

**BEFORE THE THREE-PERSON DUE PROCESS HEARING PANEL  
EMPOWERED BY THE MISSOURI STATE BOARD OF EDUCATION  
PURSUANT TO RSMo. § 162.961**

xxxx, by and through )  
his parents, xxxxxxxxxxxxxxxx )  
xxxxxxxxxxxxxxxxxxxxxxxxxxxxx, )  
 )  
Petitioners, )  
 )  
v. )  
 )  
FRANCIS HOWELL R-III )  
SCHOOL DISTRICT, )  
 )  
Respondent. )

**FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER**

The Hearing Panel, after hearing the evidence in this matter on November 18-21, 2008, makes the following Findings of Fact and Conclusions of Law and issues the following Decision and Order:

**FINDINGS OF FACT**

The Hearing Panel makes the following Findings of Fact:

**The Parties**

1. Student was born on \_\_\_\_\_ as xxxxxxxx. His mother, xxxxxxxx married xxxxxxxx , who adopted Student on \_\_\_\_\_. Student lives with his parents and stepbrother, xxxxx who is in the home part of the time. (Stipulation of Fact “Stip”)
2. Student is a student with an educational disability under the Individuals with Disabilities Education Act (“IDEA”) and received special education services through the Francis Howell School District (“the District”), first as a student with an emotional disturbance starting on September 12, 2003 and since May 2, 2006 as a student with a diagnosis of other health impairment. (Stip)
3. At all times relevant to this due process proceeding, the Parents have resided within the boundaries of the District. While Student has been attending the Devereux Glenholme in Washington, CT since August 2007, his official residency is considered with Parents. (Stip)
4. The District is an “urban school district” located in St. Charles County, Missouri. The

District operates more than 21 buildings and has in excess of 22,000 students. *Missouri School Directory*.

5. The Student and his parents were represented by Mr. Lawrence J. Altman and Amanda Mullaney, Law Offices of Lawrence J. Altman, 621 N. Skinker Boulevard, St. Louis, MO 63130.
6. The District was represented James G. Thomeczek, Thomeczek and Brink, L.L.C., 1120 Olivette Executive Parkway, Suite 210, St. Louis, MO 63132.
7. The Hearing Panel for the due process proceeding was: Pamela S. Wright, Hearing Chairperson; Dr. Terry Allee and Ms. Marilyn McClure.

### **Time Line Information and Procedural Background**

8. The Parents filed a Due Process Hearing Complaint with DESE on December 28, 2007, which was received by DESE same day. In the Complaint, the Parents requested due process seeking reimbursement for the cost of Devereux Glenholme, future costs, transportation costs and future transportation costs. (Stip) After receiving a requested extension from the Chairperson, the District filed its Response to Complaint on January 14, 2008.
9. The attorneys advised the Chairperson on January 28, 2008 that the parties had agreed to have the Resolution Meeting on January 30, 2008. The parties agreed in writing to extend the resolution period from January 30, 2008 to February 29, 2008.
10. On March 13, 2008, parties agreed to June 17-19, 2008 hearing dates and an extension of the time line to July 1, 2008.
11. On May 14, 2008, the chairperson held a Pre-Hearing Conference in her office with the attorneys to discuss the issues to be decided by the Hearing Panel.
12. On May 23, 2008, the District's attorneys requested a continuance of the hearing dates and an extension of the timeline because of summer scheduling issues with certain District witnesses. The Parents did not object to the request for continuance and it was agreed that the new hearing dates would be September 15-18, 2008, with the time line extended to October 1, 2008 for the issuance of an opinion.
13. On August 22, 2008, Student as Petitioner filed a Motion to Add Parents as Parties. The District did not object. The Chairperson entered on Order on September 2, 2008 granting the Motion.
14. On September 10, 2008, the Chairperson granted a written request for a continuance of the hearing dates and an extension of the timeline requested by counsel for Student and Parents because of health issues involving counsel's wife. The District consented to the request. The parties agreed to new hearing dates of November 18-21, 2008 with the time

line extended to December 31, 2008 for the issuance of an opinion. A detailed Scheduling Order was sent by the Chairperson to the attorneys for the parties.

15. Exhibits were introduced and received into evidence at the hearing. The following documents were admitted and made a part of the record in this case: Petitioners' Exhibits A - IIII except DDDD and Respondent's Exhibits (R) 1-89. (Tr. I at 8-9; III at 6-13)<sup>1</sup>
16. Witnesses for Student included: Mother; Father; Dr. Shirley Kaczmariski; Dr. Ralph Caraffa. Witnesses for the District included the following District personnel: Pat Curry; Dr. Martin Rosso; Travis Bracht; Julie Troxell; Linda Lott; Janelle Louis; Deborah Mason; Adam Corbitt; Edward Gettemeier; Beth Blumenstock.
17. The hearing took place on November 18-21, 2008 in St. Charles, Missouri. At the conclusion of the hearing, the parties agreed to extend the time line for mailing the decision through February 9, 2009. (Tr. IV at 210) The opinion is issued within the current time line.

### **Issues Heard by the Hearing Panel**

18. The following issues were presented to the Hearing Panel as developed by the Chairperson and counsel for the parties at a Pre-Hearing Conference on May 14, 2008 :
  - a) Did the District comply with the procedural requirements of IDEA from January 2006 to the present? If not, did the violations result in a denial of FAPE to Student?
  - b) Did the District fail to implement the IEP developed for the Student for the 2005-2006 school year and therefore did not provide FAPE to Student? Did the IEP developed for the 2006- 2007 school year provide the Student with FAPE in the Least Restrictive Environment? Is the standard for determining FAPE based on Rowley or a higher standard as alleged by the Petitioners? Is Student entitled to any compensatory services if the District failed to provide FAPE during this period?
  - c) Was Student's proposed IEP reasonably calculated to produce FAPE in the Least Restrictive Environment for the 2007-2008 school year when Student did not attend school in the District?
  - d) If FAPE was not provided or the IEPs were not reasonably calculated to provide educational benefits, what conduct, if any, of Student's parents materially contributed to the failure to provide FAPE or the development of an adequate IEP? Did the District deprive the parents of an opportunity to participate meaningfully in the development and/or implementation of the proposed IEPs?

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<sup>1</sup> Because the due process hearing took place over four days, there are four volumes of transcripts: Tr.I, Tr.II, Tr.III and Tr.IV. Citations to the transcript refer to the volume and page. Parents' Exhibits are referred to as Pet. Ex. and the appropriate letter. The District's Exhibits are referred to as R- followed by the number.

e) Is Devereux Glenholme School in Connecticut where the Student has attended and/or currently attends considered an appropriate placement under IDEA?

f) Did Student's parents act unreasonably under 20 U. S. C. Section 1412 (a)(10)(C)(iii)(III)?

g) Did Student's parents comply with the notice requirements in 20 U. S. C. Section 1412(a)(10)(C)(iii)(I)(aa)-(bb)? If not, does the safe harbor provision in 20 U. S. C. Section 1412(a)(10)(C)(iv)(II) apply to this case? If the Student's parents met the notice requirements, did the District respond in a timely fashion?

h) What services (and the amounts therefor), if any, should be reimbursed by the District to the Petitioner's parents for (a) the 2007-2008 school year and (b) the 2008-2009 school year?

## **BACKGROUND FACTS<sup>2</sup>**

### **Student's Educational History prior to 7<sup>th</sup> Grade**

19. Student started with the District as a kindergartener at Harvest Ridge Elementary School in the 1997-1998 school year. (Stip)
20. Student's first Elementary Registration form indicated that he had medical diagnoses of ADHD and hay fever. His medications included Tenex and desipramine for ADHD. (Stip)
21. On February 29, 2000, Student was accepted into the District's gifted program called Spectra. (R-13 at 39-40)
22. In December 2000, the District personnel administered the WISC-III to Student, and his full scale IQ was 121. The report states: "His test taking skills appeared to be mature with good task persistence and motivation." That report also stated: "His weak performance on the Comprehension subtest was below that of most children his age....{Student's} reasoning abilities on verbal tasks are generally average (IQ = 97), while his nonverbal reasoning abilities are significantly higher and in the very superior range" (PIQ = 142). (R-13 at 41-42)
23. During Student's fourth grade year,<sup>3</sup> he took the MAP test in Social Studies and Mathematics. His score in Social Studies showed that he was at level 2, also named Progressing, and he scored a 69 percentile on the Terra Nova National portion of the MAP test. This meant that he scored better than 69 percent of the students in the nation.

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<sup>2</sup> We are including more Background Facts than are necessary for our decision but we recognize that this opinion may very well be reviewed in the state or federal courts so a thorough Findings of Fact section may be helpful at the higher level.

<sup>3</sup> Student attended Becky David Elementary School in the District for the 4<sup>th</sup> and 5<sup>th</sup> grades.

(Pet. Exhibit CC at 218). And in Mathematics, Student's MAP test showed that he was at level 3, also named Nearing Proficiency, with a Terra Nova National percentile of 80. This indicated that Student scored better than 80 percent of the students in the nation. (Pet. Ex. CC at 219)

24. Student's 5<sup>th</sup> grade teacher referred him to the Student Teacher Assistance Team ("STAT") due to attention problems and poor reading comprehension. The STAT referral notes Student has medical diagnoses of ADHD and ODD and takes Depakote, Celexia, Resperdal and methyphenidate (Ritalin). (Stip) The Team agreed to keep him in regular education but gave Student extended time to turn in assignments; a single folder for work to do and work completed; assignment book to be checked by his teachers. (R-21 at 80)
25. Student earned A's, B's and C's during the 5<sup>th</sup> grade. (R-22 at 82)
26. In the fall of 2003, Student started at the Barnwell Middle School for sixth grade. On August 19, 2003, a Request for Initial Special Education Evaluation – Part I and Part 2 was completed. (Stip)
27. The referral identifies parent concerns as reading comprehension, amount of homework each night, and turning in work. The referral notes Student sees a psychiatrist and a neurologist due to OCD and picking on his lips. The referral continues to state that there is a possible bipolar issue due to family illness, depression, and bipolar parent and grandparent. (Stip)
28. Notice and consent for the initial evaluation was completed on August 19, 2003. On August 21, 2003 authorizations to share information with Dr. Garrett Burris, M.D. and Dr. Steven Buck, LCSW were provided. (Stip)
29. Dr. Buck sent a letter dated September 9, 2003 which indicated he provided family therapy and he had worked with Student for 4 or 5 years addressing ADHD issues, low self-esteem, and socialization skills. Dr. Buck wrote that Student had been diagnosed as severe ADHD by Dr. Burris and received medication. Dr. Buck's letter indicated that he typically met with Student on a weekly basis to address impulsivity, hyperactivity, short attention span, and difficulty controlling his behavior. (Stip)
30. The District's initial special education evaluation was completed on September 12, 2003. Student was 12 years of age and in the sixth grade at Barnwell Middle School at the time of the evaluation. Cognitive assessment using the WISC-IV produced a Verbal Comprehension Index Score of 93, a Perceptual Reasoning Index Score of 119, a Working Memory Index Score of 88, a Processing Speed Index Score of 78, and a Full Scale IQ of 93. (Stip) Dr. Martin Russo, who administered the test, stated in his report: "A Full Scale IQ of 94 indicates that Student functions intellectually at the 34<sup>th</sup> percentile relative to his age level peers. This means that he scores equal to or better than 34 percent of his age group on this administration of the WISC-IV. His performance is in the average range of intellectual functioning. On the Conner's Continuous Rating Scale Student's scores match an ADHD clinical profile. (R-27 at 102-103)

31. On the Wechsler Individual Achievement Test, second edition (WIAT-II) Student obtained scores of 102 on Word Reading, 88 on Reading Comprehension, 113 on Psuedo Word Reading, 87 on Numerical Operations, 91 on Math Reasoning, 105 on Spelling, and 104 on Written Expression. (Stip) On the WIAT-II Reading Subtests, Student scored in the low average to average range. (R-27 at 107) He scored in the low average range on Numerical Operations and in the average range on Math Reasoning. (R-27 at 108) Student performed in the average range for the Written Language subtests of Spelling and Written Expression. (R-27 at 108)
32. In the Behavior Assessment System for Children, Self-Report form, Student's ratings presented validity scales which suggested an involved profile. The rating presented Student as anxious, having low self-esteem, feeling somewhat isolated, being somewhat alienated from his parents, but with no signs of depression or thought disorders. Based on the evaluation Student was found to be eligible for special education services by meeting the emotional disturbance criteria. (Stip)
33. The initial Individualized Education Program (IEP) was developed on September 23, 2003 as Student starts the 6<sup>th</sup> grade. The present level lists medical diagnoses of ADHD, OCD, and possible ODD. (Stip) He was given an educational diagnosis of Emotionally Disturbed. (R-28 at 113) Two goals were included within the IEP. Goal I stated: "Student will increase his attention to classroom work and behavior by 80%  $\frac{3}{4}$  times." And Goal II stated: "Student will increase his organizational skills by 80%  $\frac{3}{4}$  times." (R-28 at 117) Student was provided with 48 minutes of special education services four times per week in "Individualized Instruction in the area of Ed Maint"(R-28 at 118). Also a Positive Behavioral Support Plan was attached to this IEP. It targeted two behaviors. The first: "Bringing home proper materials." The intervention for this said: "teaching prompting." The second behavior targeted was "use class time wisely" (R-28 at 122)
34. The Educational Maintenance class for 48 minutes per week, 4 times per week provided on the initial IEP is a class to handle social skills, ways to deal with anger, etc for special education students. (Tr. III at 195) The class is held in the special education resource classroom. (R-28 at 118)
35. Student became inactive in Spectra in January 2004. (R-29 at 0128)

#### **Student's Educational History Covering 7<sup>th</sup>-8<sup>th</sup> Grades: 2004-05; 2005-06**

36. The next IEP was developed on August 19, 2004. Student was entering the seventh grade at that time. The present level indicates the educational diagnosis is emotionally disturbed. The present level also indicated there is a medical diagnosis of bipolar disorder. (Stip) This IEP contained two goals. Goal I: "Student will increase his attention to classroom work and behavior by 90%  $\frac{3}{4}$  times." And Goal II: "Student will increase his organizational skills by 90% -  $\frac{3}{4}$  times." (R-31 at 134) In addition, a Positive Behavior Support Plan was attached to Student's IEP containing 4 targeted behaviors.

Those four behaviors were “[b]ring home proper materials, use class time wisely, filing out planner, and turn in proper materials & assignments” (R-31 at 140) The IEP continued to provide for Educational Maintenance for 47 minutes, 5 times per week. (R-31 at 135) He was to receive the following supports on an as needed basis: “extended time, copy of notes, preferential seating, modify assignments, small group, copy of book at home.” (R-31 at 135)

37. Three reporting periods covered the above-mentioned two goals: Goal I, Student was making sufficient progress during the first two periods but not the last one and Goal II, Student made sufficient progress during all three periods. (R-31 at 134)
38. Student’s next IEP was issued by the District on January 21, 2005, during his 7<sup>th</sup> grade year. (Stip) (R-35 at 148) Student’s Present Level of Educational Performance (“PLEP”) stated that “Student still has problems in general education classes and is working to resolve them. Student does struggle with time management and organization. Student does not always utilize class time wisely. Student can sometimes have backlog of work that is due which can become overwhelming at times. Student’s symptoms are largely controlled by medication.” This Section of the IEP also indicates concern by parents about accuracy and quality of the work completed by their son. This Section also notes that Student “does not act out in disruptive ways and seems very motivated to do well. Since his last IEP 4 months earlier, “Student has taken some responsibility for his work while at school and his teachers report that he is completing tasks and joining in group activities to a greater extent.” The PLEP further stated “Recently Student was given the Gates Reading Inventory on which he scored at the 5<sup>th</sup> grade level.” (R-35, page 149) This IEP contained one Goal: “Student will complete class work and participate in classes 90% of the time.” (R-35 at 149) The IEP provided Student 47 minutes of special education maintenance five times per week and 141 minutes of specialized instruction in the areas of behavior and academic support five times per week. Those services were to begin on September 13, 2005. (R-35 at 153) This IEP included a Positive Behavior Support Plan that contained the following targeted behavior: “Student will come prepared for class, get all assignments and notes. Also fill out planner and turn in assignments.” (R-35 at 159) Student made sufficient progress on Goal 1 for all four reporting periods. (R-35 at 152)
39. During 7<sup>th</sup> grade, Student took MAP testing in the areas of Communications Arts and Science. In both tests his achievement level was in the lowest category, Level 1. In Science his Terra Nova National Percentile was 19. That score meant Student “scored better than 19 percent of students in the nation.” His Terra Nova National Percentile in Communications Arts, moreover, was 18, meaning that Student: “scored better than 18 percent of the students in the nation.” ( Pet. Ex. BB at 216 and 217) He had no accommodations for this test. (R-38 at 169)
40. The next IEP meeting was held on October 26, 2005 when Student was fourteen years of age and in the eighth grade at Barnwell Middle School. The PLEP indicates medical diagnoses of ADHD, OCD, ODD, and Bipolar. Medications listed include Seroquel, Lexapro, Tenex, Adderall, and Lamictal. (Stip) For 8<sup>th</sup> grade, he was attending three

CWC (educational acronym for Class within a Class) classes in Social Studies, Communication Arts and Science. Student's schedule was changed at the beginning of 8<sup>th</sup> grade to the CWC classes to accommodate his problems with organizational skills and managing his time on task. He also had Educational Maintenance to address social skills and behavior issues. The following was also included in his PLEP: "Student loves to read, but appears to have difficulty with comprehending nonfiction material. He will study for a test and seems to know the material but when it comes time to take the test, he does not perform well. It is difficult to determine whether he isn't comprehending the material when he reads it on his own, or whether he just goes too quickly and is in a hurry to be finished, therefore, not thinking about each question before he answers it." (R-38, page 168) The PLEP also included the following parental concerns about Student: "Student's mother, is concerned about his test taking skills. She works with Student at home and also has a tutor who sees Student regularly. They both help him study for his tests and feel confident he knows the material, however, when the grade comes home on the test, Student has not done very well. Mother is also concerned about the quality of the work Student completes. She realizes that he often hurries through his assignments and they will appear illegible at times. She is also concerned about his rushing through and just guessing." (R-38 at 168)

41. Three goals were included within the October 26, 2005 IEP for Student. Goal I: "Student will increase his attention to class work and behavior by 90% 3/4/trials." (R-38 at 172) Goal II: "Student will increase his organizational skills by 90% in 3/4 trials." (R-38 at 172) Goal III: Student will increase his Basic Reading level lexile as determined by the Scholastic Reading Inventory test by 3% by May 2006."<sup>4</sup> (R-38,at 173) The IEP provided that Student would continue receiving Educational Maintenance (help with social skills and behavior issues) on a daily basis for 47 minutes (R-38 at 174)
42. The October 26, 2005 IEP also contained a Positive Behavior Support Plan that had three targeted behaviors: "1. To increase work completion. 2. To increase organizational skills. 3. To increase comprehension of test questions and/or reading assignments." (R-38 at 182-185) The IEP also contained accommodations and supports for Student, with nearly all on an "as needed" basis such as study guides, simplified text; note taking assistance, teachers' notes; oral exams; reduced length of exams; open book exams; modify test format; taking test in small groups; read test to student; give prompts re assignments; give directions in a variety of ways; extend time for completion of assignments. (R-38 at 180-181)
43. A Notice of Action was sent to Parents on October 26, 2005 that stated "addition of Read 180 to address Student's reading comprehension skills." (R-38 at 187) Also, on November 14, 2005, another Notice of Action was sent to Parents that said: "addition of a reading class to address reading comprehension skills." (R-38 at 189)
44. During Student's eighth grade year, he took MAP tests in the areas of Communications Arts, Mathematics, and Social Studies. In Communications Arts, Student scored a 648 that placed him in the Below Basic category. His Terra Nova National Percentile score

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<sup>4</sup> Student made progress on all three goals for the reporting periods. (R-38 at 172-173)

of 820 placed him in the 34 percentile meaning that 66% of the students in the nation scored higher. (Pet Ex. AA at 213) Student also received a score of 641 in Mathematics, which also placed him in the Below Basic category. His Terra Nova National Percentile of 14 meant that 86% of the students in the nation scored higher on this test. (Pet. Ex. AA at 214) In Social Studies Student received a score of 637. This score placed Student in the Step 1 category, the lowest on the scale. His Terra Nova National Percentile of 19 meant that 81% of the students in the nation, who took this test, scored higher than Student.

45. On November 21, 2005 Greg Mattingly, M.D., with the St. Charles Psychiatric Associates wrote that Student has diagnoses of ADD and severe bipolar affective disorder. He lists medications as Lexapro, Seroquel, Lamictal, and Zyprexa. (Stip)
46. A review of existing data was completed on March 2, 2006 and consent was received to reevaluate in the areas of cognition, speech and language, academics behavior (social/emotional), autism, sensory integration, and fine motor. (Stip)
47. An occupational therapy referral dated March 23, 2006 indicates Student was to be evaluated for possible autism and to rule out sensory motor and fine motor deficits. The referral notes that Student has fetishes about what type of material to wear. (Stip)
48. Cognitive assessment using the WISC-IV produced a Verbal Comprehension Index Score of 99, a Perceptual Reasoning Index Score of 88, a Working Memory Index Score of 59, a Processing Speed Index Score of 75, and a Full Scale IQ of 78. (Stip)
49. During the subtests of these composites Student looked around, picked his lips and made no eye contact....The Digit Span and Letter-Number Sequencing subtest were the most difficult ones for him. He had a hard time understanding and then following directions. He would do all right for while and then forget the directions again. On the Matrix Reasoning subtest Student rubbed his eyes and picked his lips. Working Memory and Processing Speed were the lowest scores for Student in the composite areas.” In interpreting the WISC-IV results, the following was reported: “Student may experience difficulty in keeping up with his peers in a wide variety of situations that require age-appropriate thinking and reasoning abilities.....Student’s nonverbal reasoning abilities as measured by the Perceptual Reasoning Index are in the Low Average range and above those of only 21% of his peers.....Student’s ability to sustain attention, concentrate, and exert mental control is in the Extremely Low range. He performed better than approximately 0.3% of his age-mates in this area (Working Memory Index = 59; 90% confidence interval 56-69). His abilities to sustain attention, concentrate, and exert mental control are a weakness relative to his nonverbal and verbal reasoning abilities. A weakness in mental control may make the processing of complex information more time consuming for Student, draining his mental energies more quickly as compared to other children his age, and perhaps result in more frequent errors on a variety of learning tasks.

Student’s ability in processing simple or routine visual material without making errors is in the Borderline range when compared to his peers. He performed better than

approximately 5% of his peers on the processing speed tasks. (Processing Speed Index = 75; 90 % confidence interval 70-86. Processing visual material quickly is an ability that Student performs poorly as compared to his verbal reasoning ability. .... Because learning often involves a combination of routine information processing (such as reading) and complex information processing (such as reasoning), a weakness in the speed of processing routine information may make the task of comprehending novel information more time-consuming and difficult for Student. Thus, this weakness in simple visual scanning and tracking may leave him less time and mental energy for the complex task of understanding new material.” (R-44 at 225- 226)

50. Within the School’s Evaluation report the following is stated for Student’s Educational Needs section: “Student would benefit from being placed in Class within a Class for Communication Arts and Science, along with Studies in high school. He would benefit from being placed in a Resource class for Math and Social Studies. He continues to need reminders to turn in homework. He needs assistance with note-taking, reading for ideas and comprehension, lengthy writing assignments, completing long-term assignments and taking final exams.” (R-44 at 215) The Report further recommended the modifications in the current IEP should be followed, consider preferential seating and a visual schedule. (Stip)
51. A new IEP was developed following the evaluation conference on May 2, 2006. The result of the evaluation was the determination that Student qualified as a child with an Other Health Impairment based on medical diagnoses of Attention Deficit Disorder and Bi-polar Disorder. The PLEP indicates medication include Seroquel, Lexapro, Tenex, Adderall, Lithium, and Lamital. (Stip)
52. Student’s PLEP stated: “Student loves to read, but appears to have difficulty with comprehending nonfiction material. He will study for a test and seems to know the material but when it comes time to take the test, he does not perform well. It is difficult to determine whether he isn’t comprehending the material when he reads it on his own, or whether he just goes too quickly and is in a hurry to be finished, therefore, not thinking about each question before he answers it.” (R-45 at 311) The PLEP also included the following concerns about Student from Mother: “Student’s mother, is concerned about his test taking skills. She works with Student at home and also has a tutor who sees Student regularly. They both help him study for his tests and feel confident he knows the material, however, when the grade comes home on the test, Student has not done very well. Mother is also concerned about the quality of the work Student completes. She realizes that he often hurries through his assignments and they will appear illegible at times. She is also concerned about his rushing through and just guessing. His parents are also concerned about his transition to high school as well as note taking, homework, completing long-term assignments and taking finals.” (R-45 at 311)<sup>5</sup>
53. Five Goals were included within Student’s IEP developed on May 2, 2006 covering the rest of 8<sup>th</sup> grade and in preparation for the 9<sup>th</sup> grade. Goal 1: “Student will increase his

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<sup>5</sup> This PLEP is basically a “cut and paste” job by the IEP team from the previous October 26, 2005 IEP containing the same language.

attention to class work and behavior by 90 % in  $\frac{3}{4}$  trials.” Goal 2: “Student will increase his organizational skills by 90% in  $\frac{3}{4}$  trials.” (R-45 at 315) Goal 3: “Student will increase his Basic Reading level lexile as determined by the Scholastic Reading Inventory test by 3% by May 2006.” Goal 4: “Student will increase his Reading Comprehension skills by answering literal and inferential questions from a given story or passage with at least 80% accuracy in 4/5 trials through May, 2007” (R-45 at 316) And Goal 5: “Student will increase his Math Reasoning skills in order to solve 2 and 3 step problems with at least 80% accuracy in 4/5 data days.” (R-45 at 317)

54. The May 2, 2006 IEP provided that Student would have the following for the rest of 8<sup>th</sup> grade: Educational Maintenance class 5 times per week in the Special Education Resource Room and CWC classes 5 times per week in Social Studies, Communication Arts and Math classes 5 times per week. The IEP further provided the following for the 9<sup>th</sup> grade in anticipation of a more rigorous curriculum at the high school level: Special education classes of Studies, Math and Social Studies 5 times per week and CWC classes in Communication Arts and Science 5 times per week. (R-45 at 318) The classes for the 9<sup>th</sup> grade were among the suggestions made by Student’s tutor, Shirley Kaczmariski, who attended the IEP meeting (as she had done on other occasions). (Tr. I at 41; Tr. I at 195; Tr. I at 245)
55. The May 2, 2006 IEP contained a Positive Behavior Support Plan targeting two behaviors: (a) increase work completion and (b) increase organizational skills. Interventions, person(s) responsible, data collection and evaluation review are also detained in the IEP. (R-45 at 326-327)
56. The May 2, 2006 IEP also provided for certain accommodations for taking the MAP, Terra Nova and District tests: extend allotted time and testing with small groups. (R-45 at 322-323)
57. Accommodations and modifications were also provided in all subject areas: provide home set of textbooks/materials; preferential seating; extended time for completion of tests; test in small groups; extended time as needed for completion of assignments; daily maintenance of assignment notebook; daily positive reinforcers; daily reminder of rules. (R-45 at 324)
58. Attendees at the May 2, 2006 IEP meeting included Julie Troxell, Student’s Case Manager and special education teacher for 8<sup>th</sup> grade and Dan Lamb, who was scheduled to be Student’s Case Manager for his 9<sup>th</sup> grade. (R-45 at 310).
59. Ms. Troxell is a veteran teacher and was a very credible witness. She has been in education for thirty (30) years. (Tr. III at 145) Ms. Troxell’s undergraduate degree is in secondary education, speech and language. Her Master’s Degree is in special education. She holds teacher certifications from the State of Missouri in special education, grades K through 12; in speech and language, grades 6 through 12; and in communication arts, middle school. (Tr. III at 145)

60. Ms. Troxell saw Student several hours a day during the 2005-06 school year. She worked with him in three general education classes – social studies, communication arts, and math – which Student attended by virtue of the District’s “class-within-a-class” program. (Tr. III at 147) In the class-within-a-class program, a special education teacher and a general education teacher would both be present in the classroom. (Tr. III at 147)
61. In addition, Ms. Troxell worked with Student in a class called “Academic Lab,” which was set up as a study hall. (Tr. III at 147) In the Academic Lab, Ms. Troxell would work with Student on homework, facilitation organizational skills, and “anything that he needed additional assistance with to help him achieve better academically.” (Tr. III at 147-148)
62. In the CWC classes, Student was educated alongside nondisabled peers. (Tr. III at 148-149)) In those classes, Student was expected to do the same basic work and follow the same curriculum that the nondisabled eighth grade students were expected to do. (Tr. III at 149)
63. Ms. Troxell demonstrated knowledge of Student’s IEPs that were in place during the 2005-06 school year. She was familiar with the accommodations and modifications contemplated by the IEPs and was responsible for implementing them. Many of the accommodations and modifications were to be implemented on an “as needed” or “as necessary” basis. (Exh. R-38 at 180-181)
64. Ms. Troxell explained that what, at first blush, may appear to be a repetition of the same goal over the course of several IEPs did not mean that Student was making no progress. Instead, variations in benchmarks and level of coursework were changing. (Tr. III at 169-170; 172) Instead, the repetition of the goal reflected Student’s continuing need for the supports as he advanced from grade to grade. (Tr. III at 172)
65. The IEPs during the 8<sup>th</sup> grade addressed Student’s educational needs, including specifically, his difficulty with test taking. (Exh. R-38 at 185)
66. The District transferred Student out of science and into Read 180 to address his difficulties with reading comprehension. (Tr. III at 155)
67. Student passed all of his classes in 8<sup>th</sup> grade. With the exception of a D in PE during the first marking period, Student’s grades ranged from A’s to C’s. (Pet. Ex. QQ at 279-280) The grades on the report card were not modified. Despite his disability, Student was able to be successful in the general education setting working on the general education curriculum. (Tr. III at 208).
68. Student also did very well behaviorally and socially. (Tr. III at 195) Student appeared to Ms. Troxell and to his other teachers to come out of his shell. He was able to work in small groups, he developed friendships that he did not have before, he was offering in class, raising his hand and participating. Ms. Troxell observed that during his eighth

grade year, Student's "overall affect seemed to change, to be happier." (Tr. III at 195-196)

69. Other than a single incident in the Read 180 classroom, Student did not have tantrums or have behavioral outbursts during his eighth grade year. (Tr. III at 196)
70. Based upon her thirty years of experience and her working with Student throughout the 2005-06 school year, Ms. Troxell opined that Student made meaningful educational progress during the 2005-06 school year, Student's eighth grade year (Tr. III at 171)

### **Student's Educational History Covering 9<sup>th</sup> Grade: 2006-07**

71. The IEP team met again on August 30, 2006. Student was 15 and entering 9<sup>th</sup> grade at the time of the IEP. The PLEP contains the previous language in this section from the May 2, 2006 IEP but adds Student attended a month long autism camp during the summer. (Stip) Only minor adjustments were made to Student's IEP during the August 2006 meeting. (Compare R-45 with Ex. R-48)
72. During Student's 9<sup>th</sup> grade, he received 14 discipline notices ranging in severity from theft –taking a digital voice recorder required under a 504 accommodation for another student for which Student received a 3 day in school suspension---to skipping homeroom. (Pet. Ex. 49)

*Teacher Linda Lott*

73. Student's Social Studies (American History) teacher in the Special Education Resource class setting was Linda Lott. (Tr. III at 210) We found Ms. Lott to be a very credible witness.
74. Ms. Lott began teaching at the District in 1993. She has been teaching in the District since 1985. (Tr. III at 210) Ms. Lott holds an undergraduate degree in special education and a Master's Degree in general education. (Tr. III at 210-211) She holds teaching certifications issued by the State of Missouri in teaching students with learning disabilities, students with emotional disturbances, and students who are educably mentally disabled. (Tr. III at 211)
75. Ms. Lott has taught Social Studies (American History) in both the class-within-a-class setting and in the special education setting. (Tr. III at 211)
76. Ms. Lott implemented the accommodations and modifications contemplated in Student's IEP, as needed. (Tr. III at 222-224)
77. Academically, Student performed very well in Ms. Lott's class. (Tr. III at 225) Ms. Lott observed that Student improved significantly with work completion and in his overall grades. (Tr. III at 225) Student was doing ninth grade work in Ms. Lott's class. (Tr. III at 246) Although Student was taught social studies in a special education classroom, the curriculum was very closely aligned to the general education curriculum. The class

covered the same topics. The difference was that Ms. Lott modified some of the work, so that it could be done as a group in class, or orally, instead of written. (Tr. III at 218)

78. Ms. Lott used a daily checklist with Student. (Tr. III at 233) When using the daily checklist with Student, Ms. Lott noted that Student's other teachers were also utilizing the daily checklist. (Tr. III at 233)
79. Ms. Lott testified that Student improved socially, as well, during the 2006-07 school year. He interacted appropriately. "I saw big improvements with his social interaction." (Tr. III at 225) Ms. Lott observed Student talk with other students in the hallway. (Tr. III at 249)
80. Student responded well to Ms. Lott's directives. (Tr. III at 248)
81. According to Mother, Ms. Lott is "a great example that children like Student can learn if given the right environment and with the right teachers. Because he did — I know he didn't do well on every assignment in there, but she had him working, and she was teaching him how to take notes, and he could learn. She worked with him." (Tr. II at 97)

#### *Other Teachers*

82. During the second semester, Student had physical education during fourth hour. His teacher was Janelle Louis. (Tr. III at 251)
83. Occasionally, Student would skip PE to meet with his friend to play Nintendo. (Tr. III at 256- 257)
84. There were four occasions when Student did not dress out. It is not unheard of for students to have ten to twelve "nondresses." In Student's case, the nondresses were not due to some sort of self-consciousness. (Tr. III at 264-265) When Student did not dress out, he would nevertheless choose to participate. (Tr. III at 255)
85. Ms. Louis was given a copy of Student's IEP and was aware of the accommodations and modifications called for in the IEP. (Tr. III at 258-259) Ms. Louis implemented the accommodations and modifications, as appropriate. In order to implement the test-taking accommodations, Ms. Louis would send Student to his Case Manager, Mr. Dan Lamb. (Tr. III at 263)
86. Student never refused teacher directives in PE. (Tr. III at 259)
87. Although PE is a fairly unstructured class, Student did not have any behavioral incidents in PE class. (Tr. III at 259) Student showed improvement in overcoming self-isolating behavior, such that by the midpoint of the class and through the end of the class, he was playing with all the other students in the class. (Tr. III at 259- 260)

88. Adam Corbitt was Student's math teacher during the 2006-07 school year. (Tr. IV at 43-44) He holds undergraduate degrees in elementary regular education and in special education, cross-categorical. (Tr. IV at 42)
89. Although he was not Student's case manager, Mr. Corbitt served as a case manager during the 2006-07 school year and was familiar with the responsibilities of a case manager. (Tr. IV at 44) The role of a case manager was to act as a liaison and to funnel information to the student. The case manager not only aids with an IEP, but communicate to parents information from the school. (Tr. IV at 45) The case manager was also to make teachers aware of the accommodations and modifications contemplated by a student's IEP. (Tr. IV at 47- 48)
90. Dan Lamb was in contact with Adam Corbitt regarding Student during the 2006-07 school year. (Tr. IV at 45-46) Some of the modifications contemplated by Student's IEP were on an "as needed" or "as requested" basis. ( R-48)
91. Student passed the Introduction to Algebra class taught by Mr. Corbitt. (Tr. IV at 49) Student was adequately prepared to enter the next level class in the District's math program (Tr. IV at 52) and, in fact, entered the Geometry class at Devereux Glenholme School.
92. Student interacted with other students in Mr. Corbitt's class. (Tr. IV at 50- 51) His interactions with the other students were typical of a ninth grade student. (Tr. IV at 51)
93. Mr. Corbitt, a very credible witness, opined that Student made meaningful educational progress during the 2006-07 school year. (Tr. IV at 52)
94. In addition to traditional academic subjects, Student was enrolled in a "Studies" course during the 2006 school year. (R- 64 at 447) The Studies class is an organized study hall. It is a special education class with a special education teacher. There is a curriculum that includes teaching students to keep organized notebooks, and to keep a planner. Students are presented with a variety of different strategies to use in the regular education classroom, such as note taking and highlighting. Students work on getting information from a textbook, checking grades and test-taking skills. Students are also given time to work on homework or to do remedial work. (Tr. IV at 136-137)
95. Student passed both semesters of all his classes taken during the 2006-07 school year. (R-64 at 447) More particularly, he received all As, Bs and Cs. (R-51 at 371) He did struggle with performance on semester exams which tested Student on all the material covered in the class for the whole semester. For example, in Communications Arts, a general education class, Student earned an F in his 1<sup>st</sup> semester exam but received a B in the course because his 1<sup>st</sup> and 2<sup>nd</sup> quarter grades were an A and B, respectively. (R-51 at 3371)
96. Student made progress on all goals of his of his IEP, except Goal 2 for one quarter, during the 2006-2007 school year. (R-48 at 343-346)

97. Student earned all seven (7) possible graduation credits during the 2006-07 school year. (R-64 at 447) He would need a total of 24 credits to graduate from high school so he was “ahead of track” to graduate. (Tr. IV at 107).
98. At the end of the 2006-07 school year, Student’s class rank was 248 out of 504 students, placing him in the upper-half of the freshman class. (R-64 at 447)

**Development of the IEP for Student’s 10<sup>th</sup> Grade: 2007-08**

99. On April 23, 2007, Dr. Shirley A. Kaczmariski sent a letter to Student’s IEP team indicating her experiences with Student as his private tutor for the past two years. Dr. Kaczmariski expressed concerns in the following areas: reading comprehension; transition from dependent to independent learning; the need for specific skills to compensate for his learning<sup>6</sup> and emotional disabilities such as problems focusing even for small periods of time as well as getting frustrated with the volume of work resulting in emotional outbursts and obsessive behaviors which she observed when tutoring him. (Pet EX EEEE at 530) Dr. Kaczmariski testified very credibly at the due process hearing on the same concerns.<sup>7</sup> (Tr. I:191-266)
100. A few days later, the parents of Student met with Daniel Patrick, Case Manager for Student. After hearing from the Parents regarding their concerns with Student’s performance, Mr. Patrick followed up by sending an e-mail on April 27, 2007 to Student’s teachers reminding them to read tests to Student; provide more structure; check his daily assignment sheet; finals are to be read in a small group setting; make sure he is staying focused and not zoned out; encourage positive social skills. (R-62 at 426)
101. The District held an IEP meeting on April 26, 2007<sup>8</sup> and then again on May 4, 2007 to discuss a new IEP covering the rest of the school year and his sophomore year. (Stip) Prior to the start of the meeting, the Parents presented a two page document, the first section dealing with “Where we see Student today” and the second part called “Our recommended solutions” containing fourteen (14) requests for services in Student’s next IEP (R-52 at 372-373).
102. The following is a breakdown of the 14 requests in the “Our recommended solutions” and the District’s response to each request:
  - a) The District should “[p]rovide more one on one teaching with additional repetition of material and extended time to facilitate actual learning and mastery of material.” The

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<sup>6</sup> Student was never diagnosed with any learning disabilities as defined by IDEA.

<sup>7</sup> Dr. Kaczmariski earned a Bachelor’s Degree in Political Science and Education from Maryville University; a Master’s Degree in Educational Administration at University of Illinois and a Ph. D in Educational Administration at Southern Illinois University at Edwardsville. (Tr. I at 192) She retired from public education in 1996 after 26 years as a teacher and principal. (Tr I at 191) Since 2004, she has been director of Electus Academy, a private, alternative school for emotionally disturbed adolescents. (Tr. I at 192)

<sup>8</sup> On April 17, 2007, Mother had requested the scheduling of an IEP meeting as soon as possible. (Stip)

District responded by increasing the number of special education classes from three to five---providing the requested support.

- b) The District should “[c]reate an educational program designed around his specific learning style and interests.” We conclude that the May 4, 2007 IEP proposed by the District takes into account Student’s learning style. He had demonstrated success under similar IEPs implemented by the District.
- c) The District should “[p]rovide tutoring available after school at least 4 hours/week.” In effect, the Parents asked the District to assume Parents’ private costs for tutoring. We find that the District’s proposed IEP and placement would diminish the need for tutoring. The Hearing Panel further finds that the District has had tutoring available (Tr. IV at 119), but Parents have failed to take advantage of the services.
- d) Parents asked that the District “[p]rovide smaller ‘chunks’ of instruction at a slower pace with more frequent breaks.” This request implicates teaching methodology, which ordinarily is committed to the discretion of the District, unless it can be demonstrated that the methodologies being used by the District fail to meet the FAPE requirement. We find that there has been no such showing here. We also note that placing Student in five special education classes would also address this request in that the pace is slower than the regular education classes.
- e) Parents asked the District to “[p]ersonally assist with any and all schedule changes.” According to Father during rebuttal, Student would get lost at the District high school when there was a schedule change. (Tr. IV at 202-203) There was no indication as to when this occurred. There was also no testimony that Student’s “getting lost” resulted in a loss of FAPE. We find that providing the personal assistance requested is not necessary for Student to make meaningful educational progress.
- f) Parents asked that the District “[m]ore closely monitor [Student’s] location at all times to prevent skipping class.” Although understandably a concern of Parents, we find that Student’s skipping PE fewer than five times is not an issue warranting the provision of a shadow during passing time. We conclude that the District adequately addressed Student’s skipping through its regular processes.
- g) Parents asked the District to “[m]onitor [Student] to insure he participates in the appropriate and required curriculum with encouragement and not disciplinary methods.” Testimony from the teachers who testified at hearing all indicated that Student willingly participated in their respective classes. There was no evidence from the documents that this was not the case in Student’s other classes. While Student failed on a few occasions to dress out for PE, this was not viewed by the teacher as rising to the level of significance requiring a provision in Student’s IEP to address same. Moreover, we note that the schedule proposed for Student for the 2007-08 school year did not contemplate Student taking a PE class. (R-78 at 648)

- h) Parents asked that the District “[p]rovide a positive reinforcement system.” However, the overwhelming evidence showed that Student responded to teacher requests and direction. Student’s IEPs have included positive behavior support plans. We find that a systemic positive reinforcement system was not necessary for Student to receive a FAPE.
- i) Parents asked that the District “[p]rovide one or more extracurricular activities with like peers that are healthy and appropriate for [Student’s ] social disability and maturity level. These events would have to be structured and monitored.” The District’s high school attended by Student has more than 100 extra-curricular activities from which he could choose to participate. (Tr. IV at 37) Student did participate in the Anime Club until he stole another student’s voice recorder. (R-49 at 359) The Hearing Panel finds that the extra-curricular activities available at Student’s high school provided him with sufficient options to participate. Extra-curricular activities are supervised by school staff. Participation in a given extra-curricular activity was generally up to the student, in line with the student’s interests.
- j) Parents asked that the District “[p]rovide a much more emotionally safe environment which should help [Student’s] social growth and improve his self-esteem.” We find that there is nothing to suggest that the District’s high school was unsafe. As noted above, he had classes to help with social skills.
- k) Parents asked that the District “[monitor Student] during lunch. Insure only healthy food choices are available to him.” Parents claim that Student lost as much as twenty pounds during the spring of 2007. Student gained weight at Devereux Glenholme, after he was taken off stimulant medication. The psychiatrist at Devereux Glenholme indicated that Student’s failure to grow in height, weight and sexual development “was one of the side effects of psychostimulant medication.” (R-86 at 707) In the spring of 2008, Student underwent surgery for a thyroid condition.
- l) Parents asked that the District “[p]rovide therapeutic program(s) to help in healthy problem-solving, reading comprehension, self-management and self expression strategies and skills necessary for coping and developing appropriate adaptive behaviors to become as functionally independent in his life after high school.” We find that Student was able to make meaningful educational progress in the general education milieu. It would be overly restrictive to isolate Student further from nondisabled peers, beyond the five (5) special education classes proposed by the District.
- m) Parents asked that the District “[p]rovide a counselor or psychologist to be available on a daily basis if Student is suffering anxiety, overwhelming feeling or conflict with his peers or teachers.” Counselors are available at the high school that Student attended in the District. (Tr. IV at 8)
- n) Parents asked that the District “[p]rovide a lap top and teach [Student] keyboarding for his educational needs.” Student had access to a computer in each of his

- classrooms. (Tr. IV at 154). He was scheduled to take a keyboarding class, had he remained at the District's high school that he attended as a freshman. (Tr. IV at 16) While Student had a laptop computer at Devereux Glenholme, it was not because of an individualized decision intended to address his unique educational needs. Every student at Devereux Glenholme had a laptop computer. (Tr. II at 80) In Student's case, the laptop proved to be a distraction in several of his classes. (R-86 at 718)
103. At the May 4, 2007 IEP meeting, the Parents complained about the difficulty of getting Student to do his homework. (Tr IV at 139) Mother admitted that she had been doing some of her son's homework. (Tr I at 87; Tr. II at 67; Tr IV at 138) Therefore, the District proposed increasing the number of special education classes from three (3) to five (5), beginning with the 2007-08 school year. (R-59 at 409; Tr. IV at 152-153) The IEP team added language services to address perceived deficits in pragmatic language. (R-54 at 386)
  104. The proposed IEP contained five goals for Student. Goal 1: "Student will increase his attention to class work and behavior by 75% in 3 out of 4 trials." (R-54 at 382) Goal 2: "Student will increase his organizational skills by 80% in 3 out of 4 trials." (R-54 at 383) Goal 3: "Student will increase his Reading Comprehension skills by answering literal and inferential questions from a given story or passage with at least 75% accuracy in 4/5 trials." (R-54 at 384) Goal 4: "Student will increase his Math Reasoning skills in order to solve 2 and 3 step problems with at least 80% accuracy on 4/5 trials." (R-54 at 385) And Goal 5: "To increase pragmatic language skills by participating in therapy/classroom activities as instructed by the SLP/teachers with 80% accuracy per targeted skills." (R-54 at 386)
  105. Goals were revised to reflect that it was anticipated that work would be getting more difficult during Student's sophomore year (Tr. IV at 139) and in recognition of the parental input with respect to the amount of time that Student was spending on homework. (Tr. IV at 139-140) Thus, there was a decrease in the percentages for the goals compared to the previous IEP.
  106. Student had succeeded in previous years with the supports contemplated by the IEP proposed for the 2007-08 school year. (See above)
  107. During the May 4, 2007 IEP meeting, Ms. Beth Blumenstock, the Chairperson of the Special Education Department at Student's high school in the District, thought that the parents were in agreement with the proposed revisions to Student's IEP. (Tr. IV at 176-177)
  108. Mother testified that she was in agreement with the proposal to increase the number of special education classes from three to five. (Tr. IV at 193) She conceded that Dr. Kaczmarek had previously urged her to put Student in fewer CWC classes and in more special education classes but Mother resisted: "I guess I didn't want to see how severe disabilities that he had." (Tr. I at 295)

109. Dr. Ralph Caraffa, the Parents' expert, reported that Glenholme School "utilize[d] the IEP Measureable Goals outlined by the District." (R-87 at 756)
110. The placement proposed by the District, "Outside regular class 21-60% of time," is less restrictive than a residential placement.
111. At the conclusion of the IEP meeting held on May 4, 2007, the Parents gave written notice to the District that they were not happy with their son's overall academic performance at his high school and as a result, they planned to enroll him in a private therapeutic educational institution at public expense. (R-52 at 374)
112. Ed Gettmeier, Assistant Principal, at the high school Student attended as a freshman testified credibly that Mother told him on February 1, 2007 that she was 90% certain that her son would be leaving the District and enrolling in Brehm, a private school in Carbondale, IL. (R-60 at 411; Tr. IV at 92-93). Mr. Gettmeier also testified that Student was well-behaved at school, especially for a freshman. (Tr. IV at 95)
113. Mr. Gettmeier also testified about a conversation with the Mother right before Student started his freshman year. She made a comment "it's not really your fault, but you just don't have what my son needs." He remembered it so clearly because he was alarmed that someone would make that statement before the child had experienced any classes or activities at that particular school. (Tr. IV at 113-114)

### **Standard Tests**

114. The District produced a highly credible witness, school psychologist, Dr. Martin Rosso<sup>9</sup>. He addressed the Parents' claim of lack of FAPE, in part because of the wide disparities in Student's WISC or IQ scores. Dr. Rosso testified:
  - a) an IQ is an assessment of cognitive ability-it's an assessment of their innate capacity to learn and function. (Tr. III at 38) It would influence the verbal sections of the IQ. (Tr. III at 39)
  - b) When asked to compare WISC-III versus WISC-IV, Dr. Rosso first noted that the former had two components and the latter had four components. (Tr. III at 40) WISC-IV is longer and the demands in arithmetic center more on linking memory. (Tr. III at 41-42) There is also an optional test on WISC-IV called word reasoning. (Tr. III at 43) Matrix reasoning is also not on the WISC-III but appears on the WISC-IV. (Tr. III at 46) Working memory is a completely new index on WISC-IV. (Tr. III at 46)
  - c) When going from the WISC-III to WISC-IV, there is a significant increase in the number of tests that relate to working memory and processing speed, which are both highly influenced by one's ability to concentrate and focus. (Tr. III at 49) Thus, the

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<sup>9</sup> Dr. Rosso has a Bachelor's Degree in Psychology from UMSL and his Master's and PhD from University of Missouri-Columbia. He's been a psychologist with the District for eighteen (18) years. He also works as a consultant for numerous state and local agencies. (Tr.III at 17-18)

- scores of child with ADHD could be impacted. (Tr. III at 49) Digit span, coding, the symbol search and letter number sequencing, which is 40% of the standard WISC-IV, are all very much subject to attention and concentration at the time of the test. (Tr. III at 50) The verbal part of the test is not as much affected by attention. (Tr. III at 50)
- d) He also stated that studies have shown when IQ tests are reformed, there is a drop in scores from the older to the newer version. (Tr. III at 52) Dr. Rosso also testified that the scores will drop for students with ADHD and with bipolar disorders, two of the diagnoses for Student. (Tr. III at 53)
  - e) Dr. Rosso highlighted behavioral observations during the WISC-IV testing indicating that Student had not been very attentive. (Tr. III at 57)
  - f) He testified that neither the perceptual reasoning subtest nor the working memory subtest is influenced by inadequate classroom instruction. (Tr. III at 58)
  - g) He also said medications can be a significant influence on test scores. (Tr. III at 59)
  - h) A student with anxiety can also have concentration or focus issues with test taking. (Tr. III at 60)
  - i) The WISC-IV test followed four days after Student sat through three administrations of the MAP test. (Tr. III at 60)
  - j) His WIAT-II scores showed no learning disabilities based upon state criterion. (Tr. III at 89)
  - k) His WIAT-II scores show that Student is making some progress in his education even though he has a weakness in Math. (Tr. III at 89)
115. Nathan Travis Bracht, Director of Assessment and Program Development for the District, testified very credibly on the subject of the MAP tests. He has dealt with MAP tests for 11 years, as a classroom teacher and as a building level administrator. (Tr. III at 94)
116. Mr. Bracht testified:
- a) The acronym MAP stands for Missouri Assessment Program. (Tr. III at 95)
  - b) Not all grade levels take the MAP test every year. Depending on what content the state is assessing will trigger what assessment you are given. (Tr. III at 95)
  - c) If a student does not make proficiency, there is no consequence for that student. (Tr. III at 95)

- d) When student took the MAP test in 4<sup>th</sup> grade in 2002, there were five different levels for rating the scores but four years later in 2006, the number of achievement levels dropped to four. (Tr. III at 100)
  - e) DESE has given directions to the schools not to compare achievement levels from one year to the next. There would be a change in content within the subject area from year to year as well as a change in the number of achievement levels. (Tr. III at 101-102)
  - f) The State has prescribed modifications and accommodations that can be given for IEP students and sometime, they are not the same as the IEP students would be given during the regular school year. (Tr. III at 134)
  - g) Missouri has one of the most rigorous statewide assessments. (Tr. III at 35-136)
  - h) Terra Nova scores are not very reliable of ability because they compromise just a few questions embedded in the MAP tests. (Tr. III at 133-134; 140-143)
117. Based on the very credible testimony of Mr. Bracht, we find that the MAP scores are not a reliable indication of educational progress for Student.

#### **Private Placement**

118. Parents produced psychologist Dr. Ralph Caraffa as a witness to support their unilateral placement of student in Devereux Glenholme School in Connecticut. (Tr. II at 5-66) Dr. Caraffa worked with student off and on in 2003-2004. (Tr. II at 8) He last saw student in 2004. (Tr. II at 35-36) Dr. Caraffa did family work with student and his parents. (Tr. II at 35-36) Dr. Caraffa testimony and report (R-87 at 753-759) included:
- a) It has always been my belief that student needed more educational programming than could be provided through public education. (Tr. II at 26)
  - b) His report prepared in May 2008 is based on information from parents, District's records and information for the Glenholme School. (Tr. II at 9)
  - c) It didn't surprise him that student had a history of problems taking tests because he is a fairly rigid guy. Student has difficulty with changes, transactions and as a consequence, his performance is going to be affected in a possible explanation for his MAP scores. (Tr. II at 13)
  - d) From reviewing the District records for student, Dr. Caraffa criticized: the failure to account for Student's drop in IQ scores; dropping expectations for improvement on IEP goals to 75%; failure to address questions repeated in several IEPs re: whether student didn't comprehend the material when he reads it on his own or he just goes too quickly and is in a hurry to be finished and therefore, is not thinking about

question before he answers it. (Tr. II at 17-18) He concluded that Student was not making educational progress in the District. (Tr. II at 49-50)

- e) He conceded that students with attention deficit disorders don't fare as well on the WISC-IV - - 11-16 point drops in full scale IQ scores can occur for those students and decreases even greater if the students also has bipolar disorder, Asperger's. (Tr. II at 34)
- f) He agreed that there has been a constant changing medications, which can have impacts on educational performance. (Tr. II at 37) The schools, however, should make appropriate accommodations. (Tr. II at 63)
- g) He testified that it would not be appropriate for school districts to suggest that medications are wrong for the disorder or there are too many medications for this diagnosis or something else should be used. (Tr. II at 64)
- h) He does not know how Student was doing behavior-wise at home during his 9<sup>th</sup> grade. He testified, however, that he learned from parents that during 8<sup>th</sup> grade, Student was very argumentative at home, aggressive toward father, in particular, outbursts occurring quite often and fairly intense causing severe strain in the marriage. (Tr. II at 56-58)
- i) His statements in R-87 at 754, paragraph 4 that "Discipline reports from school indicated that he indeed did receive suspensions for both aggressive, defiant and inappropriate sexual behavior" is an exaggeration of Student's discipline history at the District.<sup>10</sup>
- j) His statement in R-87 at 755, paragraph A: "All of the options that were proposed by the family were rejected by the school district as of September 2007" is not accurate.
- k) His statement in R-87 at 755 that a IEP written for the 10<sup>th</sup> grade had a change in educational diagnosis to Other Health Impaired is not accurate. The change had been made in the IEP dated May 2, 2006 (toward end of 8<sup>th</sup> grade). (R-45 at 310)
- l) Dr. Caraffa summarized his opinion that student needs a residential placement as follows:

It is the nature of his problem, in my opinion, that transitions must be carefully controlled in order for the lessons in one to carry over to the other. Hence, social learning provided in one area would not be able to be generalized to the other without careful monitoring and parallel instructions and reinforcement being provided. It is the nature of a good residential treatment facility to have a therapeutic education program that dovetails with residential living. (R-87 at 758-759)

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<sup>10</sup> For example, the sexual behavior involved an inappropriate comment made by Student when he observed one girl gave another girl a piggyback ride. He stated – "look one girl humping another girl." (R-49 at 357)

- m) Dr. Caraffa spoke with Case Managers and reviewed Devereux Glenholme records before concluding that the placement has been successful. (R-87 at 756-757)
119. When Student completed Application to Glenholme, he indicated the following as his greatest strengths: my talents, interests and friends. (R-89 at 767). He expressed his health as his greatest weakness. (R-89 at 767)<sup>11</sup> Student said that he was applying to the school for “more understanding and getting to know my dad and family.” (R-89 at 767) In his deposition, Student indicates that he is at Glenholme because of his disorders such as ADHD and Asperger’s, possibly bipolar. ( Pet Ex GGGG at 30)
120. Mother provided the following information in her handwriting re Student’s Problem Behaviors in the Application to Glenholme dated May 30, 2007, with all marked “very often” in terms of frequency:
- 42. fights with others. Mother adds “parents not anyone else”
  - 44. argues with others. Mother adds “parents only”
  - 46. talks back to adults when corrected. Mother adds “parents only”
  - 47. has temper tantrums. Mother adds “only at home”
- (R-89 at 781)
121. In another section of the Application dealing with Student’s behavior in the previous 4 weeks, Mother indicated the following in her handwriting:
- 55. fails to control his/her anger. Mother adds “at home only”
  - 57. demand adult approval and praise. Mother adds “mother’s only.”
  - 62. destroy or damage property. Mother adds “at home only.”
  - 66. hurt (hit/kick), push, or physically threaten others. Mother adds “dad only.”
  - 87. argue with adults. Mother adds “parents only.”
  - 89. appear easily annoyed with others. Mother adds “mostly dad.”
- (R-89 at 782)
122. The Parents had decided a residential school was their best option in making their son’s remaining high school years successful. (Tr. I at 157). She described their reasoning as follows: “The doctors that we talked to recommended that it be a 24 hour facility so

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<sup>11</sup> According to Mother, Student had received no individual counseling for at least one year, including the 9<sup>th</sup> grade. (Tr.I at 280) He did see a Dr. Mattingly for brief visits to monitor his medications. (Tr.I at 281)

[Student] would have round the care condition, basically it's conditioning, where they would be able to modify his behavior, and that he would need 24 hours a day to keep that conditioning, and changing the behavior and place the consistency of it. " (Tr. I at 157)

123. Student received As, Bs and Cs during his first year at Devereux Glenholme. (R-86 at 727)
124. Devereux Glenholme used the IEP Measurable Goals outlined by the District except the percentage for success was 85% instead of 75%. (R-86 at 737; R-87 at 756)
125. Student entered Devereux Glenholme at the 9<sup>th</sup>-10<sup>th</sup> grade instructional level in English (referred to as English II on his report card) where he was doing pretty well according to Student's expert, Dr. Shirley Kaczmariski. (Tr. I at 258); (R-86 at 727). Student took a Geometry class, which is typically a 10<sup>th</sup> grade class. (Tr. II at 50) Student testified in his deposition that he was able to adjust academically at Glenholme. <sup>12</sup> (Pet Ex GGGG at 51)
126. Student sees Glenholme as helping him get away from home and try to be more independent. (Pet Ex GGGG at 31) The school also helps to control his disorders but also "paying attention and keep doing better in my school work." (Pet Ex GGGG at 48)
127. The parties had an IEP meeting on September 17, 2007 when Parents requested that the District pay for their son's expenses at Devereux Glenholme. The request was denied by the District on September 24, 2007. (R-84 at 685)
128. Mother stated at the IEP meeting on September 17, 2007: "the issue is, there is a small percentage of children whose needs extend beyond what the public school can do. The plan in the District is the best the public school can offer but it will not meet his needs." (R-83 at 682) This same opinion was echoed by Dr. Shirley Kaczmariski in her report submitted as part of a packet to the District in August 2007. (R-79 at 652-653)
129. The basic cost from July 1, 2007-June 30, 2008 at Devereux Glenholme was broken down into the following: Room and Board in the amount of \$20,097; Treatment in the amount of \$46,540 and Education in the amount of \$39,137 for a total cost of \$105,774. (R-79 at 656) This sum does not include the transportation costs incurred by the Parents.

### **CONCLUSIONS OF LAW**

1. The District is an Urban Missouri Public School District which is organized pursuant to Missouri statutes.
2. The Student is now and has been a resident of District during all times relevant to this

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<sup>12</sup> Student also indicated that the teachers were good at the District. He felt like he was learning at the high school he attended in the District. (Pet Ex GGGG at 51) He had friends there with whom he still communicates. (Pet Ex GGGG at 53)

due process proceeding, as defined by Section 167.020 RSMo.

3. The Individuals With Disabilities Education Act, (“IDEA”), its regulations and the *State Plan for Special Education* (2007), (“State Plan”) set forth the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District in providing special education and related services to students with disabilities.

4. The State Plan was in effect at all material times during this proceeding. The State Plan constitutes regulations of the State of Missouri which further define the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District, in providing special education and related services to students with disabilities.

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

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

“...the term ‘free appropriate public education’ means special education and related services that--

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

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

7. If parents believe that the educational program provided for their child fails to meet this standard or if no program is provided for their child whom the parents contend is eligible for special education, they may obtain a state administrative due process hearing. 34 C.F.R. § 300.506; *Thompson v. Board of the Special School District No. 1*, 144 F.3d 574, 578 (8th Cir. 1998); *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 610 (8<sup>th</sup> Cir. 1997), *cert. denied* 523 U.S. 1137 (1998).

8. The IDEA is designed to enable children with disabilities to have access to a free

appropriate public education which is designed to meet their particular needs. *O'Toole by O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 698 (10<sup>th</sup> Cir. 1998). The IDEA requires the District to provide a child with a disability with a "basic floor of opportunity. . . which [is] individually designed to provide educational benefit to the handicapped child." *Rowley, supra.*, 102 S.Ct. 3034, 3047. In so doing the IDEA does not require that a school district "either maximize a student's potential or provide the best possible education at public expense," *Rowley, supra.*, 102 S.Ct. 3034, 3049; *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 612; (8<sup>th</sup> Cir. 1997); and, *A.W. v. Northwest R-1 School District*, 813 F.2d 158, 163-164 (8<sup>th</sup> Cir. 1987). Likewise, the IDEA does not require a school district to provide a program that will, "achieve outstanding results," *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8<sup>th</sup> Cir. 1998); that is "absolutely [the] best", *Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6<sup>th</sup> Cir. 1998); that will provide "superior results," *Fort Zumwalt School District v. Clynes, supra.* 119 F.3d 607, 613; or, that will provide the placement the parents prefer. *Blackmon v. School District of Springfield, R-12*, 198 F. 3d 648, (8<sup>th</sup> Cir. 1999); *E.S., supra.* 135 F.3d 566, 569. See also: *Tucker, supra.*, 136 F.3d 495, 505; and *Board of Education of Community Consolidated School District No. 21 v. Illinois State Board of Education*, 938 F. 2d 712, 716-17 (7<sup>th</sup> Cir. 1991).

9. The Parents filed a Due Process Hearing Complaint with DESE on December 28, 2007 in which they requested due process seeking a declaration that the District had not provided FAPE since January 1, 2005. They also seek reimbursement for certain expenses incurred as a result of their unilateral private placement at Devereux Glenholme. The Student's Parents bear the burden of proof in this case. *Schaffer ex rel. Schaffer v. Weast*, 546 U. S.49, 62 (2005). The U. S. Supreme Court's reference is to the burden of persuasion, which means that the Student and her Parents lose at the conclusion of the case if the evidence on both sides is evenly balanced. The standard of proof in this administrative proceeding, as in most civil cases, is proof by a preponderance of the evidence. *Tate v. Department of Social Services*, 18 S. W. 3d 3, 8. (Mo. App. E. D. 2000).

10. If a school district fails in its obligation to provide a free appropriate public education to a disabled child, the parents may enroll the child in a private school and seek retroactive reimbursement for the cost of the private school from the school district. *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U. S. 359, 370 (1985). In determining whether parents are entitled to reimbursement, the Supreme Court has established a two part test: (1) was the IEP proposed by the school district appropriate and (2) was the private placement appropriate to the child's needs. See *Burlington*, 471 U. S. at 370; see also *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U. S. 7, 12-13 (1993). The Supreme Court has also stated, because the authority to grant reimbursement is discretionary, "equitable considerations [relating to the reasonableness of the action taken by the parents] are relevant in fashioning relief." *Burlington*, 471 U. S. at 374; 20 U. S. C. Section 1412(a)(10)(C)(iii)(III).

11. An IEP does not violate the IDEA (a) if the procedures set forth in the IDEA are followed and (b) the IEP is formulated to enable the child to receive educational benefits. *Rowley, supra.*, 102 S. Ct. at 3034.

12. The *Rowley* standard continues to be applicable, and not a higher standard, for

determining FAPE under IDEA. *M. M. ex rel. L.R. v. Special School Dist. No. 1*, 512 F.3d 455, 461 (8th Cir. 2008).

13. A school district is not required to address a student's inability to generalize across settings to show an educational benefit. Making measurable and adequate gains in the classroom is sufficient under *Rowley. Thompson R2-J School District v. Luke P*, 540 F.3d 1143 (10<sup>th</sup> Cir. 2008); *L. G. ex rel B. G. v. Sch. Bd. of Palm Beach County*, 255 F. Appx 360 (11<sup>th</sup> Cir. 2007); *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289 (11<sup>th</sup> Cir. 2001); *Gonzalez v. Puerto Rico Dept of Educ.*, 254 F.3d 350 (1<sup>st</sup> Cir. 2001); *San Rafael Elementary Sch. Dist. v. Cal. Special Educ. Hearing Office*, 482 F. Supp.2d 1152 (N. D. Ca. 2007).

14. The IDEA requires that students with disabilities be educated in the least restrictive environment ("LRE") reflecting a strong preference that disabled students attend regular classes with non-disabled children and a presumption in favor of placement in the public schools. *T. F. v. Special School Dist. of St. Louis County*, 449 F.3d 816 (8<sup>th</sup> Cir. 2006).

15. To prevail on a claim of failing to implement an IEP, the challenging party must show that the school district failed to implement substantial or significant provisions of the IEP. *Neosho R-V Sch. Dist v. Clark*, 315 F.3d 1022, 1027 (8<sup>th</sup> Cir. 2003)

16. The District generally complied with the procedural requirements of the IDEA and the Hearing Panel finds no violation that resulted in a denial of free appropriate public education to Student.

17. The District fully implemented the relevant IEPs developed for Student for the 2005-2006 school year.

18. The IEPs developed for Student for the 2006-2007 school year provided FAPE in the Least Restrictive Environment. The IEPs were fully implemented for the 2006-2007 school year. Contrary to the testimony of Parent's experts, Student did make educational progress under these IEPs.

19. Even if the prior IEPs were defective either in their content or in their implementation, they are not a basis for removing a student from public school and seeking reimbursement. Those IEPs are superseded and the focus for a denial of FAPE is the IEP in place or being developed at the time of removal from public school. *Ashland School District v. Parents of Student R. J.*, 2008 WL 4831655 (D.Or 2008)

20. Contrary to the opinions of Parents' experts, Student's proposed IEP developed in May 2007 was reasonably calculated to produce FAPE in the Least Restrictive Environment for the 2007-2008 school year when Student did not attend school in the District.

21. Because the Parents failed to show beyond a preponderance of evidence that the District did not provide FAPE, we decline to address issues (d) through (h) (set out earlier in the Findings of Fact section) dealing with the appropriateness of the private placement at Devereux Glenholme and the request for reimbursement.

## DECISION

The Parents allege in their due Process Complaint that the District failed to provide free access to public education (“FAPE”) beginning in January 2006 by failing to implement the IEPs applicable to Student’s 2005-2006 school year and by failing to develop IEPs in subsequent years that were reasonably calculated to provide educational benefit to Student. As a result, the Parents claim that they were forced to place their son at Devereux Glenholme, a private residential school in Connecticut, where they allege he has made educational progress. They seek an order directing the District to reimburse them for the costs at Devereux Glenholme as well as transportation expenses: more than \$100,000.00 per year beginning in August 2007.

As noted in our Conclusions of Law, a two part test has evolved for recovery of unilateral private placement expenses: (1) show a denial of FAPE<sup>13</sup> and (2) prove that the private school was the appropriate placement for the child. *See Burlington*, 471 U. S. at 370. Some courts have skipped addressing the first step and denied reimbursement for a failure to prove the second part. *See e.g., Gagliardo v. Arlington Central Sch. Dist.*, 489 F. 3d 105 (2<sup>nd</sup> Cir. 2007) (Court concluded that deciding whether the IEP provided FAPE was a close one so they decided not to answer it and opted to base their holding on the appropriateness (or lack thereof) of the private school. *Id.* at 112. The better approach is to provide an analysis of the first prong and if the conclusion is that FAPE has not been denied, the second prong is left unaddressed. *See e.g., M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ.*, 122 F. Supp.2d 289 (D. Conn. 2000); *C.G. and B.S. v. Five Town Community School District*, 2007 U.S. Dist. LEXIS 10310 at \*109 (D. Me. 2007),

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<sup>13</sup> The Parents do not allege, and have not produced any evidence of, any procedural violations of IDEA denying FAPE so our Decision will address only the alleged substantive violations of IDEA.

aff'd 2007 WL 1051650 (D.Me.).

### **Parents Did Not Prove a Denial of FAPE**

The Parents correctly cite *CJN v. Minneapolis Public Schools*, 323 F.3d 630 (8<sup>th</sup> Cir. 2003) for the proposition that to receive educational benefit as required under *Rowley*, an IEP must address all significant factors of the child's disability, including academic and behavioral. In *CJN*, the student, an eleven year old boy, with frontal lobe lesions had a long history of psychiatric problems. *Id.* at 634 While he was in a special education classroom, student misbehaved resulting in a number of time-outs, physical restraints and one police intervention followed by a period of hospitalization. *Id.* at 635. Despite these behavioral issues, student was able to progress academically at an average rate. *Id.* The mother unilaterally placed student in a local private school, filed for due process seeking: (a) a declaration that the school district had failed to provide FAPE and (b) for reimbursement of the private school tuition. *Id.*

In *CJN*, the Eighth Circuit emphasized that where a student has a complicated history of psychiatric problems, this "makes his academic progress even more relevant to the educational benefit inquiry, because it demonstrates that his IEPs were not only reasonably calculated to provide educational benefit, but at least in part, did so as well." *Id.* at 638.

The Court, in rejecting the argument that the school should have used more positive behavior interventions, stated: "The record reveals that the District made a 'good faith effort' to assist CJN in achieving his educational goals." *Id.* at 639. Specific results are not mandated under IDEA. *Id.*, at 638.

As we have detailed in our Findings of Fact, Student made academic progress as evidenced by his grades of As, Bs and Cs and reflected in a top-half ranking of his freshman class. (FF# 95) He earned 7 of the 24 credits needed to graduate from his high school in the

District. (FF# 97) Additionally, Student was able to perform sophomore work when he started at Devereux Glenholme. (FF#91 & 125))

All of his IEPs were reasonably calculated to provide educational benefit: they set out, *inter alia*, (1) his present levels of academic achievement and functional performance (“PLEP”); (2) a statement of measurable annual goals, (3) a statement of how the goals will be measured; (4) a statement of the special education and related services; (5) an explanation regarding least restrictive environment and (6) a statement of modifications and accommodations as required by IDEA. 34 C. F.R. Section 300.320

The Parents contend that three IEPs were defective in part because the PLEP sections<sup>14</sup> kept repeating and not addressing two areas: (1) why he did not perform well on tests – does he not comprehend the material when he reads it on his own or whether he just goes too quickly and is in a hurry to be finished and (2) an explanation for the drop in IQ scores. Parents’ experts, Dr. Caraffa and Dr. Kaczmariski also testified to those same concerns. (FF# 99& 118)

Repeating prior PLEP language does not cause an IEP to be legally insufficient. In *Ashland School District v. Parents of Student R. J.*, 2008 WL 4831655 (D. Or 2008), the Court had this response to the complaint about 3 IEPs containing the same statements regarding social issues in the PLEP section:

That does not seem unusual. These IEPs were for the same student and the same qualifying disability. Nor is there any reason to believe that revising the wording of the PLEP would have affected R. J.’s education. R. J. is not a child who sat ignored in a dark corner of the schoolhouse for years. Mother and District personnel often informally discussed R. J.’s progress and any concerns, in addition to the formal IEP framework. . . . There were occasional bumps in the road, as is true of most students, but on the whole R.J. was doing well in school during that time period.

*Id.* at 17.

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<sup>14</sup> See the PLEP section in the following: IEP dated October 26, 2005 (R-38); IEP dated May 2, 2006 (R-45); IEP dated August 30, 2006 (R-48)

*Ideally*, the District should have answered the question regarding his test taking issues. The District, however, did provide the necessary support and accommodations to help with test taking in all three IEPs.<sup>15</sup> In addition, he was in either CWC or special education classes under the 3 IEPs in question so he had extra assistance by the nature of those classes. Ironically, the Student has provided the answer to the test-taking question: “I like – I like to rush through things, I guess because I just want to get things done so I can just, like, rest or, like play games on the computer. I don’t try to do it on purpose. I just have a habit of doing it.” (Pet. Ex. GGGG at 43) (emphasis added)

The other complaint was the PLEP section should have addressed the decline in his IQ scores from the WISC III to WISC IV. Again, the District *ideally* might have explained in the PLEP section that the drop in scores resulted from an increase in the components from two to four in the older versus newer version of WISC; studies have shown when IQ tests are renormed, there is a decline in scores; the scores are impacted negatively for children such as Student who have ADHD and bipolar disorders because of the emphasis on working memory and processing speed requiring an ability to concentrate and focus. (FF#114) As the Court noted in *Ashland School District, supra* at 17: “Adding fancier language to the IEP, or purporting to quantify R. J.’s behavior to three decimal places, would have made no difference in her education. The purpose of IDEA is to provide educational opportunities to children with disabilities, not merely to paper files.”<sup>16</sup> (emphasis added)

Parents cite several cases including, *Independent Sch. Dist. No. 284 v. A. C.*, 258 F.3d 769 (8<sup>th</sup> Cir. 2001) and *Seattle Sch. Dist., No. 1 v. B. S.*, 82 F. 3d 1493 (9<sup>th</sup> Cir. 1996), in support

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<sup>15</sup> R-38 at 180; R-45 at 324; R-48 at 348.

<sup>16</sup> See also, *CJN v. Minneapolis Public Schools, supra* at 639: “we note that minor ‘procedural and technical deficiencies in the IEPs’ cannot support a claim that a FAPE has been denied.” (citations omitted)

of their position that the District failed to address Student's emotional/behavioral needs in his IEPs. These decisions, however, dealt with children whose emotional disabilities clearly impeded educational progress. For example, in the Eighth Circuit case cited above, the student's behavior involved: classroom disruption, profanity, insubordination and truancy. *Independent Sch. Dist. No. 284, supra* at 771. Outside of school, this 15 year old girl used alcohol and illegal drugs, was sexually promiscuous, repeatedly ran away from home, was thought to have forged checks and was hospitalized three times for threatening or attempting suicide. *Id.* She had completed only nine of the 32 credits required for graduation after her sophomore year. *Id.* at 777. An Independent Educational Evaluation evaluator recommended private placement to receive educational benefit. *Id.* The Eighth Circuit agreed with that conclusion. *Id.* In the *Seattle Sch. District* case, the Ninth Circuit held residential placement was proper where student's behavior and emotional problems "seriously affected her ability to benefit from classroom instruction" and ultimately caused her to be expelled from school. *Seattle Sch. Dist., No. 1 v. B. S., supra* at 1497.

While Student's discipline reports do not show a model student, his behavior at the District clearly did not come close to the problems confronting the parents and school districts in the two cases discussed above. Student's IEPs had Positive Behavior Support Plans<sup>17</sup> and no teacher expressed an opinion that his behavior at school impeded his ability to learn and make educational progress. Equally important is the information provided by Mother to Devereux Glenholme in late May 2007 when she completed a section dealing with Student's Problem Behaviors. On the printed questionnaire, she inserted in her handwriting that the behaviors were at home or with parents or with Dad only. (FF# 120 & 121) (emphasis added) If the Parents decided to enroll Student at Devereux Glenholme based on behavior problems at home, there is no basis to recover reimbursement of their private placement decision. See *e.g., A. S. v. Madison*

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<sup>17</sup> See *e. g.*, R-38 at 183-186; R-45 at 326-328; R-58 at 406.

*Metropolitan Sch. District*, 477 F. Supp. 2d 969, 979 (W.D. WI 2007).

The Parents allege that defects with the IEPs beginning in January 2006 through the May 4, 2007 IEP resulted in a denial of FAPE and a justification for Student's unilateral placement at a private school. While we have concluded that the earlier IEPs<sup>18</sup> provided FAPE, those IEPs were superseded by the May 4, 2007 IEP and would not be a basis for recovery against the District.<sup>19</sup> *Ashland School District, supra* at 16. Thus, we now analyze the May 4, 2007 IEP proposed by the District.

The Parents met with District officials on April 26, 2007 and then again on May 4, 2007 to develop an IEP for the rest of the school year and for Student's sophomore year. (FF#101) At the initial meeting, the Parents presented fourteen requested services from the District. (FF#101 & 102) In support of their requests, Mother claimed that her son's grades of As, Bs and Cs were not truly reflective of his work because she had been doing some of her son's homework.<sup>20</sup> (FF#103) She also repeated her previous complaints to the IEP team about the amount of homework and the difficulty in getting Student to do the homework. (FF#103) In response, the District increased the special education classes from three to five. (FF#103) Mother was in agreement. (FF#108) The District proposed a decrease in the percentages for the goals compared to previous IEPs based on the likelihood the work would be more difficult his sophomore year and also in recognition of the parental input regarding volume of the homework for Student. (FF#105) Parents and their experts at the hearing cite the decrease in the percentages in support of their argument that the May 4, 2007 IEP was not reasonably calculated to provide FAPE.

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<sup>18</sup> R-38 at 167; R-45 at 310; R-48 at 338.

<sup>19</sup> Of course, they may be helpful to show what effort the District made to meet Student's needs in the past and how he responded as well as evaluating the adequacy of the current proposed IEP. *Id.*

<sup>20</sup> This admission is troubling on several fronts: (1) it sends a message to a child that the parent has no confidence in his or her ability to do the work; (2) a child will not become independent if a parent keeps coming to his or her rescue; and (3) it is disingenuous to ask for private tuition reimbursement based on a claimed lack of FAPE in turn allegedly premised on phony grades because a parent has been doing the work.

Dropping the percentages, however, does not alone mean a lack of potential benefit from the May 4, 2007 IEP. See *Hjortness v. Neenah Joint Sch. District*, 507 F.3d 1060, 1063-1064 (7<sup>th</sup> Cir. 2007)(Four goals originally set at percentage of 50% were decreased by the IEP team but upheld in the federal courts)

The Parents have also expressed concern about their son's need for 24 hour "conditioning" that is, to be in a place where the skills from one setting would transfer to another. (FF#122;128) Dr. Caraffa also stated the following to justify the need for residential placement: "transitions must be carefully controlled in order for the lessons in one carry over to the other. Hence, social learning provided in one area would not be able to be generalized to the other without careful monitoring and parallel instructions and reinforcement being provided." FF#118(l) Dr. Kaczmariski also supported Student's residential placement stating that he needs, *inter alia*,: "An environment which provides consistent therapy. An environment which will foster independence of living and self-reliance. [Student] remains wholly dependent upon others, and must develop a sense that he is capable of performing basic life functions independently." (R-79 at 653)

While it is understandable that Parents advocate the need for generalization of skills to achieve self-sufficiency and independence, IDEA does not require it where a student such as their son is making some progress in school. *Thompson R2-J School District v. Luke P*, 540 F.3d 1143 (10<sup>th</sup> Cir. 2008); *L. G. ex rel B. G. v. Sch. Bd. of Palm Beach County*, 255 F. Appx 360 (11<sup>th</sup> Cir. 2007); *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289 (11<sup>th</sup> Cir. 2001); *Gonzalez v. Puerto Rico Dept of Educ.*, 254 F.3d 350 (1<sup>st</sup> Cir. 2001); *San Rafael Elementary Sch. Dist. v. Cal. Special Educ. Hearing Office*, 482 F. Supp.2d 1152 (N. D. Ca. 2007). Put another way, even if a child might benefit more from residential placement, the school district is not

required to pay for that expense if the child could receive an adequate, if not as good, education in the public school.<sup>21</sup> *Swift v. Rapides Parish Public School System*, 812 F. Supp. 666 (W. D. La. 1993).

While IDEA makes reference to its purpose of preparing students with disabilities for “employment” and “independent living,” there are no cases equating these worthy goals to substantive standards. *San Rafael Elementary Sch. Dist. v. Cal. Special Educ. Hearing Office*, *supra* at 1160. The Court emphasized that “participation in the educational process, under the IDEA, is the vehicle for assisting individuals in achieving the goal of independence --- it is not a guarantee that all children will receive that level of independence.” *Id.* at 1161.

### **Conclusion**

We conclude: (a) that the District fully implemented the relevant IEPs developed for Student for the 2005-2006 school year; (b) that the IEPs developed for Student for the 2006-2007 school year provided FAPE in the Least Restrictive Environment. The IEPs were fully implemented for the 2006-2007 school year; and (c) Student’s proposed IEP developed in May 2007 was reasonably calculated to produce FAPE in the Least Restrictive Environment for the 2007-2008 school year when Student did not attend school in the District.

Because the Parents failed to show beyond a preponderance of evidence that the District did not provide FAPE, we decline to address issues (d) through (h) (set out earlier in the Findings of Fact section) dealing with the appropriateness of the private placement at Devereux Glenholme and the request for reimbursement.

### **ORDER**

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<sup>21</sup> Note also the U. S. Court of Appeals, 8<sup>th</sup> Circuit has consistently emphasized that one of the primary purposes in the IDEA is mainstreaming for children with disabilities. See *e.g.*, *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648 (8<sup>th</sup> Cir. 1999). Thus, the Court has viewed residential placement as a very last option after other less restrictive placements have been tried . See *e.g.*, *T. F. v. Special School District of St. Louis County*, 449 F.3d 816 (8<sup>th</sup> Cir. 2006).

The Due Process Complaint filed by the Student's Parents is dismissed and judgment is entered against Student and the Parents and judgment is entered in favor of Francis Howell R-III School District.

**APPEAL PROCEDURE**

PLEASE TAKE NOTICE that these Findings of Fact, Conclusions of Law, Decision and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter and you have a right to request review of this decision. Specifically, you may request review as follows:

1. Proceedings for review may be instituted by filing a petition in the circuit court of the county of proper venue within forty-five days after the mailing or delivery of the notice of the agency's final decision....
2. The venue of such cases shall, at the option of the plaintiff, be in the circuit court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence...

PLEASE TAKE NOTICE that you also have a right to file a civil action in Federal or State Court pursuant to the IDEA. See 34 C.F.R. §300.512.

Dated this 9<sup>th</sup> day of February, 2009.

*/s/ Pamela S. Wright*

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Pamela S. Wright

*/s/ Terry Allee*

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Dr. Terry Allee

Marilyn McClure submits a separate  
dissenting opinion

### **CERTIFICATE OF SERVICE**

The undersigned certifies that a true copy of the foregoing was served by email and by certified mail, return receipt requested, on this 9th day of February, 2009 upon:

Mr. Lawrence J. Altman  
621 North Skinker Boulevard  
St. Louis, Missouri 63130  
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Pamela S. Wright

Student v. Francis Howell School District

McClure

I respectfully Dissent.

My fellow panel members address “CONCLUSIONS OF LAW” in the majority opinion::

At 5 “The purpose of IDEA...”to meet their unique needs”.”

At 10 reference is made to the Supreme court two part test :

... (1) was the IEP proposed by the school district appropriate and (2) was the private placement appropriate to the child’s needs...

It is my opinion that part one of the two-part test was not met since the school district IEP proposed was not appropriate for this student. Thus, part 2 is moot.

### **UNIQUE NEEDS AND GOALS:**

The IEP team did not address the unique needs of a student with these disabilities when developing the IEP and its goals.

In the May 2006 IEP, at the end of the 8<sup>th</sup> grade, (Respondents Exhibit page 311), this boy has a diagnosis of ADHD, Obsessive Compulsive Disorder and Oppositional Defiant Disorder and bipolar disorder.

Regarding behavior this IEP indicates:

“[Student] was also administered the BASC rating Scale to assess behavior. Five teachers were given this scale to rate [Student’s] behavior as observed at school. Four out of five teachers rated some behaviors as either at risk or significant. Areas of concern were: Aypicality, Attention, Withdrawal, Depression, Learning Problems, Somatization, and Anxiety. The parent rating scale showed concern in the same areas as the teachers, with additional concerns in Hyperactivity, Aggression, and Conduct Problems.”

This IEP has one goal ( of five): “...to increase his attention to class work and behavior by 90% in ¾ trials.”

There is no indication what the baseline (starting point) is for this goal. This is an arbitrary goal.

Regarding language, this May 2006 IEP indicates:

“[Student’s] overall oral language abilities are below the average range. In particular, his pragmatic judgement score is 3 standard deviations (45 standard points) below the average range. His strongest oral language skills are in the area of semantics. His greatest oral language diffculties lie in the areas of supralinguistics and pragmatic judgment.

This IEP has no goals for language/pragmatics.

In March of 2006 the school district OT referred the boy to the Speech and Language department (R page 217). The Clinical Evaluation of Language Fundamentals – 4<sup>th</sup> Editions (CELF-4) was administered in March of 2006; his total core language score was at the 4% rank. The Comprehensive Assessment of Spoken Language (CASL) was administered in March of 2006; his core composite was at the first (1) percentile. This boy is very severely impaired in language.

The student was administered the Comprehensive Assessment of Spoken Language (CASL) (R page 222) where he scored below zero percentile in pragmatic judgment; his core composite score for the assessment was a one percentile. Pragmatic judgement is listed as:

“Evaluates a student’s awareness of the appropriateness of language in relation to the situation in which it is used and the ability to modify language to the situation. For example, students must generate questions, requests, or expression of gratitude or sorrow; initiate conversation or turn-taking; and judge the appropriateness of certain language in a given situation.”

There are no related services, supplemental aids / services or supports for school personnel provided in this IEP for any of the goals we reviewed.

In 66 of the majority opinion:

“Successful in the general education setting working on the general education curriculum”

I am of the opinion these grades could not be reflective of the student’s actual performance due to the mother admitting she was doing his homework and the student was receiving two hours of tutoring twice a week by Dr. Kaczmariski. Good grades do not necessarily reflect comprehension/mastery of material covered.

The IEP teams did not fully consider the contribution of Dr. Kaczmariski. Dr Kaczmariski holds a doctorate in Educational Administration with emphasis on curriculum and instruction. Dr. K attended the IEP meetings with the parent. She served as a tutor at home for the boy for two years, twice a week.

In the May 2007 IEP, although Asperger was listed in the Present Level of Performance section of the IEP, the unique needs of this student was not addressed by a corresponding goal or objective. Since the IEP did not address the student’s unique needs, especially those of the learning style of a student with Asperger, the goals were faulty. The goals did not address the complicated needs of the student.

Dr. Caraffa, Psychologist, who has worked as a school psychologist for a number of years, testified this was a complicated student.

In the last proposed IEP, the district changed goals in the IEP from the previous IEP to a lower expectation. Decrease in expectation of the same goal indicates lack of being reasonably calculated at initiation.

The emphasis on Least Restrictive Environment/ being school alongside non-disabled peers by the school district overrode the need of the student to receive services to address his specific needs.

The IEPs require consideration of a “continuum of placements” that include eight choices:

1. Outside regular class less than 21% of time
2. Outside regular class 21-60% of time
3. Outside regular class more than 60% of time
4. Public separate school (day) facility
5. Private separate school (day) facility
6. Public residential facility
7. Private residential facility
8. Homebound/hospital

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“Outside regular class 21-60% of time” was selected for the May 2006 , August 2006, and May 2007 IEP’s. Consideration was not indicated for items four through eight. This indicates the school district failed to investigate possibilities of increasing time/intensity of the services this student needed, perhaps to separate schools or residential facilities.

Few, if any, residential programs exist specifically for male students with the complicated needs of this student in Missouri. As a result, parents resorted to a distant school that had the right “Fit”.

### **Conclusion**

This panel member finds the IEPs faulty and not appropriate for the student. Parents were justified in their removal of the student and resulting outside private placement. The school district did not meet the threshold for the Supreme Court two-part test.