

**BEFORE THE THREE MEMBER ADMINISTRATIVE HEARING PANEL
EMPOWERED PURSUANT TO SECTION 162.961, R.S.MO.**

Student's Name:

Parent's Name:

Local Education Agency: Gasconade County R-1 School District
164 Blue Pride Drive
Hermann, MO 65041-9802

Agency Representatives:
Teri B. Goldman,
Alefia E. Mithaiwala, and
Michael D. Hodge of Mickes Goldman, LLC,
555 Maryville University Drive, Suite 240
St. Louis, MO 63141

Time Line:

Parent's Complaint filed	March 12, 2008
LEA Complaint filed	March 25, 2008
Resolution meeting held	March 28, 2008
Order consolidating Complaints	April 4, 2008
Time for Decision Extended to At LEA request by order 04/28/08	July 31, 2008
Time for Decision Extended to At LEA request by order 06/10/08	November 17, 2008
Time for Decision extended to On October 15, 2008 by consent of the parties at hearing and formalized by written order dated November 14, 2008	December 23, 2008

Hearing Dates: October 13, 14, and 15, 2008

Date of Report: December 23, 2008

Hearing Officers: Patrick O. Boyle, Chairman, and
Ms. Pamela Walls, and
Dr. Terry Allee, Panel Members

Hearing Decision

Issue

Student's mother filed a complaint seeking 70 additional minutes per week of instruction within the regular classroom for a total of 1400 minutes per week. Use of a classroom within a classroom instruction was requested to facilitate the main stream instruction of the student.

Student's mother proposed that the student be given an Independent Educational Evaluation (I.E.E.) as the basis for a new Individualized Education Program (I.E.P.). The I.E.P. providing every opportunity for main stream instruction in a classroom within a classroom instruction.

Parent's complaint presents the issue of whether the student's IEP provides for a free appropriate public education (FAPE) in the least restrictive environment (LRE).

Student's mother requested an I.E.E. on March 7, 2008 and, included the request as a proposed resolution of the complaint filed on March 12, 2008. The Local Education Agency (L.E.A.) denied the request and, filed a complaint on March 25, 2008 seeking to establish that the student had been given an appropriate evaluation by the L.E.A. on February 6, 2008. The two complaints were consolidated for hearing by Order of April 4, 2008.

The issue concerning whether the evaluation of student on February 6, 2008 is appropriate was raised by the LEA.

Time Line

Parent's complaint was filed on March 12, 2008 and, the LEA complaint was filed on March 25, 2008. The complaints were consolidated by Order of April 4, 2008. A resolution session held on March 28, 2008 was not successful and, the time for decision was extended to July 31, 2008 by order dated April 28, 2008 at the request of the LEA. A hearing was set for July 1 through 3, 2008. The hearing was cancelled at the request of student's father to be rescheduled on October 13 through 15, 2008. Time for decision was extended to November 17, 2008 in order to accommodate student's father on the hearing dates by Order of June 10, 2008 on motion of the LEA. A hearing was conducted October 13 through 15 and, the parties agreed to extend the time for decision to December 23, 2008 in order to permit the filing of briefs by November 17, 2008. This agreement was formalized by order of November 14, 2008. This decision is timely rendered.

FINDINGS OF FACT

1. Student is currently a six-year-old (DOB:) male student who resides with his mother within the LEA. LEA Ex. 35, 223.
2. Student has Down's Syndrome. This medical condition affects his cognitive achievement and intelligibility. Student is a student with disabilities for purposes of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. Section 1400 et seq., LEA Ex. 1, 1.
3. Student's father, shares joint custody of student. Transcript at Page 98, lines 22-25 and Transcript at Page 99, lines 1-3 (hereinafter "Tr. XX:1-2").
4. Student's father disagrees with the filing of the instant due process complaint and believes that the LEA is affording a FAPE to student. Tr.97:18-19; 99:23-25; 100:1-2, 15-18; 101: 8-18.

5. The LEA sent a Notification of Meeting regarding a review of existing data meeting to parents on or about November 13, 2007. The Notification scheduled the meeting for November 29, 2007. LEA Ex. 30
6. The LEA conducted a review of existing data meeting on or about November 29, 2007. Student's father attended this meeting in person. Student's mother did not attend; however, she did provide written input prior to the meeting. LEA Ex. 29, Tr. 465: 24-25; 469: 13-17.
7. At the review of existing data meeting, the team determined that additional data was necessary and that a re-evaluation with assessment should be conducted. LEA Ex. 29.
8. On or about November 29, 2007, the District provided student's parents with a written notice of action proposing to conduct the re-evaluation and describing the areas in which assessment would be conducted and the tests to be used. LEA Ex. 31.
9. On or about November 29, 2007, student's father gave his consent for the reevaluation. LEA Ex. 31.
10. The LEA conducted a re-evaluation during December 2007 and January and February of 2008.
11. On or about February 6, 2008, student's multi-disciplinary team convened to review the re-evaluation data. The LEA prepared an evaluation report containing this information dated February 6, 2008. LEA Ex. 35.
12. Each component of the re-evaluation was administered by trained and qualified LEA personnel. Tr. 46: 3-25; 47: 1-23; 483: 12-25; 484: 1-6; 48: 2-20; 491: 11-18; 523: 16-25; 524: 1-7; 528: 1-12; 529: 23-25; 530: 1-10; 532: 13-25; 533: 1-4; 535: 9-12.
13. The evaluation report and assessments administered therein complied with the requirements set for by the Missouri State Plan for Special Education and the IDEA. Tr. 472: 5-25; 473: 1-25; 474: 1-25; 475: 1-25; 476: 1-5.
14. Pursuant to the 2/6/08 re-evaluation, the team determined that student meets Missouri eligibility criteria to be educationally diagnosed as a student with an Intellectual Disability under the IDEA. LEA Ex. 35, 248. LEA Ex. 35, 223.
15. Pursuant to the 2/6/08 re-evaluation, student's IEP team developed an IEP on February 6, 2008 ("2/6/08 IEP"). LEA Ex. 36, Tr. 494: 23-25; 495: 1-5; 537: 20-25; 538: 1-12.
16. Student's father was present in person at the re-evaluation and IEP meeting on February 6, 2008. Tr. 101: 19-24.

17. Student's mother participated by telephone during the 02/06/08 re-evaluation and IEP meeting. Tr. 101:25; 102:1; 144: 6-9, 372: 14-15.

18. Student's 02/06/08 IEP present level of academic achievement and functional performance indicates that he is a very social young man, but his disability impacts him across academic areas, including: storing and retrieving information, language, expressive and receptive skills, following directions, working independently, participating in group activities, poor attention to task, and self-distracting behaviors. Student also has difficulty with articulation and communications. LEA Ex. 36, 253.

19. Under the 02/06/08 IEP, Student's IEP team decided that student required the following special education and related services: 150 minutes per week of speech therapy in the special education setting; 40 minutes of occupational therapy services (20 minutes in the special education environment, and 20 minutes in the general education environment); and 450 minutes per week of direct instruction in early academic skills in the special education setting. LEA Ex. 36, 274.

20. The 02/06/08 IEP team increased student's speech therapy minutes from 120 minutes per week to 150 minutes per week due to the deficits and delays identified in the 02/06/08 re-evaluation. Tr. 537: 20-25; 538: 1-12. The team also increased student's occupational therapy services from 30 minutes per week to 40 minutes per week in order to accommodate student's mother's request that student receive some occupational therapy services within the general education setting. Tr. 371: 6-17. However, student's minutes of direct instruction in the special education setting remained constant at 450 minutes per week. LEA Ex. 36, 274.

21. Student's mother agreed and continues to agree that student would benefit from the additional 30 mpw of speech therapy and the additional 10 mpw of occupational therapy services. Tr. 96:15-19; 138: 21; 539: 9-12; 145: 4-19; 159: 4-9; Tr. 96: 15-19, 138: 8-12; 145: 4-15; 372: 9-15.

22. Student's special education teacher, implemented student's IEP with regard to the 450 mpw of direct instruction in early academic skills during the 2007-2008 school year and continues in this capacity this school year. Student receives these services in the special education classroom. 269: 1-25; 270: 1-25; 271: 1-19; 358: 3-7.

23. At the hearing, student's mother testified that she filed the instant due process complaint because she was dissatisfied with student receiving 450 mpw of direct instruction in early academic skills and would prefer that student spend less time in the special education classroom. 137: 22-25; 138: 1-4; 141: 12-19; 296: 4-25; 297: 1-18.

24. Student's mother would prefer that student spend between 20-70 fewer minutes per week receiving direct instruction in the special education environment. Tr. 61: 3-16; 159: 18-25; 160: 1-19; 296: 4-25; 297: 1-18.

25. Each of student's service providers testified that it is likely that student would not continue to make the same level of academic gains and progress on his IEP goals if such a reduction were to occur. Tr. 61: 17-22; 71: 12-18; 222: 8-14; 297: 19-25; 298:1-16; 271: 20-25; 272: 1-5; 394: 14-25; 395: 1-15; 396: 12-25; 397: 1.

Decision and Rationale

This case arises under, and is governed, under the individuals with Disabilities Education Act (IDEA) and the Missouri state regulations implementing its special education statutes. The State Plan constitutes regulations of the State of Missouri, which further defines the rights of students with disabilities and their Parents and regulates the responsibilities of educational agencies. The State Plan was in effect at all times during this proceeding.

The Student is clearly a student with a disability as that term is defined in the IDEA, its regulations and the State Plan.

The IDEA and Missouri law require that a disabled child be provided with access to a "free appropriate public education" ("FAPE") to meet their unique needs.

The term "FAPE" 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 the public supervision and directions, and without charge; (b) Meet the standards of the SEA, including the requirement 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 requirement 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” and “the requirements of this part. 34 C.F.R. Part 300.”

In determining whether the IEP placement was appropriate, the Hearing Panel should consider the evidence relevant to the facts as they existed when the contested IEP was developed.

The IDEA guarantees placement in the least restrictive environment (LRE), as follows: “To the maximum extent appropriate, children with disabilities... are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature of severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services and cannot be satisfactorily achieved.

The LRE requirement in our Circuit is expressed as follows: “The IDEA creates a preference for mainstream education, and a disabled student should be separated from her peers only if the services that make segregated placement superior cannot be feasibly provided in a non-segregated setting. The IDEA requires both that the child be provided a FAPE and that such a FAPE be provided in an LRE to the maximum extent appropriate. The mainstreaming requirement is a separate substantive standard under the IDEA.

In this case, the IEP and placement was made by a group of persons who were both knowledgeable about the Student and able to evaluate the considerations which permitted to determine the LRE.

The burden of proof in an IDEA due process hearing is placed upon the party seeking relief. The due process complaint in this matter was filed by the parents. Accordingly, the burden of proof on the issues to be determined by the Panel rests with the parents.

The Supreme Court's reference as to the burden of proof is burden of persuasion, which means that the student and their parents lose at the conclusion of the case if the evidence on both sides is evenly balanced. The standard of proof in this administrative proceeding, as in most civil cases, is proof by preponderance of the evidence.

The LEA offered the student (FAPE) in the least restrictive environment (LRE).

Missouri's State Plan implementing Part B of the Individuals with Disabilities Education Act (IDEA) covers the requirements for LRE under Section IV, FAPE/IEP/LRE, at Pages 52 through 56. Student's IEP calls for placement outside of the classroom for 21% to 60% of the day. LEA's Exhibit 36 at Page 277. Student's mother's request for an additional 70 minutes per week in the regular classroom would not move the student to a higher level on the placement continuum set forth under the Missouri plan for LRE.

Student's mother has the burden of proving her complaint that the student is not receiving appropriate instruction in the LRE. Proof has not been offered to support her complaint.

The local education agency (LEA) conducted a comprehensive education evaluation and assessed all areas related to the suspected disability and identified all of

the child's special education and related services needs. A variety of technically sound non-discriminatory assessment procedure were used to gather the relevant information about the student, including information from the parents. The procedures that were used were valid and reliable, administered by trained and knowledgeable personnel, and used for the purposes for which they were intended.

The LEA evaluation of student reported on February 6, 2008 is appropriate. Missouri State Plan implementing Part B of the IDEA covers the procedures for student evaluation under Section III, Identification and Evaluation, at Part 3, Pages 31 to 37. The LEA offered uncontradicted evidence of following the procedures required and using appropriate assessments of the student.

APPEAL PROCEDURE

Either party has the right to appeal this decision within 45 days to a State Court of competent jurisdiction pursuant to Chapter 536 of the Revised Statutes of Missouri, or to a Federal Court.

Panel Members Supporting
Decision

Patrick O. Boyle
Pamela Walls
Dr. Terry Allee

Panel Members Opposing
Decision

Dated: _____