 2006 through May 2007. Tr. 273.

484. Student did not attend summer services at Rainbow during the 2007 summer. Tr. 824.

485. During the summer of 2007, Parents received a Tango augmentative communication device for Student that Ms. Knight obtained on loan. Tr. 339. Per Mother's testimony, they sent that loaner device with Student to the Rainbow Center, but not on a daily basis because they were still in the "learning process." Tr. 340. Mother testified that Parents had not received any formal training on the Tango and was unaware as to whether Ms. Knight or the Rainbow Center staff had. Tr. 340-341. At hearing, Mother further testified that Student made progress in the speech-language area at Rainbow without the Tango. Tr. 341. At Rainbow, per Mother, staff used a combination of things to work with Student in the communication area, including verbalization, signing and a visual schedule and an augmentative device. Tr. 341. Mother stated that she was unsure as to whether Student had an augmentative device at Rainbow, and the question would have to be posed to Rainbow because she thought they did use such a device. Tr. 341-342.

486. The Panel finds that such a device was not available for Student's use at Rainbow with the exception of an approximately one week period in January-February 2007.

487. In August 2007, Kristi Hinton returned, on a less than full-time basis to the position of Director of Student Support Services. Tr. 881-882. Because of continuing health concerns, she resigned her position with the District at the conclusion of the 2007-2008 school year.

488. During the 2007-2008 school year, Student continued to attend Rainbow and did not return to the District. Tr. 824.

489. During the 29-day hearing, Petitioners called the following witnesses in their case in chief: Parents, Dr. Patty Smith, Beverly Emery, Marilu Herrick, Molly Pomeroy, and Nancy Mulford. On rebuttal, Petitioners called the following witnesses: Rhonda Weir, Father, Ms. Knight, and Molly Pomeroy. The District called the following witnesses during its case in chief: Dr. Patty Smith, Kristi Hinton, Stephanie Dustman, Heather Duensing, Becky Hughes, and Brenda Williams. The District recalled Dr. Patty Smith for brief sur-rebuttal testimony.

490. In addition to the testimony referenced above, Mother testified that Parents wrote the May 17, 2006 letter to the District because they believed that it was important for Student to receive the correct diagnosis because her services would be different if she were classified autistic rather than mentally retarded. Tr. 82, 86.

491. Mother acknowledged that she had taught children in first through third grades for more than ten years and that her expectations for children with average IQs were higher than for children with lower cognitive functioning. Tr. 326. Moreover, she testified that, as a general education teachers, she estimates students' cognitive levels and adjusts her teaching methods to

account for that. Tr. 329-330. She stated that a teacher's expectations for a child were too high, that child could become frustrated and engage in behaviors. Tr. 332-333.

492. Parents did not file due process until April 2007 because they wanted to see if things got better for Student at Rainbow, but looking back they should not have waited. Tr. 818. When asked why Parents lost trust in the District in or around December 2004, Mother stated that the only thing she could point to was the computer not working and Aimee Geringer's position that Student should attend Elm Grove. Tr. 457-459. When asked about the importance of the computer, she testified that it helped with Student's fine motor issues, but conceded that each of Student's IEP goals could be implemented without a computer. Tr. 430-433. She was unable to say how many days the computer was not working. Tr. 430-433. The evidence revealed that adaptive computer (Intellekeys) called for in Student's March 9, 2005 IEP (Tr. 397) was very problematic for everyone, having a number of breakdowns and computer compatibility problems. Tr. 5454-5555. A new computer was not ordered until February 2006 with there apparently being very little working time during the 11 month period. Tr. 5455, 5502, 5503.

493. Mother also complained about teacher absences and substitute issues. Specifically, she testified that sometimes a substitute teacher was not hired for Ms. Emery so the classroom paraprofessional had to be Student's teacher and there was no paraprofessional in the room. Tr. 433. When asked how she knew that, she stated that she was a teacher in the building. Tr. 433. She did not document the number of days that Ms. Emery was absent and did not know if the paraprofessional who substituted for her was a qualified substitute teacher. Tr. 436. In addition, she could not state how many times the classroom was without a paraprofessional assistant. Tr. 439. She later conceded that she probably was told that when Ms. Emery could not be present, the substitute who took her place was a qualified substitute and another

paraprofessional was moved around so that Student always had paraprofessional assistance. Tr. 439. Although her classroom was some distance from Ms. Emery's, she stated that she had to walk her students to art class every third day and that classroom was near that of Ms. Emery. Tr. 433-434. She also testified that, during her daily plan time, she also visited Ms. Emery's room. Tr. 433-434.

494. Besides the computer, paraprofessional assistance and substitute issues, Mother could not think of anything from Student's IEP that was not implemented. Tr. 440.

495. Mother also testified about what they alleged was a lack of communication with Ms. Emery. She acknowledge that a daily communication planner was sent home, but complained that the comments contained therein were very vague. Tr. 116, 852-854. She could not recall if she asked Ms. Emery to provide specific data. Tr. 411. She also acknowledged that she received a detailed schedule from Ms. Emery that showed Student's day including her 1:1 time. Tr. 411, 1279. She also acknowledged that she frequently spoke to Ms. Emery and Student's paraprofessionals and went into the classroom to check on Student and speak to Ms. Emery. Tr. 411. She was able to do that in a way that most parents were not. Tr. 411, 847.

496. The Panel finds Mother' complaints about school to home communication to be misplaced. First, the planner that she testified contained only vague comments contained considerable detail about Student's day and work activities. Moreover, Mother conceded that she had ample opportunity to put notes in the planner seeking additional information, but rarely did so. Second, the IDEA does not require the type of communication Parents desired. Third, Parents each had frequent and ongoing communication with Ms. Emery.

497. Mother testified that Student made no or limited progress at the District.

498. Per Mother, the family had been “interested” in a communication device for Student prior to May 2006, but the District made no efforts to obtain one. Tr. 1210-1211. In the same vein, she testified that during the time Student was at the District, Parents wanted her to use a variety of communication methods including sign, verbal language and PECS. Tr. 350. She further testified that Parents and Ms. Knight brought up the idea of an augmentative communication device several times, but she could not recall when. Tr. 350-351. She also said that Ms. Knight brought that up at every meeting. Tr. 139-141. The Panel finds that Mother’s testimony regarding the lack of use of an augmentative device at Rainbow with her concession that Student made progress in communication without that device demonstrated that Student did not require such a device to receive a free appropriate public education, at least in the Rainbow setting. *See* Tr. 344-349.

499. Mother testified about Rainbow and Student’s time while there. Mother stated that all the Rainbow students have disabilities and that Student has no opportunity for integration with nondisabled peers while there. Tr. 845. Although early in her testimony she stated that she wanted Student to have more time in regular education at the District, she was not concerned that Student had no opportunity at all to be in regular education at Rainbow. Tr. 1207, 1293. The Panel does not believe these positions are inconsistent. Parents, like all parents, wanted their daughter to have more time in regular education at her local school. However, from their perspective, to stop what they saw as an educational free-fall for their daughter, felt that such a restrictive setting was warranted.

500. Mother also acknowledged that, even though she testified that the District’s progress reports did not have sufficient detail, she acknowledged that the Rainbow progress reports were comparable to those of the District. Tr. 408-410.

501. Mother testified that Student had a behavior plan at Rainbow to help prevent behavior. Tr. 789. She could not recall when Rainbow completed an FBA. Tr. 790. She also testified that she was not stating that Student had no behavior while at Rainbow, but that it was “fairly good,” Tr. 789. When asked what behaviors the Rainbow behavior plan and data referred to, she did not answer the question and stated that the District’s attorney would “have to ask Rainbow.” Tr. 842-843.

502. Father also testified on Petitioners’ behalf and on rebuttal. Tr. 3934. In addition to his testimony set forth above, he testified that Student attended Buckner and stayed in Beverly Emery’s classroom for four years at Parents’ request. Tr. 4076-4077. According to Father, that was a “good place” for her prior to when things started going badly, however, even after that time, Parents did not consider asking for Student to be taken out of Ms. Emery’s room. Tr. 4077-4078.

503. With respect to Student’s IEP meetings, Father testified that he was lost at the first IEP meeting he attended and still did not understand a lot of the process even though Mother was a teacher. Tr. 3964-3965, 3984. With respect to Parents’ decision to not consent to an IQ test in 2005, Father testified that “they tried to snooker me into an IQ test.” Tr. 3986. He also stated that Brenda Williams told him that the District required an IQ test and that he felt as though he was being bullied about that. Tr. 3987. According to Father, Parents also refused to consent to the IQ test because he felt like the District wanted to “put a lid” on Student. Tr. 3989. In Father’ opinion, the District could not obtain an accurate test because of Student’s autism. Tr. 3989. He obtained that information from Rand Hodgson. Tr. 4087.

504. Father further testified that Parents regularly take Student to doctors’ appointments and she has a regular pediatrician. Tr. 4024. None of those doctors suggested that

Student was autistic. Tr. 4025. With respect to Student's hearing, Father testified that "we dropped the ball on the hearing." Tr. 3996. The loss is in only one ear and her other ear is fine. Tr. 4044. Student's hearing is adequate for Parents to talk to her at home and they did not use an FM system there. Tr. 4044.

505. At the point where the IQ testing was at issue, Father stated that things were becoming adversarial so Parents called Ms. Knight who pointed them to Rand Hodgson. Tr. 3988. Because Parents were "in over our heads," they engaged Mr. Hodgson's services as an advocate. Tr. 3983-3984, 3990. Parents paid Mr. Hodgson \$50-55 an hour for his services until he raised his rate. Tr. 4065. According to Father, after Mr. Hodgson became involved, things got worse and even more adversarial. Tr. 4005. Per his testimony, Parents did not hire Rand to be in due process; as he stated, "that was never an option." Tr. 3998. After Mr. Hodgson became involved, Student's IEPs got better but, according to Father, "they didn't follow them." Tr. 3999, 4090. He also stated that Mr. Hodgson did most of the talking and he was "big on data." Tr. 3999-4000.

506. Father testified that he did not feel as though Parents were treated as equal partners in the IEP process (Tr. 4002) and provided examples as depicted below. When asked what that meant, he testified that, if Parents brought information in, they wanted the team to look at that in a fair and honest fashion. Tr. 4072. He further testified that the team agreed to do a lot at Parents' request. Tr. 4071. At team meetings, Parents shared information with the team and Ms. Pomeroy was allowed to talk about the ABLLS. Tr. 4062, 4072-4074. On occasion, Parents asked for an explanation of terminology. Tr. 4064-4065. After Mr. Hodgson got involved, Father got a better feel for the IEP process. Tr. 4065.

507. Father also stated that Parents, on two occasions, asked Kristi Hinton about having outside individuals come to observe Student at school and were told that District policy did not permit it. Tr. 6756. He testified that they specifically only requested that Marilyn Stubbs⁷⁶ be permitted to observe, but would have liked to have had Ms. Pomeroy and Ms. Knight also observe. Tr. 6762.

508. Father acknowledged that Mr. Hodgson suggested other health impaired as a diagnosis but stated that he told Mr. Hodgson that he was upset for suggesting that. Tr. 4067, 6762. In his opinion, that was not the correct diagnosis for Student but was close as they could get and was a step in the right direction. Tr. 4001, 4067.

509. Per Father' testimony, Ms. Knight was the first person to suggest that Student might have autism and Mr. Hodgson also suggested autism before Parents took Student to Jamie Prestage. Tr. 4014, 4030. However, Mr. Hodgson did not spend a lot of time with Student and would go by what Parents told him. Tr. 4030. In Father' opinion, Student is autistic. Tr. 3965-3966, 4014. His opinion is based on some articles that he read and his conversations with people. Tr. 3965-3966. He also testified that Beverly Emery told him that Student has autism. Tr. 4003-4004. He testified that Student did not use to sit and spin and was not engaging in that behavior at age 4 or 5. Tr. 4023. Rather, he stated that Student was around six or seven years old when Parents "kind of started seeing it." Tr. 4028. Per Father, Student does not make good eye contact. Tr. 3968-3969. In addition, routine is important to her. Tr. 3947-3951. Further, according to Father, Student understands and remembers everything. Tr. 3943-3944.

510. Father testified that Student only rarely displays behaviors at home. Tr. 3978. He also testified that if you "keep after her" she will get a behavior and acknowledged that Student

⁷⁶ The record reflects that Parent only specifically requested Marilyn Stubbs to observe. The record suggests that Marilyn Weber and Marilyn Stubbs are the same person.

is capable of manipulating people. Tr. 4055-4056, 4058. He further testified that she has pulled her pants down when she was over stimulated. Tr. 4060.

511. Father testified about what he believed the District was not implementing for Student. Tr. 4079. According to him, the District failed to provide Student's computer for one and one-half years, Tr. 3992, 4079, and failed to provide her daily speech. Tr. 4079. In addition, he stated that Parents had to fight to get Student a personal paraprofessional and the District did not follow the behavior plan. Tr. 4080-4081.

512. Father also testified about Student's IEP goals. Tr. 3970. When asked about the goal for learning to open her milk carton, he stated that he "thought it was stupid to start with but the family and the District worked on this goal and a lot of progress was made." Tr. 3970-3971.

513. Father testified that Ms. Knight was the first person to bring an augmentative communication device to Parents' attention. Tr. 3991, 3993-3994. Although he thought that she mentioned it in an IEP meeting, he could not identify which one. Tr. 3991.

514. Father further testified about Parents' decision to place Student at Rainbow. Tr. 3973. He stated that, before Student began attending there, she made "very little, if any" progress at Buckner and it was "like she was being tortured" there. Tr. 3974, 3977-3978. However, Parents never considered asking for Student to be moved out of Ms. Emery's class or Buckner before considering outside options. Tr. 4078. Before placing at Rainbow, Mother visited several schools. Tr. 4009-4010. Mr. Hodgson continues to go to Rainbow IEP meetings with Parents to ensure that Rainbow is doing things correctly. Tr. 4066.

515. Father testified that Student loved school at Rainbow and was eager to attend there. Tr. 3974, 3979. While there, she had an average of 5-6 children in her classes. Tr. 4127. Father acknowledged that Student received less speech-language therapy at Rainbow than she

did at the District, but stated that Rainbow incorporated that throughout Student's day. Tr. 4085-4086. According to him, she made progress at Rainbow and, at one point, stated that her behaviors went away. Tr. 4119-4020. Later, he testified that he had not stated that she had no behaviors at Rainbow but that he wanted that. Tr. 4146.

516. According to Father, Parents did not intend to bring Student back to the District when they wrote to Dr. Smith in the fall of 2006. Tr. 4095.

517. When asked about Student's future, Father testified that he did not think she would ever live on her own. Tr. 4046. Although he would like for her to learn to read, he did not know if she could. Tr. 4050-4051. As he stated, he "can't predict where the years going to take her." (Tr. 4054)

518. Beverly Emery was called to testify in Petitioners' case-in-chief. In addition to the testimony referenced above, Ms. Emery also testified that, during the four years that Student attended Buckner Elementary, she attended each of her IEP meetings. Tr. 2956. During those meetings, Parents were given an opportunity to participate and they actively did so. Tr. 2957, 3172. They also were allowed to bring others with them, including Ms. Knight and Rand Hodgson, who had the opportunity and did participate. Tr. 2957. During the meetings Ms. Emery attended, Parents and Mr. Hodgson agreed with content of Student's IEPs and spoke up when they had a disagreement. Tr. 3545.

519. Ms. Emery also testified that, from April to June 2006, she was less than candid with Parents about her opinions during IEP meetings but that did not negatively impact Parents' ability to participate in IEP meetings or Student's ability to receive FAPE. Tr. 2378-2380, 3173-3174. Ms. Emery stated she did not withhold information from Parents; she simply withheld her opinion at times. Tr. 2378. Ms. Emery elaborated and stated that she had a good relationship

with Parents but disagreed with them about things, including parental follow-through. Tr. 3173, 3186-3188. Because she wanted to maintain that relationship, she chose not to always state what she was thinking. Ms. Emery also testified that she “wasn’t” real honest at that time (Tr. 2377), with the time she referred to being April, May and June of 2006. (Tr. 2377-2378) Following this statement, Petitioners’ attorney asked: “If you are not being honest with the whole IEP team about your thoughts and opinions about what is good for this child or what needs to be done for this child, aren’t you doing a disservice to the whole IEP team, not just the Parents?” Ms. Emery’s answer: “Probably so.” Tr. 2382-2383. Even if good intentions prompted Ms. Emery not to be candid with Parents, the fact remains that she was not, which helped to undermine the IEP process. For Ms. Emery to minimize her failure to be candid by proclaiming that she did not withhold information just opinions appears to be rationalization as teacher’s opinions are critical components of information. By her own admission, she probably did a disservice to the entire IEP team.

In addition to Ms. Emery’s lack of candor, Father testified that Marcie Terrill, a regular education teacher, told him that she wasn’t going to speak at meetings because before Ms. Terrill got there, “you guys” (District personnel) had already talked to her. Tr. 4002.⁷⁷ Also, Father testified that at an IEP meeting as Ms. Emery was speaking, she suddenly stopped. It was apparent to Father that somebody⁷⁸ shut her down. Afterwards Father questioned Ms. Emery about this situation and Ms. Emery told Father that Ms. Williams slapped her on the leg. Tr. 4003. When Ms. Emery was asked at the hearing whether there was a point at an IEP meeting (believed by the Panel to be the May 2006 IEP meeting) when she was going to say something,

⁷⁷ This happened before the fall of 2006 as Father testified this happened “way before Dr. Smith.” This is confirmed by the record in that Ms. Terrill’s only participation in IEP meetings concerning Student, germane to this hearing, was on March 9, 2005 (Ex. R-24, p. 387) and May 24, 2005 (Ex. R-37, p. 480).

⁷⁸ This “somebody” according to Father had to be Brenda Williams since it was a tight area and Ms. Williams was sitting right next to Ms. Emery. Tr. 4003.

Brenda Williams kicked her under the table giving her an indication not to say something, Ms. Emery replied that she didn't remember that happening. Upon being further pressed by Petitioners' attorney, Ms. Emery stated that she wasn't saying it did not happen, just that she didn't remember. Tr. 3216-3217. Ms. Williams denied such an action. Tr. 4659 and 4790.

Father testified that he knew of two instances that people were told or coached not to do "this or that" before a meeting. Tr. 4004. It is not clear from the record whether the two occasions are included in the situations referenced above. The Panel holds that as a result of Ms. Emery's failure to be candid and the suppression of open discussion, Parents' role as partners in the IEP process, prior to April 2, 2007, was compromised. In so holding, the Panel realizes that Parents' opportunity to participate at the IEP meetings on the surface, was more than extensive given their ability to bring representatives, the length and number of IEPs and related meetings, and input in all parts of the IEPs. However, meaningful participation requires a baseline of complete and candid disclosure.

520. At that time, (around May 2006) Ms. Emery did not feel as though Parents were dissatisfied with Student's progress because that always told her that she was doing "a really good job" with Student. Tr. 2379-2380.

521. In Ms. Emery's opinion, the fact that she was not going to be allowed to continue as Student's teacher during the 2006-2007 school year was a factor in Parents' decision to send Student to Rainbow. Tr. 3177. Although there had been decision in June 2006 about where Student would attend if she returned to the District, Mother had "made it quite clear that she wanted Student to stay with Ms. Emery. We had had this conversation every year that Student – there would be a time when Student would have to leave me and Mother did not want her to go over to Ms. Malotte's room, but by that point Student . . . was , what, nine, ten years old, it was

getting to be a little bit inappropriate for her to be with the kindergarten, the little kids that I had.” Tr. 2426, 3177. The team had decided, in June 2006, that Ms. Malotte’s room was not appropriate and that a different location, such as Elm Grove or Fire Prairie, was necessary. Tr. 2429-2430. Ms. Emery agreed with that decision. Tr. 2429; *see also* Tr. 2429-2433. Because Student never returned to the District, an IEP meeting in the fall of 2006 was not necessary to continue that discussion. Tr. 2434-2436.

522. Ms. Emery also testified that she had training in autism and experience with children with autism. Tr. 2909. Based on her training and experience with autism, she testified that children with that disorder usually do not play well with other children and generally do not interact with other children. Tr. 2909-2910. Children with autism also generally play with toys in their own way and not in the way the toy was intended and also sometimes perseverate on a particular toy. Tr. 2910. Ms. Emery did not observe those characteristics in Student. Tr. 2910. Ms. Emery also acknowledged that children with autism may have splinter skills but testified that children with mental retardation display the same. Tr. 2828.

523. Although Student, according to Ms. Emery, engaged in some repetitive activities and showed some resistance to changes in routine, she was very social, her language did not lack communicative intent, she used objects in an age appropriate fashion based on her developmental age, and did not have a deficit in the capacity to form relationships with people. Tr. 2692-2694.

524. In Ms. Emery’s opinion, Student met the criteria for mental retardation and did not believe that Student was autistic. Tr. 3464-3465, 3468. Contrary to this position is Father’s testimony that Ms. Emery had told him and his wife that she believed Student had autism. (Tr. 4003-4009). In her opinion, the major difference between Student and an autistic student was

Student's social ability. Tr. 3468. However, she also testified that an IEP is not written for a child's handicapping condition, but is written for the way the child is. Tr. 3470.

525. Ms. Emery also confirmed that, in 2005, Parents would not permit the District to administer an intelligence test to Student. Tr. 3465. She also testified that, when a child is mentally retarded and as the student gets older, you cannot expect the gap between that student and her same age peers to lessen. Tr. 3498. Because mentally retarded children cannot catch up cognitively, the gap widens because, intellectually, the child cannot do what her peers can. Tr. 3498-3499.

526. In Ms. Emery's opinion, Student's IEP goals represented a reasonable expectation of what she could accomplish. Tr. 2405. Moreover, neither Parents nor Mr. Hodgson requested that those goals be written with higher expectations based on an IQ higher than the mentally retarded range. Tr. 3474. As she explained, she never tries to establish goals lower and sometimes sets them higher than her expectations, hoping the child will be able to achieve at that level. Tr. 3476-3477. However, if the student fails to master those higher levels, that does not make the IEP inappropriate. Tr. 2403-2405, 3477.

527. Ms. Emery testified that, during the four years in her classroom Student made meaningful progress and she watched Student grow developmentally. Tr. 3449, 3477-3478. She also testified that she took data regarding Student's progress in a number of ways. Tr. 2388-2392, 2459-2457, 3452-3453, 3546. From August 2005 through May 2006, Student learned to use letter cards to write her name. Tr. 3191-3192. In August 2005, she did not recognize any numbers, but by the end of the year, could point to 1 and 2 and sometimes 3. Tr. 3192. During that year, she also learned to use some functional sign language, increased her cutting/scissor skills, and draw a line in a maze. Tr. 3192-3193.

528. Ms. Emery also talked about her use of technology with Student. At an earlier time, she tried using the touch screen with Student on the computer. Tr. 2918, 3518-3519. There was much difficulty with the screen staying on the computer. However, Student was able to successfully use the computer with a modified mouse and the cursor and, later, an adaptive keyboard. Tr. 2506-2507, 2918-2919. Ms. Emery testified that Student, during those four years, could receive a FAPE without any technology. Tr. 2919-2920.

529. Ms. Emery also testified regarding steps taken to address Student's communication deficits. As referenced earlier, she explained that she made a communication necklace for Student that was primarily to be used at recess with her peers. Tr. 3515. She took pictures of Student in different settings and put those on a lanyard. Student could then show the relevant picture to her friends. Tr. 3515, 3521-3524. In the special education classroom, Student was able to successfully communicate with vocalizations and signs and, had a method of communication as well in her regular education classroom. Tr. 3523-3525. Ms. Emery also used a picture exchange communication system with Student. Tr. 3520.

530. Ms. Emery discussed the loaned device (Mighty Mo) that the District obtained on or around May 9, 2006. Tr. 3526. With respect to that device, she testified that she was looking for something smaller with voice output that Student could use. Tr. 3526-3528. During the brief time the loaner was available, it did not seem to make much difference with Student's communication and Ms. Emery was concerned that it was too big and heavy and that Student would need to have assistance to remember to carry it from place to place. Tr. 3529-3531, 3198. Ms. Emery testified that Student made progress on her IEP goals with such a device. Tr. 3186. Ms. Mulford testified that Student would have benefited from some type of augmentative

communication device during the 2005-2006 school year, had it been provided to her in a more timely fashion. Tr. 2318-2319.

531. During the time Student was in her classroom, Ms. Emery was able to instruct Student 1:1 and the occupational therapist also provided 1:1 therapy. Tr. 3531, 3538. As she stated, she was able to do so even in the middle of a group and emphasized that Student did not have to be in a sterile environment to receive 1:1 instruction. Tr. 3532. At Parents' request, the District did place Student in a sterile environment at times to address her distractibility. Tr. 3488-3489.

532. Student did well in the small group setting. Tr. 3537. During the afternoons, Student had 1:1 time with Ms. Emery. Tr. 3541. Ms. Emery saw some increase in Student's behaviors during that 1:1 time and attributed that to Student's desire to be with her peers. Tr. 3199, 3201-3202, 3543. Ms. Emery also observed that Student's behaviors tended to increase after a break from school. Tr. 3462. Ms. Emery testified that, during the 2005-2006 school year, Student did exhibit some behaviors that impeded her learning and somewhat that of others. Tr. 2363-2368, 3193-3194. She testified that Student's behaviors did not get continually worse; at times, the behaviors were worse particularly in April 2006. Tr. 2596, 2879-2880. Ms. Emery kept functional analysis charts regarding those behaviors and those were used to prepare a behavior plan for Student. Tr. 3426. In Ms. Emery's opinion, not all of Student's behaviors resulted from her disability. Tr. 2399, 2401-2402. Ms. Emery never believed that such a behavior plan was needed. Tr. 3194-3195.

533. Petitioners also called Molly Pomeroy to testify during their case-in-chief and on rebuttal. In addition to her testimony referenced above, Ms. Pomeroy testified she had only met Student twice, spent less than two full days with her and only in a testing situation. Tr. 3836,

4243. Ms. Pomeroy attended only one IEP meeting for Student at Buckner and had had not attended any IEP meetings at Rainbow and had never spoken to the staff at Rainbow. Tr. 3836, 3842, 4247.

534. During cross-examination, Ms. Pomeroy acknowledged that she did not know when Student began receiving special education services, did not know how many years she had attended Buckner and, before she testified in this case, did not know Parents were planning to place Student at the Rainbow Center. Tr. 3843. She never conducted a functional behavioral assessment or analysis of Student. Tr. 3843.

535. Ms. Pomeroy testified that, in her opinion, Student demonstrated characteristics of autism. Tr. 3775. During her testimony during the Petitioner's case in chief and rebuttal regarding autism, she testified that, generally, one expects to see characteristics of autism before the age of seven. Tr. 4175, 6636, 6657-6658. During cross-examination, however, she acknowledged that the state criteria stated that such characteristics generally were evident before age three but stated that, based on the "literature" that she had reviewed "I know that they have to be evident prior to age seven." Tr. 3776-3777, 4176, 6657-6658, 6660. When asked what literature, she stated that she believed the age seven criteria was from the DSM-IV. Tr. 4176. When shown the DSM-IV, she acknowledged that it referenced age three and not age seven. Tr. 4398, 6660. On rebuttal, she testified that, with respect to age seven, she was not referencing DSM or any specific set of criteria "because I'm not a diagnostician." Tr. 6658. Ms. Pomeroy conceded that she was not qualified to diagnose autism and had not so diagnosed Student. Tr. 4176. She also conceded that Student's multidisciplinary team was required to use the state plan criteria for educational diagnoses. Tr. 4179.

536. During her testimony regarding autism, Ms. Pomeroy also testified, in response to Petitioners' attorney's questions, that students with autism display "splinter skills." Tr. 3683, 4180, 6635. She defined that phrase to mean "a child is demonstrating or performing skills at a much higher increased level of difficulty than in other areas." Tr. 4180, 6635. When asked to define splinter skills, she stated that her definition came from a variety of sources, and thought the phrase was used in the DSM-IV but did not know whether it was used in the state plan. Tr. 6655. She later acknowledged, however, that the Missouri state plan does not reference "splinter skills" but talks about "precocious skills." Tr. 4181. In her opinion, precocious skills describes the same thing as splinter skills. Tr. 4181-4182. When asked to define precocious, she stated that precocious means that a skill may develop at a higher than normal rate. Tr. 4182. She agreed, upon cross, however, that a precocious skill would be one that a child demonstrated that was above the child's chronological age. Tr. 4182. Ms. Pomeroy then conceded that Student did not demonstrate precocious skills that were above or even close to her chronological age. Tr. 4183-4184. She also conceded that the term "splinter skills" is not in the DSM-IV. Tr. 4398-4400, 6656.

537. Ms. Pomeroy also testified about Student's IEPs, her testing and other IDEA requirements. During Petitioners' case-in-chief on May 12, 2008, Ms. Pomeroy testified that she was "vaguely familiar" with the LAP-D test that the District administered in 2002 but was not able to answer questions regarding that instrument. Tr. 4313-4314. As she stated, "I think it is just an assessment, but I'm not a hundred percent positive." Tr. 4314. During her rebuttal testimony, Ms. Pomeroy testified that the LAP-D was a normal referenced instrument that was not an IQ test. Tr. 6629-6633. During cross-examination of her rebuttal testimony, however, she conceded that she had never administered the LAP-D, had not read or looked at the test manual,

and her sole source of information about the LAP-D was the Internet. Tr. 6653-6654. She then further conceded that she looked up the LAP-D on the Internet the week prior to her rebuttal testimony. Tr. 6654.

538. Ms. Pomeroy testified that she was familiar with IDEA requirements, but had no formal training in that area or on the Missouri State Plan. Tr. 3905-3906. She further testified that she had never been directly responsible for writing IDEA legally compliant documents. Tr. 3906. Her general understanding of IDEA is that the disabled child has the opportunity to be educated in the least restrictive environment, offered the right to go to public school for free and to get their needs provided for using the same educational standards as a typical child. Tr. 3907-3908. She acknowledged that the IDEA requires only an appropriate and not a perfect program. Tr. 3911.

539. Ms. Pomeroy also testified that, in her opinion, IEP goals, objectives and benchmarks had to be measurable and observable. Tr. 3914. Although she testified during direct that IDEA required data, during cross, she stated that she did not know if the IDEA referenced data in relation to goals and objectives. Tr. 6651. She further conceded that the IDEA did not specifically require percentage data for measurability. Tr. 6652. She was unable to answer questions regarding whether the IDEA contained guidelines with respect to writing measurable goals. Tr. 6652.

540. Ms. Pomeroy testified that, in her opinion, Student's the District's IEPs were not appropriate but acknowledged that she had only reviewed them briefly prior to her testimony and further acknowledged that many of her specific recommendations were included in those IEPs. *See, e.g., 3727-3729, 3754-3755, 3756-3757, 3770.*

541. In light of Ms. Pomeroy's lack of familiarity with specific IDEA requirements and her limited knowledge of Student, the Panel finds that her testimony regarding Student's IEPs should be given little weight.

542. Ms. Pomeroy also testified, in her opinion, that a student's IEP and the teacher's learning methods would change depending on whether that student's educational diagnosis was autism as compared to mental retardation. Tr. 3651, 3776.

543. Ms. Pomeroy also testified extensively about what she termed functional behavioral assessment and functional behavioral analysis and behavior intervention plans. Tr. 3595. Ms. Pomeroy testified that, in her opinion, behavioral analysis is a science and not a methodology. Tr. 3583-3584. According to Ms. Pomeroy, the science of behavior analysis includes the ability to observe behavior and determine what is causing it, why it is occurring and what needs to be manipulated to achieve altered behavior. Tr. 3556. She also testified that a functional behavioral assessment (FBA) is a document that is used to determine how to write a behavior intervention plan. Tr. 3578-3579, 3916. In Ms. Pomeroy's opinion, an appropriate behavior plan can never be written unless data is first collected with an FBA. Tr. 3580. Ms. Pomeroy testified that an FBA requires the testing of experimental conditions. Tr. 3586. She also testified regarding her opinion of the criteria required for a functional behavioral assessment. Tr. 3570. Per her testimony, an FBA is a data driven process that requires a written and functional definition of the behavior. Tr. 3572.

544. During cross-examination, she was not able to state whether the IDEA requires functional behavioral assessment or functional behavioral analysis. Tr. 3918. She then stated that it probably requires functional behavioral assessment and not analysis, "but unfortunately federal and state laws intermix those terms which is not accurate." Tr. 3918-3919.

545. Ms. Pomeroy initially stated that she believed that IDEA defined the criteria for an FBA, but could not state what that criteria was. Tr. 3919-3920. When asked where the examiner could find such criteria, she responded “probably someplace in the IDEA.” Tr. 3920. She also testified that she thought the IDEA also included criteria for behavior intervention plans, but could not state what that was. Tr. 3920. She then stated what she believed the criteria for an appropriate behavior plan for Student would be. Tr. 3788-3789. Based on that criteria, she testified that, in her opinion, neither the District’s nor Rainbow’s behavior plans were appropriate. Tr. 3793, 3610-3611. Finally, Ms. Pomeroy acknowledged that the special considerations page of the IEP did not require a behavior plan even where the team notated that the student’s behavior impeded the learning of the student or others. Tr. 3917-3918.

546. Regardless of Ms Pomeroy’s inability to cite specific requirements of FBAs under the IDEA, her analysis that there first needs to be assessment wherein Student’s behaviors and the antecedents thereto are observed and recorded, as a FBA should be based upon those observations, makes common sense.

547. With respect to Student, Ms. Pomeroy acknowledged that she had recommended a sterile environment for Student and was not aware that, after that recommendation was implemented, according to Ms. Emery, Student’s behaviors increased. Tr. 4226.

548. Petitioners also called Nancy Mulford to testify in their case-in-chief. As stated above, Ms. Mulford teaches second grade at Buckner and is a friend and colleague of Mother. Tr. 2224, 2273. Mother was Ms. Mulford’s student teacher at the time Student was born. Tr. 2233, 2273.

549. Student was in Ms. Mulford’s second grade classroom during the 2005-2006 school year for 30-35 minutes per day. Tr. 2265. During that year, Student never looked

unhappy at school. Tr. 2311. Prior to February 2006, she had a shared paraprofessional who attended with her and, after February, had a 1:1 paraprofessional with her. Tr. 2265-66. Prior to February 2006, she never brought to any one's attention that she thought Student needed a 1:1 paraprofessional. Tr. 2267. While in her room, Student had the opportunity to associate with her nondisabled peers. Tr. 2268. At times, Ms. Mulford assigned students to be special friends with Student at recess and Student was social with her regular education peers. Tr. 2314. Ms. Mulford worked with Student and her peers on signing to assist her with communication. Tr. 2269.

550. Ms. Mulford had contact with Mother two-to-three times per week at Buckner but never had any real discussion regarding Student's progress. Tr. 2312. Ms. Mulford testified that Ms. Emery was in a better position than she to judge Student's progress on her IEP. Tr. 2313. Ms. Mulford could not recall any discussion with Mother regarding an augmentative communication device, although she testified that she thought Student needed one. Tr. 2304, 2338. Student demonstrated some behaviors in her classroom and she did not feel the need to implement a behavior plan for her. Tr. 2288, 2333, 2340-2341. Ms. Mulford also stated that Parents never requested more therapy time for Student and she never suggested an increase at team meetings. Tr. 2335. She also stated that it would concern her if Rainbow offered Student less speech-language therapy than the district. Tr. 2336-2337. Ms. Mulford also never suggested any additional goals or objectives at the October 15, 2005 meeting. Tr. 2299.

551. Ms. Mulford testified that she was somewhat familiar with the IDEA and attended IEP meetings as a regular education teacher. Tr. 2262. She also testified that she understood her obligation to speak up and state her opinion at IEP meetings. Tr. 2263. She attended Student's IEP meetings and no one every told her she could not state her opinions at those meetings. Tr.

2263. Although she testified that she believed that Student's June 2006 program at Buckner was not appropriate for Student, she never stated that she disagreed with that program. Tr. 2237-2238, 2263. This withholding is significant. Ms. Mulford testified that, at Buckner, Student had been in an inappropriate program for the mildly retarded and "I felt like Student was more moderate to severely retarded" and had other handicapping issues that were not being taken care of. Tr. 2238, 2282. She further acknowledged, however, that a student's program was based on the goals, objectives and services specified in the IEP and not the classroom. Tr. 2283. Ms. Mulford stated that she did not know if an outside placement was necessary for Student in June 2006 because she was not familiar with all the district programs. Tr. 2238. During the meetings she attended, Parents never asked Student's IEP team to place her at Rainbow. Tr. 2314. She had no opinion with respect to whether Student had autism and stated that she rocked, but not very often. Tr. 2308-2309. She also never saw her spin. Tr. 2317.

552. During the October 2005 IEP meeting that she attended, Ms. Mulford was not in disagreement with Student's time in regular education and never asked the team to change those minutes. Tr. 2286. With respect to that IEP, Ms. Mulford ensured that Student was in close proximity to her during story time and consistently used the FM system. Tr. 2292-2295.

553. Ms. Mulford testified that, at a meeting to prepare for the due process hearing, Kristi Hinton – when asked if she agreed with Student's placement – told her that she could be held liable or morally and ethically responsible if she did not speak up at IEP meetings. Tr. 2231. Ms. Mulford testified that she feared adverse ramifications if she testified at hearing in light of Ms. Hinton's statement. Tr. 2230-2231. During cross-examination, she clarified that Ms. Hinton had told her, during that preparation meeting, that she had an obligation to speak up

at team meetings if she had a disagreement with the team and her job was never threatened. Tr. 2275.

554. During cross-examination, Ms. Mulford acknowledged that she was told, during the preparation meetings, that the discussions therein were privileged and were not to be discussed outside the meeting. Tr. 2271. However, after that meeting, she had conversations with Mother and told her what Ms. Hinton allegedly said to her. Tr. 2271. Ms. Mulford testified that she had 5-6 conversations with Mother about the due process and her need to testify. Tr. 2271-2272.

555. Angie Knight testified on rebuttal for Petitioners. Tr. 6545. Ms. Knight is a speech-language pathologist who has a master's degree in communication disorders and, upon receipt of that degree in 1996, began working in the field. Tr. 6545. Ms. Knight also is licensed in the State of Missouri as a speech-language pathologist. Tr. 6545. Although Ms. Knight had a teacher's certificate as a speech-language pathologist, she no longer does because "to keep up with it you have to be in the schools." Tr. 6583. Upon receipt of her master's degree, Ms. Knight worked for two years for a home health company that provided First Steps services to children aged birth to three in the child's home. Tr. 6547. After that, Ms. Knight started a private practice called "Outreach Therapies & Consulting" which provides speech-language and occupational therapists to serve children with special needs in their homes. Tr. 6547.

556. From 1999-2001, Ms. Knight was a contract employee for the District and served, during that time, as the speech therapist for the early childhood center. Tr. 6579. Beyond that one-two years, Ms. Knight has never worked in a public school setting. Tr. 6583. During that time, she provided direct therapy to Student as part of that contracted employment and, for one year of that same time, operated her private Outreach company. Tr. 6579-6580. During the time

that Ms. Knight provided speech therapy to Student as a contracted school employee, her company also provided private therapy to Student. Tr. 6580. She further acknowledged that she had had the opportunity to observe Student in the Buckner school environment. Tr. 6604.

557. Ms. Knight testified that she met Student in 1998 when Student was two through the First Steps program. Tr. 6550, 6584; *see also* Tr. 1171. At that time, she provided speech-language therapy to her in her home. Tr. 6551, 6586. She continued “seeing” Student until Student started at Rainbow in 2006, but had not seen her since. Tr. 6551, 6675, 6691.

558. According to Ms. Knight, she attended all of Student’s IEP meetings at the District. Tr. 6553.

559. During her work with Student in the District’s early childhood program, Ms. Knight worked with Student in a setting that was not 1:1, although her private therapy with Student was in a 1:1 setting. Tr. 6592-6593. According to Ms. Knight, Student learns best in a 1:1 setting due to her hearing loss, her distractibility and her self stimulatory gestures and that she expressed that opinion during Student’s IEP meetings. Tr. 6552-6555. She further testified that “they” disagreed with that opinion, but “they” finally agreed that Student should learn new skills in a 1:1 setting. Tr. 6555. Ms. Knight testified that she had “very few behavior” problems with Student and was able to redirect her with strategies when those occurred. Tr. 6561.

560. Ms. Knight testified that she has had experience with children with autism, Down’s syndrome and mental retardation. Tr. 6575-6576, 6624-6626. Ms. Knight testified that all of her training in autism has come from continuing education programs that she has attended and acknowledged that she is not qualified to diagnose autism on her own. Tr. 6594-6595. She also has had a “few” classes relating to the characteristics of mental retardation and knows the criteria for that disability. Tr. 6595. She also has been to several workshops on Down’s

syndrome. Tr. 6595. She stated that children with Down's exhibit some characteristics of autism. Tr. 6576.

561. Although Ms. Knight testified that, in her opinion, Student met "some" of the state's criteria for autism, she stated during cross-examination that she had never put that opinion in writing. Tr. 6566-6571, 6587, 6669. As she stated, "I never said the words "I think she's 'autism' in meetings, no. I did not do that." Tr. 6671. When she attended the evaluation meeting in 2005 and the team determined not to classify Student as having autism, "we finally consented to OHI." Tr. 6698. Ms. Knight acknowledged that autism, mental retardation and Down's syndrome have characteristics that are similar, but was unable to give any specifics. Tr. 6595-6596.

562. In discussing the characteristics of autism, Ms. Knight testified that Student had "pervasive" characteristics which she defined as "strange or idiosyncratic, not typical." Tr. 6575.⁷⁹ She also testified that, in her opinion, Student "definitely has splinter skills." Tr. 6557. Ms. Knight stated that "splinter skills" means having a scattering of skills where a child does some things very well and others not so well. Tr. 6604. When asked about precocious skills, Ms. Knight testified that precocious means "very good, very high. I don't know," "it means probably off the charts. I don't know exactly what the exact definition of precocious means." Tr. 6609. Although Ms. Knight testified that Student had a "very good" memory and had some skills that were higher than others, she conceded that any such skills were below her age level. Tr. 6558, 6604-6607. Ms. Knight conceded that, on her evaluation, Student did not demonstrate any precocious skills and she had never seen any documentation showing such. Tr. 6609-6610. Ms. Knight further acknowledged that the May 2002 present level she wrote and the 2005

⁷⁹ According to the Merriam-Webster Dictionary, pervasive means "to become diffused throughout every part of" and does not have the meaning ascribed by Ms. Knight.

evaluation she conducted did not document any precocious or “wow” memory skills. Tr. 6610-12. She also stated that good memory is characteristic of children with Down’s syndrome. Tr. 6607.

563. Neither of the reports that Ms. Knight prepared showed that Student displayed self-stimulatory behaviors, engaged in stereotypical communication, showed inappropriate use of play objects or documented other characteristics of autism. Tr. 6611-6617. Although she acknowledged that children with autism generally don’t engage in pretend play, Student did. Tr. 6617. When asked about self-stimulatory gestures, Ms. Knight stated that Student engaged in rocking and a “weird finger gesture,” but stated that Student did not display such behaviors in 2002. Tr. 6602. When asked when Student’s self-stimulatory behaviors began, Ms. Knight testified that the majority occurred during the 2005-2006 school year. Tr. 6696-6697.

564. Rhonda Weir testified on rebuttal for Petitioners. Tr. 6716. Part of Ms. Weir’s testimony is set forth above. At the time of her testimony, Ms. Weir had been employed as a special education director in the District for five years. Tr. 6717. Ms. Weir has a bachelor’s degree in elementary education and a master’s degree in special education. Tr. 6719. She is certified to teach both regular and special education. Tr. 6718.

565. In the fall of 2006, Ms. Weir became the Process Coordinator at Buckner. Tr. 6719. Prior to that, she had never worked as a process coordinator. Tr. 6735. At that time, Student was not enrolled in the District. Tr. 6744. Ms. Weir testified that, at some unspecified date after that meeting, Dr. Smith asked her if Student’s file was in order and where it was. Tr. 6720-6723. Ms. Weir interpreted that to mean “in chronological order.” Tr. 6723. According to Ms. Weir, Dr. Smith also told her that she needed to make sure that documentation showing progress existed. Tr. 6723. Ms. Weir then went to the speech therapist and Ms. Emery and

repeated that request. Tr. 6723-6724. At another time, Dr. Smith asked Ms. Weir to collect the prior data on Student. Tr. 6742. During cross, she acknowledged that she did not fulfill that request as she was not getting information from others and Dr. Smith, therefore, had to pull others in to assist. Tr. 6742.

566. Ms. Weir attended Student's first IEP meeting during the 2006-2007 school year. Tr. 6728. After that meeting, she was "taken off the case." Tr. 6729. In her opinion, that action was retaliatory. Tr. 6729. However, that opinion was based on her assumption as no one at the District ever voiced that to her. Tr. 6746. After that time, she testified that she was placed on a professional improvement plan stating that she did not complete requested paperwork but could not recall the date when that occurred. Tr. 6729, 6738-6739. Although she believed that the improvement plan related specifically to Student's situation, she conceded that Dr. Smith and Patrick Farnan informed her that her paperwork in general was inadequate. Tr. 6739. Subsequently, she was removed from her process coordinator position and transferred to a teaching job. Tr. 6729-6730.

567. During cross, Ms. Weir testified that she was unaware that staff and administration had expressed performance concerns before Parents ever contacted the District in the fall of 2006. Tr. 6733-6734. She further testified that she was never told that, if she did not comply with the improvement plan, she would be terminated. Tr. 6737. As she stated, "It was never job threatening." Tr. 6737. After being reassigned to a teaching position, she was granted tenure in the District. Tr. 6735-6737.

568. During sur rebuttal, Dr. Smith testified about concerns with Ms. Weir's performance. Tr. 6767. She testified that such concerns came to her attention as early as late September or October of 2006. Tr. 6767. When those concerns came from staff and

administration, she met with them and with Assistant Superintendent Jeff White to discuss what options existed to assist Ms. Weir and to keep the District in compliance with IDEA. Tr. 6767. She then had a conversation with Ms. Weir about the concerns. Tr. 6767. Prior to November 15, 2006, the District made the decision to remove Ms. Weir's process coordinator duties at the Blue Hills building and assign her only to Buckner and to have Susan Edwards assist her there. Tr. 6767. From November through May, Dr. Smith developed other concerns regarding Ms. Weir, including her inability to follow directions, to complete paperwork and to keep the District compliant. Tr. 6788. After the development of the improvement plan, Dr. Smith met with and assisted Ms. Weir to improve with respect to the concerns. Tr. 6769-6771. By the end of the school year, Dr. Smith concluded that Ms. Weir had not successfully completed the improvement plan. Tr. 6771. Dr. Smith was not involved in the decision to reassign Ms. Weir to a teaching position. Tr. 6772.

569. None of the concerns expressed by others concerning M. Weir, to Dr. Smith and none of Dr. Smith's concerns were specific to Student. Tr. 6768. With respect to Student, Dr. Smith testified that, after receiving the November 2006 letter from Parents, she asked at a process coordinator meeting where Student's file was and was informed it was at Buckner. Tr. 6772. In December 2006, she asked Ms. Weir to locate that file. Tr. 6772-6773. At that time, she did not ask Ms. Weir to locate Student's prior data. Tr. 6773. After Parents enrolled Student in January 2007, Dr. Smith asked Ms. Weir to pull together prior data to see if Student had made progress. Tr. 6773. Dr. Smith recalled that Ms. Weir stated that she could not do the data and, in fact, she did not pull together the data as requested by Dr. Smith. Tr. 6776. According to Dr. Smith, after repeatedly asking Ms. Weir to do so, Dr. Smith removed that responsibility from Ms. Weir and enlisted others to accomplish that task. Tr. 6776-6777.

570. In addition to the testimony included elsewhere in these findings, Dr. Smith testified that, during the 2006-2007 school year, she served as the District's interim Director of Student Support Services during the time Kristi Hinton was on medical leave. Tr. 530-533, 1023. As the interim director, she worked part-time based on retirement rules. Tr. 532-533, 1023, 1026. At the time of her testimony, she also consulted for some school districts including a local charter school, taught at William Jewell College, and consulted for NASA. Tr. 1023-1024. Dr. Smith also is a trained hearing officer for special education hearings in Missouri. Tr. 1023-1024.

571. Dr. Smith has a bachelor's degree in elementary education, with an emphasis on behavior disorders, emotionally disturbed and mentally handicapped, a master's degree in learning disabilities, a specialist's degree in administration and superintendency, and a doctorate in educational administration from the University of Missouri. Tr. 1023-1025. She holds certification as a reading specialist, principal, superintendent, and director of special services. Tr. 1023.

572. Prior to her part-time interim position with the District, Dr. Smith was employed as an elementary teacher for 12 years, an elementary principal for 10 years, an associate superintendent for six years and a director of special services for a period of time until her retirement. Tr. 1022. As assistant superintendent, she was responsible for all federal programs, gifted, special education, and Title I. Tr. 1022. Dr. Smith has approximately 18 years in the field of special education. Tr. 1022. During her public school experience, Dr. Smith had experience with children with autism, mental retardation and Down's syndrome. Tr. 1026-1027.

573. Dr. Smith also testified about certain of the District's policies and procedures during her part-time tenure there. First, she testified about the access logs which the District uses

to document parent communications. Tr. 1149, 1734, 1745. She also testified about the District's practice of keeping IEP meeting notes. Tr. 1731. Per her testimony, the IDEA does not require districts to either keep such notes or to provide copies to parents. Tr. 1731. Dr. Smith also testified that, pursuant to FERPA, Mother was allowed to review Student's records and Dr. Smith was present during that review. Tr. 1766. Mother was given access to all of Student's records and, when she requested copies, those were provided. Tr. 1767.

574. Dr. Smith did not know whether the District had a policy regarding observations of parent outside persons and, during the brief time she worked there, she had no reason to check. Tr. 578. In her opinion, it is not unfair for a District to bring outside observations in for purposes of assessment and deny that opportunity to parents. Tr. 580. Moreover, in her opinion, the parents remain equal partners in the IDEA process even if their outside experts are denied such observations. Tr. 581. The Panel questions the fairness of these conclusions as such a policy would provide the District with an unfair advantage.

575. In Dr. Smith's opinion, Student is not autistic. Tr. 601, 1768-1769, 2161. The information she reviewed showed that Student formed relationships with people and used objects in a functional manner. Tr. 2161, 2187-2188. She also is very social and did not have a great deal of, or any, repetitive activities. Tr. 2187. In addition, even though she was essentially nonverbal, she was able to communicate and her language did not lack communicative intent. Tr. 2187. In addition, although Student had generalization issues, that is not unique to children with autism. Tr. 562-563, 598. Dr. Smith also testified that Student's mental retardation and Down's syndrome could be responsible for any deficits that she had and any autistic like characteristics that she displayed. Tr. 2188.

576. Dr. Smith also testified that Student did not display any precocious skills. Tr. 2189. Rather, her profile was “fairly consistent across the board.” Tr. 2189. She noted that Missouri’s criteria for autism does not require that the student be compared to her same aged peers, the way the criteria for mental retardation does. Tr. 2190-2191.

577. In Dr. Smith’s opinion, Student is mentally retarded as defined by the Missouri state plan. Tr. 562, 602, 2171. However, she emphasized that, at the relevant time, Student’s educational diagnosis was other health impaired and not mental retardation. Tr. 611. She noted that, under the state plan, a multidisciplinary team can use professional judgment to assess a student’s cognitive ability. Tr. 605, 2175-2176. Moreover, there are ways to measure cognitive ability, such as direct observation and a collection of responses to tasks, other than through a standardized norm referenced test. Tr. 2209. Because Parents refused to consent to an IQ test in 2005, the District used the 2002 LAP-D administration, the shortcomings of which have been addressed earlier in these findings, as a measure of Student’s cognition and according to Dr. Smith, that was permitted under the state plan. Tr. 2186. Based on the 2002 and 2005 assessments and other information available to the team, Student performed at least two standard deviations below her peers and had commensurate adaptive behavior skills. Tr. 603-604, 2179-2186.

578. In Dr. Smith’s opinion, had the team agreed to change Student’s diagnosis to autism, her IEP would not have taken a different form; it was highly likely that, even with a different diagnosis, the IEP present level, the goals and objectives, and the services and placement would have remained the same. Tr. 1772-1773, 2202-2203.

579. During the 2006-2007 school year, Dr. Smith attended Student’s IEP meetings as the LEA representative. Tr. 545-549, 1783. During that time, Parents never explicitly requested

for the District to change Student's placement to Rainbow. Tr. 1783. However, Mr. Hodgson said Parents might want Rainbow. At the IEP meetings she attended, the team agreed upon a certain number of minutes of regular education for Student and Parents never requested a change in those either. Tr. 1784.

580. At the meetings she attended, Dr. Smith stated that Parents brought others with them and those individuals were not denied participation in the meetings. Tr. 1777.

581. Dr. Smith also testified about Rainbow and the Rainbow records that were received. Dr. Smith testified that, from September 2006 through April 2007, District personnel were never invited by Parents to participate in the Rainbow IEP meetings. Tr. 1044. Dr. Smith did review the records that Rainbow sent. Tr. 1769. Based on that review, it appeared to her that Student's behavior had not lessened at Rainbow. Tr. 1769. Instead, it appeared that Student exhibited more behaviors at Rainbow than at the District. Tr. 1084, 1769-1772. Moreover, she believed that the District received inconsistent information from Parents, Mr. Hodgson and Rainbow about Student's behaviors. Tr. 1084. Although Mr. Hodgson had earlier informed the District that Rainbow conducted an FBA, the District never received one. During the late January 2007 telephone conference with Rainbow, Rainbow informed District staff that they had never conducted one. Tr. 1085-1086. In addition, when the District ultimately received Rainbow's behavior plan, staff was unable to tell when it was developed. Tr. 1084. The District team used Rainbow's behavior plan when developing the April 2007 IEP. Tr. 1085.

582. Dr. Smith testified about the IEP that was finalized in April 2007. Tr. 633-634. She testified that the IEP form was different because the District had purchased a new IEP software system. Tr. 634. At the meeting, Parents were given a copy of an IEP with that date and some minor changes were made as the result of the meeting. Tr. 892.

583. She further testified that IDEA contains no requirements about the length of a present level. Tr. 637. The April present level included information from Rainbow and the District, including information about Student's behaviors at Rainbow. Tr. 677, 877, 894. The special considerations page indicated that Student had behaviors that impeded learning and that decision was also based on information from the District and Rainbow. Tr. 677-680, 895-896.

584. Dr. Smith testified that during the IEP process, the team had sufficient information from Rainbow to generate goals and objectives and further stated that the team did not require data to generate those. Tr. 900-01. Moreover, the IDEA does not require that the IEP specify precisely where a child is on a particular date. Tr. 905, 915-916. As she stated, the important thing was that IEPs could be revised at any time; if Student attended and staff thought the goals needed to be changed, those would have been revised. Tr. 904-905.

585. Student's April 2007 IEP included all required information and the team generally was in agreement that she needed intensive individualized instruction, although that did not necessarily mean 1:1 instruction. Tr. 917. Placement at Rainbow was fairly considered during the process. Tr. 935.

586. At the conclusion of the meeting, the District was prepared to implement the new IEP and had approval to purchase the augmentative device. Tr. 970. Dr. Smith stated that Student could come at any time but Mr. Hodgson suggested a longer time and a compromise was reached that the IEP include an implementation date of April 24, 2007 to give the District time to get everything in place. Tr. 972.

587. Brenda Williams testified on behalf of the District. Tr. 4655. Ms. Williams has a bachelor's degree in elementary and special education, a master's degree in curriculum and instruction and is certified by the state of Missouri to teach elementary and special education.

Tr. 5657. Ms. Williams is employed as a Process Coordinator for the District. Tr. 4655. She has been employed by the District for 15 years, with 7-8 of those years as a Process Coordinator. Tr. 4656, 4825. From 2002-2006, she served as the Process Coordinator at Buckner Elementary School. Tr. 4658, 4758. Prior to being employed as a Process Coordinator, she taught special education for seven years in the District to children with a variety of disabilities. Tr. 4657, 4925.

588. Ms. Williams was the Process Coordinator at Buckner Elementary during the time Student attended that school. Tr. 4658. In that role, she became more involved in the special education process that she typically did. Tr. 4658, 4663. From 2002-2006, Ms. Williams had the opportunity to observe Student at Buckner in Ms. Emery's room and while transitioning through the hallways. Tr. 4661. In her Process Coordinator role, she attended all of Student's IEP meetings during the time Student attended Buckner. Tr. 4658-5659, 4762. During the four years that Ms. Williams served as the Buckner Process Coordinator, she documented her contacts with Parents and staff. Tr. 4663, 4956-5957; Ex. R-92. Ms. Williams testified in addition to her testimony referenced elsewhere in this decision, during the relevant time period, Parents never informed her that Student was not happy while attending Buckner Elementary nor did Parents or Mr. Hodgson communicate to her that the level of Student's IEP goals were too high or too low. Tr. 4731. According to Ms. Williams, Parents – at each IEP meeting – indicated that they were pleased with Student's progress. Tr. 4920.

589. From 2002-2006, Ms. Williams provided Parents with procedural safeguards. Tr. 4774-4775. During that time, staff kept data regarding Student's progress and that data was placed in the her special education file and the end of each IEP cycle. Tr. 4754. During the four years that Ms. Williams was the Buckner Process Coordinator, Parents never requested access to

Student's education records nor did they request to review the raw data relating to her IEP progress reports. Tr. 4663, 4838.

590. Ms. Williams also testified that the District did not have a standard practice of taking conference notes for every meeting but did so at those meetings where it was deemed appropriate. Tr. 4719.

591. In her role as a Process Coordinator, Ms. Williams received training on IDEA compliance, including training on the IDEA requirements for the development of IEP present levels of performance and goals. Tr. 4666-4667. Based on her participation in Student's IEP meetings, Ms. Williams testified that each of Student's IEPs was IDEA compliant and all mandatory team members were present. Tr. 4667-4668, 4955-4956. She further testified that Student's IEPs were based on her individual needs and not her category of disability. Tr. 4887-4888, 4895. The IEPs identified all of her disability-related needs and the persons who attended the IEP meetings were people who worked with Student at Buckner and had knowledge of how she presented in school. Tr. 4955. Each IEP also included all the related services that Student needed. Tr. 4954.

592. Ms. Williams testified that, with respect to most IEP students, the IEP team typically meets one time per year, for approximately 30-45 minutes, with the parents to review the students' IEP. Tr. 4664-4665. However, with Student, the IEP team generally had to meet 2-3 times, for two hours per meeting, to complete the IEP process. Tr. 4664-4665. Indeed, she testified that, generally, at least one full session was spent drafting IEP goals, including how to word and measure the goals. Tr. 4668-4669. Changes to the goals were made at Parents' request. Tr. 4668-4669.

593. Ms. Williams testified that the District's IEP team members met and worked with Parents as a team and "always listened to what they said." Tr. 4783. The District members of the team also looked at and considered the outside information presented by Parents. Tr. 4784. Mr. and/or Mother attended Student's IEP meetings and were "consistent" participants. Tr. 4665. Initially when Student began attending Buckner, Parents participated and communicated in an open manner; after Mr. Hodgson began participating as their advocate, he served as their spokesperson. Tr. 4665.

594. Ms. Williams testified that Parents were involved in the drafting of Student's IEPs and never disagreed with the manner in which the present levels or goals were written. Tr. 4668-69. In Student's situation, the District always provided draft copies of the IEPs to Parents and, after the provision of such drafts, Parents often asked for additional changes. Tr. 4668. At the subsequent meeting, those changes were discussed and, by the end of each meeting, in Ms. Williams' opinion, "everyone was always in agreement" regarding the IEPs. Tr. 4668.

595. During the last two years that Student attended Buckner, Ms. Williams had discussions with Parents regarding the implementation of the accommodations and modifications included in Student's IEPs. Tr. 4714-4715. She testified that, at the beginning of each school year, Parents would approach her to discuss concerns with implementation, especially regarding the adaptive keyboard or Intellekeys. Tr. 4714. She acknowledged that there was one delay in obtaining that keyboard, but stated that Student's time regarding the use of that device was made up. Tr. 4714-4715. This testimony is highly questionable as the delay in processing a workable Intellekeys was about 11 months, as depicted earlier in these findings.

596. Ms. Williams also discussed with Parents their concerns that Student was not receiving her speech-language therapy. Tr. 4715-4716. Ms. Williams asked them to speak

directly to the therapist regarding their concerns. Tr. 4715-4716. At the time, Student was scheduled to receive that therapy four days per week and any missed time was made up on the fifth day. Tr. 4715-4716.

597. Ms. Williams also testified regarding Student's need for augmentative or assisted communication. Tr. 4679. She testified that Student made progress in the language area prior to the time an augmentative communication device was added to her IEP. Tr. 4953. She also stated that the District used pictures and an icon necklace to assist Student with communication. Tr. 4679. The necklace specifically was developed to help Student with peer interactions during recess and "it was a successful tool for her that she could independently initiate." Tr. 4679. Subsequently, the team discussed an augmentative communication device, but Ms. Williams was unable to recall who initiated that discussion. Tr. 4679. In Ms. William's opinion, the necklace was more helpful for Student than an augmentative device because it was difficult for her to maneuver such a device independently and she would have to rely on adult assistance. Tr. 4953-4954. However, contrary to this testimony, Ms. Mulford testified that, as earlier set forth in these findings, Student did not use the necklace with her peers during the limited time Student was with Ms. Mulford.

598. Ms. Williams also testified about Student's evaluations. She testified that the District conducted two audiological evaluations of Student even though Parents never requested such an evaluation. Tr. 4776, 4839.

599. Ms. Williams testified about Student's IDEA diagnosis and the Missouri criteria for a diagnosis of autism. Tr. 4768-4772, 4777-4778. Ms. Williams testified that a medical diagnosis of autism is not required to diagnose a child educationally. Tr. 4768, 4840; *see also* Ex. R-93. Under the State Plan, no diagnostic tool or formal assessment tool is required to

diagnosis educational autism. Tr. 4840-4841, 4944-4945, 4965; Ex. R-93. Instead, the team has to gather information to support the diagnosis. Tr. 4944-45. Although the CARS assessment is not required for such a diagnosis, it is one of the tools that can be used. Tr. 4777-4778. When the team looked at whether Student met criteria to be educationally diagnosed with autism, Ms. Williams testified that there was not sufficient information present to give that diagnosis. Tr. 4965-4966. In Ms. Williams's opinion, Student was not autistic. Although she had communication concerns, she made verbal attempts towards communication and would seek out peers. In addition, she handled change in the school environment "fairly well." Tr. 4827-4836. In her opinion, Student's delays could better be explained by her developmental age. Tr. 4965-4966.

600. In May 2006, Ms. Williams was made aware that Parents were planning to remove Student from the district but did not know that they placed her at Rainbow Center. Tr. 4791, 4963, 4992. At that time, she knew Parents had concerns about the location where Student's future services would be provided, but stated that the IEP team had not yet had that discussion with respect to the development of the IEP. Tr. 4963-4964. After Student's removal, Ms. Williams was not invited to participate in Rainbow Center IEP meetings. Tr. 4949.

601. Stephanie Dustman was called by Respondent to testify. In addition to other testimony referenced earlier in these findings, Ms. Dustman testified that, in the school environment, she has had experience with children with Down's syndrome, mental retardation and autism. Tr. 5004.

602. Ms. Dustman worked with Student during the time she attended the District. She evaluated her when she was transitioning from early childhood special education to kindergarten and Student was on her caseload until the time of her withdrawal in May 2006. Tr. 3005, 5090,

5092-5093, 5351. During the years that Student was in Ms. Emery's room, Ms. Dustman conducted a weekly group occupational therapy/motor lab session with all the children in Ms. Emery's classroom. Tr. 5005-5006, 5063, 5086, 5420, 5506. That group session was offered to all children in the class because they had similar needs in the fine and gross motor area. Tr. 5086-5087. That was in addition to the 60 minutes per week of occupational therapy specified in Student's IEP. Tr. 5086, 5421. Data was not taken during those sessions. Tr. 5088. Ms. Dustman also, as part of her COTA supervision, attended Student's direct OT sessions with the COTA at least monthly. Tr. 5006. She was "almost always" in the therapy room when Student had her OT sessions two times per week. Tr. 5063.

603. Student received her direct occupational therapy from the COTA and Parents were aware of that fact. Tr. 5018, 5396. Ms. Dustman did not provide direct occupational therapy to Student unless the COTA was absent. Tr. 5088. Instead, Ms. Dustman supervised the COTA and discussed student progress with her. Tr. 5018. Cindy Grimmatt, the COTA who worked with Student from August 2002 through May 2006, took data on Student's IEP goals during her 1:1 therapy sessions. Tr. 5022, 5052, 5075, 5083-84. Ms. Dustman instructed the COTAs to document every time they saw a child for therapy. Tr. 5052, 5088, 5351-54, 5363, 5409-11. The charts she developed for their use had the student's goals written on the left hand side of the page, with dates in a different column. Tr. 5052. The therapist then was instructed to write how the child did on each goal during the therapy session. Tr. 5052. At the end of each school year, that data was placed in Student's records. Tr. 5075-76. The data that was collected was used to report Student's progress on her IEP goals and those progress reports were given to Ms. Emery to provide to Parents. Tr. 5070. Ms. Dustman reviewed the data and how to report progress with the COTA, but the COTA's handwriting was on Student's progress reports in the

OT area. Tr. 5021, 5396. Per Ms. Dustman, the information on Student's progress is accurate with respect to her progress (Tr. 5413) and Student made some progress. Tr. 5052. After the progress reports were sent to the Parents, Parents never contacted her for clarification or further explanation. Tr. 5504-5506.

604. Student had multiple implementers of her IEP fine motor goals and Ms. Emery also collected data on those. Tr. 5364-66. They assisted Student in generalizing those skills. Tr. 5366.

605. Ms. Dustman and Ms. Emery worked together to plan sensory activities that Ms. Emery could use in the classroom. Tr. 5378. Ms. Dustman testified that Student did not need a "sensory diet" which is "prescribed, scheduled consistent activities that are done throughout the day." Tr. 5044. Rather, she needed sensory activities built into the entire day and not just at scheduled times. Tr. 5044-5046.

606. Ms. Dustman also testified that, during the two relevant years, Student's IEPs contained appropriate technology. Tr. 5400. Ms. Dustman testified about the Intellekeys adaptive keyboard which she ordered and helped set up. Tr. 5037, 5377, 5400, 5046. That keyboard can be programmed for the child and for voice output and includes an expanded keyboard for easier access. Tr. 5047, 5375. Student had use of the Intellekeys from March 2005 on. Tr. 5376. However, as discussed earlier in these findings, Student had very little use given the extensive problems encountered. Ms. Dustman testified that if the Intellekeys was not working, Ms. Emery was still able to work on Student's goals in other ways. Tr. 5519.

607. During the relevant time, Ms. Dustman also attended and directly participated in many of Student's IEP meetings. Tr. 5006, 5015, 5065. At those meetings, Parents never

expressed that they were unhappy with her; rather, Mr. Hodgson stated that Parents had no issues with her or Ms. Emery and their issues were with administration. Tr. 5399.

608. According to Ms. Dustman, Student's goals were appropriate except for the one involving learning to put on her gloves. Tr. 5048. Ms. Dustman maintained that goal in the IEP at Parents' request. Tr. 5048. When the goals were written, Ms. Dustman believed that the goals could be accomplished within one year, including ESY. Tr. 5507. During IEP meetings, Parents and their advocates advocated for changes in the IEP goals and most of the time such changes were made. Tr. 5397. Ms. Dustman was not always in agreement with all of those requests. Tr. 5397. By the conclusion of each meeting, Ms. Dustman believed that Parents and their advocate were in agreement with the IEP present levels and goals/objectives in her area. Tr. 5397. However, Ms. Dustman concluded that none of the OT goals in the May 2005 IEP were met after four grading periods, although she stated Student made progress. Tr. 5429. Since 2002, Ms. Dustman had lowered her expectations for Student. Tr. 5423.

609. At hearing, Ms. Dustman noted that the OT/fine motor goals in the Rainbow IEP were similar to those in the District's IEPs. Tr. 5386-5387. The Rainbow progress reports did not show mastery of any of those goals and provided no data regarding the IEP objectives. Tr. 5509.

610. According to Ms. Dustman, Student displayed the limited strength, vitality and alertness that is required for an educational diagnosis of other health impaired and was not autistic. Tr. 5100-5101, 5370-5371. Student's developmental age, which is the age at which most of your skills fall, was around 3 to 3 ½. Tr. 5394, 5490-5498. Developmental age is not the same as chronological age. Tr. 5393. However, most children have developmental and chronological ages that correspond. Tr. 5394. That generally is not true of children with

disabilities and it was not true of Student. Tr. 5394. According to Ms. Dustman, because of her Down's syndrome and the other disabilities that go with Down's, Student displayed an inability to attend, low cognition, low muscle tone, apraxia, sensory issues, and hearing and vision issues. Tr. 5395, 5511, 5394. When writing an IEP for a disabled student, the IEP goals must be based on the child's developmental age. Tr. 5394-5395.

611. During the 2004-2005 school year, Ms. Dustman had no concerns about whether Student was happy at Buckner. Tr. 5064. At the end of the 2005-2006 school year, she did see some behavioral issues including defiance and inattention. Tr. 5064, 5390-5391. Ms. Dustman testified that, in her opinion, those behaviors were related to Student's visual perception issues. Tr. 5390-5391. She stated that children with that dysfunction often try to avoid fine motor and close-up work. Tr. 5390-5391. Ms. Dustman did not view those behaviors as related to Student's sensory needs as she saw an increase in Student's academic performance and no behavioral difficulties when Student participated in sensory activities. Tr. 5391.

612. Ms. Dustman was aware of Molly Pomeroy's recommendation for a sterile environment and testified that that recommendation went against Ms. Pomeroy's recommendation for a sensory rich environment. Tr. 5392. As Ms. Dustman stated, a sterile environment would take away the longer duration of sensory input that Student needed. Tr. 5392. She also testified that, when the District agreed to use the sterile environment, Student's behaviors increased and, in Ms. Dustman's opinion, that would make it less likely that Student could perform optimally. Tr. 5483-5485.

613. Ms. Dustman testified that, during the relevant time, Student made meaningful progress from the implementation of her OT/fine motor goals. Tr. 5366-5372, 5396-5397. For example, she improved in her ability to use her right hand as the dominant hand and learned to

cross the midline. Tr. 5071. She also improved in her ability to cut with scissors and no longer needed to use adaptive scissors. Tr. 5371-5372. Student's progress was reflected in the progress reports and the IEP present levels. Tr. 5396-5397, 5407, 5426-5428, 5514-5517. In Ms. Dustman's opinion, Student's progress could have been greater had Parents followed through with her recommendation to see the developmental optometrist and had Student attended ESY. Tr. 5510, 5393.

614. In Ms. Dustman's opinion, the District could have continued providing Student with FAPE at the time she was removed from the District. Tr. 5065.

615. Becky Hughes was called by Respondent to testify. In addition to her other testimony referenced above, Ms. Hughes emphasized that the student's category of disability does not determine how you teach that child. Tr. 5738, 5960. She testified that there are lot of similarities in the characteristics of Down's, mental retardation and autism. Tr. 5883-5884. She also testified she concluded that Student was in the mentally retarded or cognitively deficient range because all of her skills and testing revealed that she was significantly below her peers and had standard scores more than two standard deviations below the mean. Tr. 5738, 5878-5879, 5911, 5956. Student displayed no adaptive behaviors that were consistent with her chronological age. Tr. 5901-5902. Per Ms. Hughes' testimony, the 2002 LAP-D that was used to cognitively assess Student can be used as a cognitive instrument and, in Student's situation, the District converted the LAP-D scores to an IQ because Parents would not permit another IQ test. Tr. 5897-5898, 5095. Again, the questionable reliability of this test has been discussed elsewhere in these findings. In the absence of a new test, according to Ms. Hughes, the District had sufficient information upon which to make a diagnosis of mental retardation in March 2005. Tr. 5908.

She further noted that, per state guidelines the team is not required to use a standardized test for intelligence, but can rely on professional judgment. Tr. 5978.

616. Ms. Hughes placed Student's developmental age at between two and four, which was half her chronological age. Tr. 5945, 5956. In her opinion, age 2-4 shows a flat, not a splintered, profile. Tr. 5945-5946.

617. Ms. Hughes did not believe that Student was autistic and she did not display "splinter skills." Tr. 5885, 5956. Moreover, the state criteria for autism does not reference splinter skills. Tr. 5979. She testified, "a splinter skill displays normality." Tr. 5956. She did not observe her engage in spinning, and the things that she observed were not typical of autism. Tr. 5885. As Ms. Hughes testified, "her extreme desire to be with other people, her need to socialize, her need to communicate, her communicative intent, her empathy, her desire for friendships," all contributed to Ms. Hughes' conclusion that Student was not autistic. Tr. 5885; *see also* Tr. 5885 ("her social behaviors, her ability to look at nonverbal behaviors, her ability to follow social cues in her environment, her ability to watch what was going on and to learn from what was going on around her."). Although Student had an area of strength in socialization, her scores in that area were not "splinter scores" and were still significantly below average. Tr. 5938-5939. Ms. Hughes also stated that many children with autism also are mentally retarded. Tr. 5921.

618. Ms. Hughes also clarified that, per state guidelines, to be classified as having classic autism, the characteristics must be evident by the age of three, with the exception of Asperger's syndrome. Tr. 5926. However, to be Asperger's, the child has to have an average to above average IQ. Tr. 5926. Based on her training and experience, children with classic autism demonstrate the traits very early on and before age 3. Tr. 5928.

619. The District also called Heather Duensing to testify. Ms. Duensing acknowledged that she did not provide speech-language services to Student. Tr. 5605. However, she attended some IEP meetings for her. She further testified that the 150 minutes per week of speech-language therapy in the District's IEPs would allow her to make progress in that area. Tr. 5599. She acknowledged that the Rainbow IEPs only included 60 minutes per week of such therapy. Tr. 5651-5653.

620. Ms. Duensing also testified about the general protocol for determining if a student needs an electronic communication device. In her opinion, a district should begin with low technology devices and then try others to see what works. Tr. 5595-5596. Ms. Duensing testified that, in her opinion, Student had adequate fine motor skills to use the Tango device. Tr. 5597.

621. At some IEP meetings Ms. Duensing attended, the Tango communication device was discussed and the team was looking at the possibility of that device for Student. Tr. 5589. Prior to that, Ms. Duensing had reviewed the Rehab Institute assistive technology evaluation. Tr. 5591. In addition, prior to the IEP meeting, she had checked out the Tango and spoken with Mother about it. Tr. 5592. During her discussions with Mother, Mother indicated that Parents had a trial with the Tango and were pleased with it. Tr. 5589. Ms. Duensing was familiar with the Tango and testified that it was very new and a "very nice piece of augmentative communication." Tr. 5589-5590. It is lightweight and has the potential to grow with the student. Tr. 5591. Ms. Duensing was in agreement with the team's decision to include the Tango in Student's April 2007 IEP. Tr. 5592. She also was aware that the District planned to purchase the device upon Student's enrollment. Tr. 5642.

III. CONCLUSIONS – DECISION

A. General Legal Standards Under the IDEA

1. Nature and Source of the IDEA Requirements

IDEA was adopted by Congress pursuant to the Spending Clause of the United States Constitution. *Schaffer v. Weast*, 126 S.Ct. 528, 531 (2005). Spending Clause legislation is essentially contractual in nature; states are free to accept or reject federal funding offered in conjunction with Spending Clause legislation, but if they accept federal funding, they are required to accept the conditions placed on the receipt of that money by the federal government. However, those conditions must be clear and unambiguous, before there can be knowing acceptance by states of the terms and conditions placed on the use of funds by Congress. *Pennhurst State Sch. and Hosp. v. Halderman*, 101 S.Ct. 1531, 1539-1540 (1981).

The State of Missouri has enacted legislation to implement IDEA. Mo. Rev. Stat. § 162.670, *et seq.* Further, the Missouri Department of Elementary and Secondary Education (DESE) has adopted the *State Plan for Part B of the Individuals with Disabilities Education Act* (“State Plan”).⁸⁰ The State Plan constitutes regulations of DESE that further define the rights and responsibilities of public school districts in the State, as well as those of disabled students and their parents.

Missouri law, at least in the context of the issues in this case, does not impose on school districts obligations that exceed those of the IDEA. *See* Mo. Rev. Stat. § 162.670 (“...it is hereby declared the policy of the state of Missouri to provide or to require public schools to provide to all handicapped and severely handicapped children within the ages prescribed herein, as an integral part of Missouri’s system of gratuitous education, a free appropriate education

⁸⁰ All references to the State Plan are to the State Plan as revised in 2007, unless otherwise indicated. Even though the State Plan has varied in prior years, those prior State Plans have been considered, and this decision would remain unchanged.

consistent with the provisions set forth in state and federal regulations implementing the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1400 et seq. and any amendments thereto.”) *See also Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1035 (8th Cir. 2000).

2. 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*, 458 U.S. 176, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982) 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. § 1415⁸¹. 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

⁸¹ All references to the IDEA and its regulations are to the law and regulations in effect at the time the due process request/complaint was filed, unless otherwise indicated. Even though IDEA and its regulations have varied in prior years, the prior law and regulations have been considered, and this decision would remain unchanged.

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); *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 by 34 C.F.R. § 300.17:

Free appropriate public education or FAPE 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 an appropriate preschool, elementary school, or secondary school education in the State; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.320-300.324.

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).

“[T]he law of [the Eighth] Circuit is clear. A school district meets the statutory obligation to provide a free appropriate public education by providing educational benefit. The statute does not require the school district to provide the best possible education.” *Carl D. v. Special Sch. Dist. of St. Louis Co.*, 21 F. Supp. 2d 1042, 1047 (E.D. Mo. 1998). The IDEA is satisfied when the educational agency provides individualized education and services sufficient to provide the disabled child with “*some educational benefit.*” *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003) (emphasis added). According to the United States Supreme Court, IDEA’s goal is “more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.” *Rowley*, 102 S.Ct. at 3043.

3. Burden of Proof

The burden of proof in an IDEA due process hearing is placed upon the party seeking relief. *Schaffer v. Weast*, 126 S.Ct. 528, 537 (2005). The due process complaint in this matter was filed by the Parents. Accordingly, the burden of proof to be determined by the Panel in this case rests with the Parents.

B. Findings-Conclusions as to the June 13, 2006 IEP⁸²

1. Procedural Compliance

a. Introduction

As noted previously, Congress in 2004 explicitly directed due process hearing officers to base their decisions on the substance of an IEP, and to find a denial of FAPE based upon

⁸² The Panel is focusing on the June 13, 2006 IEP and the development thereof because the timeline began to run on April 24, 2005. Although there was an IEP formulated on May 24, 2005 and two subsequent addendums thereto, it is the June 2006 IEP that was in place at the time Parents placed Student at Rainbow. In addition, Parents’ requested relief is private placement and reimbursement and not compensatory services or other relief relating to the 2005-2006 school year.

procedural violations only in limited circumstances. The procedural violations asserted by the Parents must be viewed in that context.

b. Scope of Procedural Issues to be Considered

Although Petitioners' Complaint as amended and supplemented, contains a list of procedural and substantive defects, the evidence revolved around four main alleged procedural violations: (1) denial of parental participation; (2) failure to consider a private school placement for the Student; (3) lack of consideration of a diagnosis of autism; and (4) failure to provide needed accommodations.

c. Parental Participation

By a 2-1 vote, the Panel holds that there are grounds for the Panel to conclude that the Parents were denied the right to meaningfully participate in the development of the Student's June 13, 2006 IEP and so holds. As discussed in the findings above, the culmination of: (1) Student's primary teacher (Ms. Emery) withholding information from Parents constituted a disservice to the IEP team and parents; (2) a regular education teacher (Ms. Terrill) advising Father that she, in effect, was restricted by the District in what she could say; (3) the abrupt silence at the May 26, 2006 IEP meeting by Ms. Emery, who testified that she might have been touched by Ms. Williams under the table (she couldn't remember); and (4) Ms. Mulford's failure to disclose that she did not believe that the program being provided Student was appropriate, resulted in significant impediments to Parents' opportunity to meaningfully participate in the decision-making process regarding the provision of a FAPE for Student.

In so ruling, the Panel is mindful that Parents had extensive input into virtually all (they missed only one IEP meeting) of their daughter's IEPs, including the June 13, 2006 IEP. Not only did the Parents actively participate, but those that they invited, including their experts and advocate, also actively participated, and often, as a result of that participation, numerous

components of IEPs including present level of performance, goals and objectives, modifications and adaptations were changed. The District spent an inordinate amount of time and manpower to accommodate Parents and their representatives' positions and in the development of Student's IEPs. Indeed, Student was allowed to stay in Ms. Emery's classroom for four years as an accommodation to Parents. In addition, the District expended considerable resources in preparing for the IEPs and for testing that was considered in developing Student's IEPs. The number of meetings and hours devoted by District's staff to Student is overwhelming. Much of the length of the Panel's findings has been purposely included in this decision to illustrate District's efforts.

The problem is Parent participation must be meaningful and must be based on complete candor. Regardless of Parents' unlimited opportunity to speak and have others speak and present for them, this opportunity must have a foundation of complete disclosure. Participation is tainted, if not fully compromised, if parents do not know the thoughts and opinions of key members of the IEP team.

The Panel has considered many cases on the issue of the threshold of procedural violations required to make a determination that Parents were denied meaningful participation. These cases included those referenced above and *Brown v. Bartholomew Consol. Sch. Corp.*, 2005 WL 552194, 5 (N.D. Ind. 2005), *vacated and remanded due to mootness arising during appeal*, 442 F.3d 588 (7th Cir. 2006) (although school district refused to yield on placement, the fact that other components of IEP were developed with input from parents and their representatives reflected appropriate parental participation); *see also Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 610 (6th Cir. 2006) (no denial of parental participation where parent actively participated in IEP meetings, made school district aware of her desires, and was able to be a

significant part of the discussions concerning the student's IEP); *Paolella v. District of Columbia*, 2006 WL 3697318, 2 (D.D.C. Dec. 6, 2006) (no denial of parental participation where parents were involved in the development of the IEP itself, and they and their representatives were allowed to inform the school district of their requests; disagreement by school district with parent's requests does not show a denial of parental participation); *Sch. Bd. of Indep. Sch. Distr. No. 11 v. Revollett*, 440 F.3d. 1007, 1001 (8th Circuit 2006) (In a suit under IDEA the inquiry is "whether the school district met the IDEA's procedural and substantive requirements" and "an IEP should be set aside only if procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formation process, or cause a deprivation of educational benefits."); *Foley v. Special Sch. Dist. of St. Louis County*, F.Supp. 481, 490 (E.D. Mo. 1997) ("[a]n IEP should be set aside only if procedural inadequacies comprised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process or caused a deprivation of educational benefits."); *MM v. School District of Greenville County*, 303 F.3d 523, 534 (Fourth Circuit 2002) (If a disabled child received (or was offered) a FAPE in spite of a technical violation of the IDEA, the school district has fulfilled its statutory obligations).

In ruling that a child has not been denied a FAPE due to procedural violations, courts have examined the nature and extent of the violations and have based these rulings on the specific violations. For example, in the *Renollett* case, *id.*, the Eighth Circuit deemed that the procedural violations were: (1) failure to provide a written behavior intervention plan; (2) district's failure to focus on skills acquisition; (3) the district use of "conditional procedures" without calling an IEP. The Court concluded that the district used appropriate behavior interventions, focused on skills acquisition, and the district did not invoke conditional

procedures. In the *Blackmon* case, *id.*, the issue germane to this case was whether it is appropriate to draft an IEP before IEP meetings. The Court concluded that this is an acceptable procedure. In *MM*, *id.*, parents maintained that a draft or proposed IEP cannot satisfy the IDEA, and that District's failure to finalize the IEP by the beginning of the year constituted a denial of a FAPE. The Court ruled that such violations were technical and did not deny student a FAPE. In *S.D.*, *id.*, the Court ruled that the procedural violations were harmless or remedied by the payment of professional fees.

Other cases, although significantly fewer in number, have ruled that violations of procedural rights are sufficient to constitute a denial of FAPE.

In the *Knable* case, *id.*, the Court ruled that the district's failure to convene an IEP conference constituted a substantive deprivation of child's right under the IDEA.

In the *Amanda J., et al. v. Clark County School District*, 267 F.3d 877 (Ninth Circuit 2001) case, the Court ruled that by the district's failure to provide parents copies of evaluations suggesting autism and the need for further psychiatric evaluations when the district learned of the possible diagnosis, violated the procedural requirements of the IDEA, and deprived student a FAPE. *Id.* at 894.

In *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, Missoula, Montana*, 960 F.2d 1479 (Ninth Circuit 1992), the parents brought suit to challenge the denial of reimbursement for private tutoring for the handicapped child. The Ninth Circuit held that the district deprived the student of a free appropriate public education by failing to comply with procedures in preparing the IEP. The district failed to comply with the procedural requirements of IDEA because it independently developed the IEP without the parents' input or participation, without the input or participation of the child's regular classroom teacher or any representative of

the child’s private school. In issuing its ruling, the Court found that the “Act requires states and local education agencies to guarantee procedural safeguards for handicapped children and their parents in the provision of a FAPE.” *Id.* 1483. Central among these safeguards is the process of developing the IEP.” (Panel’s emphasis added) *Id.* The court found that in its review of an administrative determination, the Court “first must examine whether the state has complied with the procedures established by the Act, and then must determine whether the IEP is reasonably calculated to enable the child to receive educational benefits.” *Id.* In regard to procedural violations, “[p]rocedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents’ opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE,” *Id.* at 1484. The Court also noted that “rigid adherence to the laundry list of items given in section 1401(1) is not paramount.” *Id.* Rather, “[w]hen a district fails to meet the procedural requirements of the Act by failing to develop an IEP in the manner specified, the purposes of the Act are not served, and the district may have failed to provide a FAPE.” *Id.* at 1485. In fact, the “significance of the procedures provided by the IDEA goes beyond any measure of a child’s academic process during the period at issue. . . Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every step as it did upon the measurement of the resulting IEP.” *Id.*⁸³

⁸³ In *R.B. v. Napa Valley Unified Sch. Dist.*, the Court ruled that *Target Range* was superseded by statute on the narrow issue of whether IDEA required the presence of the child’s current regular education teacher on the IEP team. *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 938-939 (9th Cir. 2007). The Court found that the 1997 amendments to the IDEA required the presence of at least one regular education teacher, rather than the child’s current regular education teacher. *Id.* Moreover, *R.B.* was factually inapposite to *Target Range* because the student in *R.B.* was not eligible for IDEA opportunities in the first instance and therefore could not lose such opportunities due to procedural violations.

Likewise, in *L.M. v. Capistrano Unified Sch. Dist.*, the issue was whether the procedural violation of limiting parents’ classroom observational opportunities to 20 minutes significantly restricted parents’ participation in the IEP process. *L.M. Capistrano Unified Sch. Dist.*, 556 F.3d 900, (9th Cir. 2009). The Court quoted *Target Range* for its holding and merely referenced in dicta that *Target Range* had been superseded by statute on grounds not at issue in

Although it is abundantly clear from the many cases cited herein that “technical” violations cannot serve as a basis for determining a denial of FAPE, it is the factual underpinnings of a case which determine whether the procedural violations constitute a denial of FAPE. Herein, as stated above, the majority of the Panel holds that the factual underpinnings in this case are lack of candor and suppression of thought by critical IEP team members constituted a denial of meaningful, effective and full parental participation resulting in a denial of a FAPE from the beginning of the 2006-2007 school year until April 2, 2007.

The Supreme Court has recognized the importance of parent participation in the development of the IEP that is mandated for each child: as cited above, “it seems to us no exaggeration to say 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, see, *e.g.*, §§ 1415(a)-(d), as it did upon the measurement of the resulting IEP against a substantive standard.” *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205-206 (1982). IDEA was committed to “ensuring that all children with disabilities have available to them a free appropriate public education” and by “ensuring that the rights of children with disabilities and parents of such children are protected.” 20 U.S.C. §§1400(d)(1)(A) & (B).

Accordingly, Congress provided that the team that develops the IEP must include the parents, 20 U.S.C. §1414(d)(1)(B)(i), and must consider “the concerns of the parents for enhancing the education of their child.” *Id.* §1414(d)(3)(A)(ii). In addition, the IEP team must “revise the IEP as appropriate” to address information about the children provided by the

that case. *Id.* at 909. Accordingly, the Court did not give any negative treatment or criticism to *Target Range’s* holding regarding procedural violations. *See generally id.*

Therefore, it is clear from the subsequent cases that any negative treatment of *Target Range* has been based on specific facts that are not similar to the facts herein. In addition, these cases have not criticized the holding that once a substantial procedural violation resulting in a denial of FAPE has been established, there is no need for further inquiry into whether the IEP was reasonably calculated to enable the student to receive educational benefits.

parents. *Id.* §1414(d)(4)(A)(ii)(III). In light of these procedural protections, the Supreme Court has concluded that “[t]he IEP proceedings entitle parents to participate not only in the implementation of IDEA’s procedures but also in the substantive formulation of their child’s educational program.” *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 2004 (2007); *See also Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (“Parents and guardians play a significant role in the IEP process”).

When a school “blatantly violated one of the Act’s procedural requirements, preventing full and effective parental participation,” courts have described such actions as “driving a stake into the very heart of the Act.” *Burlington School Committee v. Mass. Dept. of Ed.*, 736 F.2d 773, 783 (1st Cir. 1984), *aff’d on other grounds*, 471 U.S. 359 (1985), and “undermining the very essence of the IDEA.” *Amanda J. id.* p. 892. *See also Knable v. Bexley, id.*

The 1997 amendments to the IDEA were intended to strengthen the participation of parents in the education of their children with disabilities. In the Congressional findings of the 1997 amendments, the IDEA states:

(5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by-

(B) strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school at and home; 20 U.S.C. §1400(c)(5).

The United States Department of Education reinforced Congress’ emphasis on parental participation in the regulations it adopted to enforce IDEA. The ability to participate in meetings is an absolute parental right. 34 C.F.R. §300.501(b) addresses parent participation: “The parents of a child with a disability must be afforded an opportunity to participate in meetings with

respect to – (i) the indemnification, evaluation, and educational placement of the child; and (ii) the provision of FAPE to the child.”

As stated above, the Panel fully understands that an inadvertent non-disclosure or the withholding of superfluous information does not meet the threshold of negating parents’ rights of meaningful participation. Here, however, as discussed above, there were multiple incidents of failure to be candid which the majority of the Panel deems met that threshold. The District personnel involved in the incidents of lack of candor were in a very difficult position, given their personal friendship with one of their colleagues (Mother) and their loyalty to their roles in the IEP process, and their loyalty to their employer. They were dedicated professionals and acted without malice or bad intentions, but they did compromise Parents’ right of meaningful participation and constituted a denial of FAPE for Student for the 2006-2007 school year.

4. Substantive Compliance

Having ruled that the procedural violations constituted a denial of FAPE, the majority of the Panel holds that it is not necessary to rule as to whether there was substantive compliance. See *Target Range, Id.* “Procedural violations that interfere with parent participation in the IEP formulation process undermine the very essence of the IDEA. An IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child’s needs are not involved or fully informed.” (Panel emphasis added.) *Amanda J., Id.* “These procedural violations which prevented *Amanda’s* parents from learning critical medical information about their child, rendered the accomplishment of the IDEA’s goals and the achievement of FAPE impossible.” *Amanda J., id.*, 894. In *Knable, id.*, p. 767, the Court stated: “Having concluded that, under the first prong of *Rowley*, Bexley, (the school district) denied Justin (the student) a FAPE by virtue of its procedural violation of the IDEA, we need not

determine whether the draft IEP proposed by Bexley offered Justin an appropriate program.”

Panel member Allee dissents⁸⁴ from the ruling that the procedural violations denied Student FAPE and concludes that there was substantive compliance. Dr. Allee believes that the record supports a finding that Student received a FAPE during the entire time she attended Buckner. Dr. Allee further believes that the June 13, 2006 IEP was compliant in all respects and would have provided Student with a FAPE based on the testimony of IEP team members and recorded evidence of prior educational progress as set forth in the findings above.

The majority of the Panel that concluded that the procedural violations constituted a denial of FAPE, and no further analysis is warranted, deems it advisable (although not needed) to indicate their respective rulings on whether there was substantive compliance of the June 13, 2006 IEP as written.

Panel Member Davis concludes that there was not substantive compliance primarily on the basis that he feels that Student did not receive educational benefits during the 2005-2006 school year, and the data used to support Student’s success was tainted.

Chairperson Ulrich concludes that if the IEP of June 13, 2006 was procedurally valid, there was substantive compliance based upon the same reasons presented by Panel Member Allee.

Considerable evidence was presented and hotly contested as to Student’s educational diagnosis. While the ruling of the Panel that the procedural violations constituted a denial of a FAPE for the 2006-2007 school year, renders this issue moot for the purposes of this decision, the Panel chooses to address this issue and what affect, if any, a wrong diagnosis might have meant. Student was initially diagnosed as being mentally retarded, with this diagnosis being changed to other health impaired on May 24, 2005. Parents adamantly maintained that the

⁸⁴ Dr. Allee’s dissent follows this decision.

proper diagnosis should have been autism from the time of Jamie Prestige's January 25, 2005 diagnosis of same. Parents further adamantly maintained that a diagnosis of autism should have altered the services being afforded by the District. District, on the other hand, with the same fervent adamancy, maintained that Student was not autistic, and even if she was, the services and education afforded her would not have been materially altered.

The parties presented a plethora of evidence supporting their respective positions. Mental retardation and autism have many common characteristics including cognitive delays. The primary distinction between the two diagnoses is that autistic children have significant issues of socialization whereas children who are mentally retarded normally do not.

The Panel does not make a determination of the appropriate educational diagnosis (each diagnosis was supported by substantial evidence), but it does determine that whether Student's diagnosis should be other health impaired, mental retardation or autism is of no legal consequence because it is the child's unique needs, not the diagnostic label, that determine the special education services that are to be provided. "In evaluating each child with a disability under 34 C.F.R. §§300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." 34 C.F.R. §300.304(b)(6). In *In Re: Scott M.*, 24 IDELR 1229 (SEA NA 1996), the hearing officer rejected parents' claim that their mentally retarded son's diagnosis included autism. In so doing, the hearing officer aptly noted, "An appropriately drafted IEP addresses the unique needs of the student, irrespective of the label attached to him/her." *Id.* at 1250. Thus, the transcending consideration is whether a district developed an IEP that addressed the manifestations of a student's conditions and addressed his/her needs, not the label attached. The fact that Rainbow

did not change Student's diagnosis and still provided Student with educational benefit is a sound example of this principle.

5. **Propriety of Rainbow as a Private Placement**

Since the District's June 13, 2006 IEP for Student was not adequate, the issue of whether Rainbow was an appropriate placement must be considered. Parents contend that Rainbow was an appropriate placement. District challenges the parent placement at Rainbow on several grounds. First, District contends that Parents' letter of May 17, 2006 (Ex. R-55, p. 616) did not provide notice as required by the Eighth Circuit in *Evans v. District No. 17*, 841 F.2d 824 (8th Cir. 1988), and affirmed in *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607 (8th Cir. 1997) and *Schoenfeld v. Parkway Sch. Dist.*, 138 F.3d 379 (8th Cir. 1998). The test requires that the parents must make clear to the district that they want the school district to "initiate" a "change in placement" before unilaterally placing the child in the private setting. *Evans, id.*, 841 F.2d at 829. Behind this well-established threshold test is the need to afford districts an opportunity to develop an appropriate IEP and provide a FAPE. See *Schoenfeld, id.*, 382. Herein, Parents gave District notice of their belief that District was not providing a FAPE for their daughter, intentions to enroll their daughter in a more appropriate educational setting and that they may be seeking District reimbursement. The Panel deems that the requirements of 34 C.F.R. §300.148(d)(i) were met. The notice was timely. 34 C.R.F. §300.148(d)(ii). Parents afforded the District an opportunity to afford Student a FAPE, but it did not do so until April of 2007.

Second, District contends that Parents are not entitled to any relief because it ceased being obligated to provide Student with a FAPE upon her unilateral placement at Rainbow. The thrust of Respondent's position is (1) that proper notice was not afforded; and (2) that since the 1977 IDEA, children privately placed by their parents have no individual right to special

education and related services and, therefore, no right to a free appropriate public education. Respondent's first point has been addressed above. On its face, District's second point is correct (34 C.F.R. § 300.137(a)), however, this regulation encompasses situations where parents place children in private placements without having previously received special education and related services by the district against whom reimbursement is sought.⁸⁵ This clearly is not the case here as Student had been receiving special education services from District since kindergarten. 20 U.S.C. §1412(a)(10)(C) is applicable to this case. That section begins with a general statement explaining that the IDEA “. . . does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.” 20 U.S.C. §1412(a)(10)(C)(i). Controlling in this case is §1412(a)(10)(C)(ii) which reads:

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

The obvious conclusion is that reimbursement is available to parents who had previously received special education and related services while in a public school (a condition clearly present herein) if that public school had not made a FAPE available to the child.

⁸⁵ Legislative history suggests that Congress meant to also include children who had requested, but not yet received, special needs services during their period in the public schools. See *H.R. Rep. 105-95* at 91-93, reprinted in 1997 U.S.C.C.A.H 78, 89-90.

District cites the case of *Greenland School District v. Amy N.*, 358 F.3d 150 (1st Cir. 2004) as authority supporting its position, which is misplaced. In that case the student had never received, nor had there been a request for, special education services prior to the filing of parents' due process complaint. This case can be easily distinguished given Student's prior receipt of special education services from District.

Third, District contends that Parents' request for reimbursement should be denied because Parents did not satisfy their burden of proving that Rainbow was an appropriate placement and was Student's least restrictive environment. However, mainstreaming is not required in every case. "While IDEA requires that children with disabilities be mainstreamed to the extent possible, it does not require their integration at the expense of other IDEA mandates, such as minimum educational opportunities." *Board of Education of Murphysboro v. Illinois State Board of Education*, 41 F.3d 1162, 1168 (7th Cir. 1994).

For reasons stated above in the findings, the majority of the Panel determines Rainbow was an appropriate placement.

Dr. Allee dissents as he believes that although Rainbow could have implemented the IEP as written, because Rainbow did not service any non-disabled peers, Rainbow was not the least restrictive environment for Student and therefore was not an appropriate placement. Consequently, he deems that District should not be responsible for the tuition costs at Rainbow for 2006-2007. Dr. Allee further holds that District successfully integrated Student to the maximum extent appropriate.

Fourth, District contends that even if reimbursement was proper, it should be denied and/or limited because Parents did not provide sufficient proof of damages. While Parents' proof of damages was not crystal clear, it was proven through Ms. Herrick that the cost at

Rainbow was \$2,200 per month for the 2007-2008 school year, although she did not know if that cost went up from 2006-2007 which is the year in question. She also testified that the \$2,200 per month was the amount Rainbow had expected the Parents to pay and continue to pay as long as Student attends and the Parents paid \$2,200 a month. Structuring the remedy as set forth below in the manner in which the Panel has done establishes an equitable reimbursement to Parents.

D. April 2, 2007 IEP

As stated in the Panel's findings of facts, the Panel concludes that the April 2, 2007 IEP was appropriate and would have provided a FAPE to Student. The taint of non-disclosure had been removed as Ms. Emery testified that her lack of candor was in April, May and June of 2006. Ms. Terrill and Ms. Mulford were no longer participants in Student's education or IEP participants. There is no evidence that the April 2, 2007 IEP and the developmental process thereof had any indices of failures to disclose or suppression.

Having ruled that the April 2007 IEP afforded the Student a FAPE for the 2007-2008 school year, there is no consideration of remedies for that school year, or years thereafter.

E. CONCLUSION

For the reasons stated above, the Panel finds and concludes that the Parents sustained their burden of proving that the June 13, 2006 IEP did not afford Student a FAPE due to substantial procedural violations which denied Parents meaningful participation. With regard to the April 2, 2007 IEP, the Panel finds and concludes that it was substantially and procedurally appropriate to afford the Student a FAPE. Accordingly, Student was denied a FAPE for the 2006-2007 school year, and that year only.

F. REMEDIES

Having ruled that the June 13, 2006 IEP did not afford the Student a FAPE, we turn to the appropriate remedy. The tuition during school months at Rainbow for the 2007-2008 school year was \$2,200 per month. No evidence was presented as the cost per month at Rainbow for the year in question, 2006-2007. The Panel holds (by a 2-1 vote) that district shall reimburse to Parents the cost of tuition at Rainbow for nine months at a cost per month to be that which was in existence for the 2006-2007 school year, not to exceed \$2,200 per month. Parents shall cause Rainbow to submit a cost statement evidencing the tuition cost per month for the 2006-2007 school year to the District, and District shall pay Parents a sum equaling nine times that monthly cost.

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: June 18, 2009

Richard H. Ulrich, Chairperson

Terry Allee, Hearing Panel Member

Fred Davis, Hearing Panel Member

Given by Order of :



Richard H. Ulrich, Hearing Chair, on this
18th day of June, 2009
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CERTIFICATE OF SERVICE

I do hereby certify a copy of the foregoing was sent via certified mail, return receipt requested this 18th day of June, 2009 addressed to:

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Robert H. B.

752240

June 18, 2009

Hearing Panel Member dissent in the Due Process Hearing pursuant to the IDEA, Student vs. School District.

I disagree with the majority panel members decision regarding B. 1. c. Parental Participation beginning on page 204 of the final decision.

As stated on page 205 of the final decision, “the majority panel concluded that the Parents were denied the right to meaningfully participate in the development of the Student’s IEP because of the culmination of: (1) Student’s primary teacher (Ms Emery) withholding information from Parents constituted a disservice to the IEP team and parents (2) a regular education teacher (Ms Terrill) advising the Father that she, in effect, was restricted by the District in what she could say (3) the abrupt silence at the May 26, 2006, IEP meeting by Ms Emery, who later indicated she might have been touched by Ms Williams under the table (that she couldn’t remember); and (4) Ms Mulford’s failure to disclose prior to the June 13, 2006 IEP meeting that she did not believe that the placement being proposed for the Student was appropriate, resulted in significant impediments to Parents’ opportunity to meaningful participate in the decision-making process regarding the provision of a FAPE for their daughter.”

As stated on pages 205-206 of the final decision, the parents had extensive input, as did their advocate, therapist, and consultants. The District considered all suggestions offered by the parents as well as recommendations of their supporters. They incorporated most of their suggestions and made numerous changes to the IEP present level, goals and benchmarks/objectives, supplementary aides and supports etc. They agreed to keep the Student in Ms Emery’s classroom for at least two years longer than most students are allowed in an effort to accommodate the parent’s wishes. Many IEPs were conducted during the time in question and it often took two or three lengthy meetings to develop one IEP. The parents and their supporters participated in all but one of those meetings. As stated in this final decision, “The number of meeting and hours devoted by District’s staff to the Student is overwhelming.”

Through every step of the way the Parent was provided an opportunity to participate in the decision making process regarding the provision of FAPE for the Student. Mother was in the same building with the Student during the four years. She had daily contact with staff and could see the Student periodically throughout the day.

Based on a review of the many cases the panel considered as described beginning on page 206 of the final decision, the District complied with each of the requirements of the IDEA and the case law that was reviewed.

In the Amanda v Clark County School district, the district failed to provide the parent copies of an evaluation suggesting autism. In the Renollett case the district failed to provide a written behavior plan and failed to discuss skill acquisition and use of conditional procedures without calling an IEP meeting.

The procedural violations in those cases ("Amanda" and "Renollett") are substantive in nature, but are not the same as individuals withholding a personal opinion. In this case the withholding of an opinion did not result in the loss of educational opportunity for the student or prevent the student from making educational progress.

The fact that Ms Emery did not share her opinion about the Parents lack of follow through and parenting philosophy did not impede the Student's right to FAPE.

The panel does not know exactly what information Ms Emery withheld from the Parent. She appeared to be concerned that the Parent did not hold the Student responsible for her behavior and did not always follow through with logical consequences for the Student's misbehavior. These are very sensitive areas for educators to discuss with parents. Topics like this which in professional judgment, would not effect the IEP or services rendered there under cannot always be discussed if the District wants to continue to have a good working relationship with parents. Some parents have filed complaints with OCR claiming that this type of discussion creates a hostile environment. To require IEP members to challenge parents on parenting skills would put a district in the position of having to choose between full, complete and confrontational disclosure of every observation whether or not related to the IEP, and the fostering of a meaningful relationship with parents. I don't believe this constitutes a denial of FAPE based on a lack of parent participation.

Ms Terrill did not testify in this hearing and the Petitioners (Parent) had the burden of proof in this hearing and therefore did not meet its burden with this witness.

The alleged incident between Ms. Williams and Ms Emery appears to be situation where the Parent's are making certain inferences and the District is denying what happened or didn't recall. The panel cannot know exactly what happened and this becomes a matter of he said she said.

Ms Mulford's unwillingness to state that she thought the student had severe disabilities and that the placement was inappropriate did not impede the Student's right to FAPE. Ms Mulford agreed with the IEP and did not state the reason why she believed the placement was inappropriate. Ms Mulford testified that Ms Hinton told her that if she had a disagreement with the team she should speak up. In addition, Ms Mulford testified that Ms Hinton told her to tell the truth. Further, she testified she was Mother's mentor and friend. She also testified that she had requested an IDEA evaluation of her son and he was found ineligible under the IDEA and she disagreed with that decision.

I do not believe that the withholding of this type of information and lack of candor described in this decision are substantive procedural violations. These are very sensitive issues to discuss with parents and I don't believe they are what Congress intended when they wrote the Parent Participation statues in IDEA. If this is or does become the Standard, then LEAs are put in an tenuous position of sharing information with parents that may do irreparable harm or not sharing their opinions and committing a substantive procedural violation. Choosing the latter will literally leave them at the mercy of a Hearing Panel or the court. Educators should have discretion regarding what should be shared with parents and should not be penalized for using appropriate discretion.

The preponderance of evidence shows that the Parent was provided extensive opportunity to participate in almost every conceivable way and beyond the requirements or intent of the IDEA. The Parent was encouraged to participate fully by attending IEP and reevaluation meetings, sharing their thoughts and ideas as well as the suggestions and recommendations of their advocate, therapist and consultant. Most of the suggestions were incorporated into the IEPs. They were provided written a daily communication log. Mother had daily contact with the staff that worked with the Student and saw the Student at school on a daily basis because she taught in the same building the student attended. The District agreed to keep the Student in the same building with the same teacher for two years longer than was generally the practice. The District agreed to provide all the special education, related services, supplementary aides and supports that was requested by the Parent. The only thing LEA did not agree to provide was placement at the Rainbow Center because they believed they could provide FAPE within the Ft. Osage School District and that was the Student's LRE.

I disagree with the majority panel members decision regarding B.5 Propriety of Rainbow as a Private Placement.

On p. 215 in reference to the Rainbow placement being appropriate, I think Rainbow could have implemented the IEP as written, but do not believe Rainbow was the LRE for the Student. The student was being successfully integrated to the maximum extent appropriate at Ft. Osage. Rainbow did not have any non-disabled peers, therefore, I don't believe the Rainbow placement was appropriate and consequently the LEA should not be responsible for the tuition costs for 2006-07

Dr. Terry D. Allee