

**THREE MEMBER DUE PROCESS HEARING PANEL**  
**EMPOWERED PURSUANT TO 162.961 R.S.MO.**  
**HEARING DECISION**

Student's Name:

Parents' Names:

The mother, , was present at the hearing.

This was an open hearing at the request of the parents.

State Education Agency (SEA): State Schools for the Severely Handicapped,  
Mapaville State School

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Hearing Dates: September 8 through 11, 2008

Time Line: Complaint filed on March 20, 2008

Decision Extended until: December 8, 2008

Date of Report: December 8, 2008

Chief Hearing Officer: Samara N. Klein

Hearing Officer chosen by the Parents: Beth Mollenkamp

Hearing Officer chosen by the School District: George Wilson

**BEFORE THE THREE MEMBER DUE PROCESS PANEL**  
**EMPOWERED BY THE MISSOURI STATE BOARD OF EDUCATION**

In the matter of

by and through his parents,

,

v.

The State Schools for the Severely Handicapped.

**DECISION**

This is the final decision of the hearing panel in an impartial due process hearing pursuant to the Individuals with Disabilities in Education Act (IDEA) 20 U.S.C. §1415(f) (2004) and Missouri law §162.961.3 RSMO.

**I. STATEMENT OF ISSUES**

The Petitioners' Third Amended Due Process Complaint was 13 pages long and included 60 different counts, including many non-IDEA claims. There was a general statement of issues at the end based on all of the claims, both under IDEA and other laws. The Chief Hearing Officer then dismissed the claims that were non-IDEA claims. The Chief Hearing Officer asked the Petitioners to file a clarification of issues before the hearing to summarize the remaining issues that were before the panel. The Petitioners offered an "outline" of the complaint as a clarification, but objected to using the outline in any way that might be read more narrowly than the original complaint.

The outline of the remaining issues is as follows:

- (1) Whether material provisions of the September 27, 2005, September 26, 2006, and September 25, 2007, and February 4, 2008 IEPs were not implemented.
- (2) Whether 's operative IEP is reasonably calculated to provide a meaningful educational benefit under IDEA for its failure to accommodate 's disability-related need for independent observation at Mapaville.

- (3) Whether independent observation is an appropriate accommodation under IDEA.
- (4) Whether Mapaville has adequate supervisory apparatus, or adequate personnel, to ensure that receives proper care or education; and whether, based on the above inadequate supervision, neglect, and failure to provide FAPE, has been denied reasonable accommodations for him to receive the full benefits of his school programs; and, whether, as a result of the above inadequate supervision, staffing, and neglect, has been excluded from the participation in, denied the benefits of, and subjected to discrimination with respect to, his public education program, and whether, the State School, by and through the Department of Elementary and Secondary Education, has failed to provide necessary oversight, accommodations, training, and other measures, and has done so based on 's disability.
- (5) Whether 's placement at Mapaville is sustainable or proper under IDEA given the systemic breakdown at the school and the concomitant failure to deliver a FAPE.
- (6) Whether has been abused and neglected at Mapaville.
- (7) Whether Barb Poposky, Kathy Pope, Marsha Adams, Judy Barber, Diane Stillwell, Sally Zhang should be removed from Mapaville in order to provide a FAPE.
- (8) Whether is entitled to compensatory educational services, and if so, what services would be appropriate.
- (9) Whether is entitled to independent observation as a remedy to provide a prospective FAPE, and if so, what means should be used to provide such?

The nine statements in the outline can be put into three categories for purposes of organizing this decision. The three issues below are broad enough to address all of the nine issues listed in the Petitioners' clarification and also all of the issues in the Petitioners' Third Amended Complaint that were not dismissed. They do not include anything that was outside of the Third Amended Complaint or the outline of the issues. They are as follows:

**Issue 1: Did the State School offer the Student a Free Appropriate Public Education under the Student's operative IEPs from March 20, 2006 until June 27<sup>th</sup>, 2008?**

**Holding: The State School provided the Student a FAPE from March 20, 2006 until the beginning of the school year of 2007/2008. The State School failed to provide the Student a FAPE from Approximately August 20, 2007**

**until February 4, 2008, resulting in the Student receiving homebound services.**

This issue includes what Petitioners listed as Issues 1, 4 and 6 above. Most of the evidence provided and the issue emphasized by the Petitioners' counsel at the hearing involved the implementation of the Student's IEPs (the 2006/2007 IEP and the September 2007/2008 IEP) and not the content of the IEPs, and for that matter, most of the evidence presented involved the implementation of those IEPs during the 2007/2008 school year.<sup>1</sup> The issues listed in the Third Amended Complaint involved both overall circumstances present at the school and classroom which the Petitioners thought made it impossible for the school to deliver an appropriate education for the child (Issues 4 and 6 above) and allegations of specific material provisions not being implemented (Issue 1). The decision on this issue will therefore review questions of supervision, personnel, staffing, training, reasonable accommodations under IDEA, care of the Student (as listed by Petitioners in number four of its clarification) as well as claims of abuse and neglect only to the extent they relate to a FAPE under IDEA.

The June 27<sup>th</sup> date is the date of last amended complaint. The First complaint was filed on March 20, 2008 so the statute of limitations started at the first complaint and goes back two year to the date of March 20, 2006.<sup>2</sup>

**Issue 2: Whether the Student's IEP should have included "independent observation", particularly, "audio/visual surveillance" as an accommodation in 2008?**

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<sup>1</sup> During the first day of the hearing, counsel for the Petitioners said they were withdrawing issues concerning the implementation of the 2005/2006 and 2006/2007 school years and only focusing on the 2007/2008 school year. Petitioners explained that they wanted to present evidence about the 2006/2007 school year due to its relevance to the following year. The Petitioners said that they didn't think it was necessary for the Respondent to review data before the 2007/2008 school year because it wasn't in issue. The Chairperson asked for clarification and held a conference with the parties. Tr. Vol. I, at 89-91. The Petitioners then said on the record that they were going to keep on the table anything going back to March 20, 2008. The Respondent did not object. Tr. Vol. I, at 120. However, most of the Petitioners' evidence was focused on the 2007/2008 school year.

<sup>2</sup> Some of the language in the Petitioners' complaint and, as stated in Petitioners' clarification in number four above, uses language that is more often associated with Section 504 of the Rehabilitation Act and not IDEA. DESE denied the Petitioner's request to use this hearing procedure to decide the Section 504 issues and they were therefore dropped from the complaint. However, the question of whether the school provided the proper support for the Student to receive a FAPE is still an IDEA question that can be heard by this Panel. However, in making that determination this Panel does not imply that the 504 issues were disposed of, which would require analysis outside of this panel's jurisdiction.

**Holding: The State School did not violate the Student's right to FAPE by not providing for audio/visual surveillance or independent observation in the Student's IEP**

The Petitioners did not challenge the content of the IEP on any matter other than the provision of independent evaluation. This was also listed as a remedy, but the Petitioners thought this was a separate issue in itself and that the failure to provide independent observation on the IEP was a violation of IDEA.

**Issue 3: If the Student's rights were violated under Issues 1 or 2 above, what is the remedy?**

**Holding: As outlined in section V.**

The issues listed as 5, 7, 8 and 9 in the clarification all relate to the appropriate remedy if there were violations of the Student's right to a FAPE.

## **II. TIMELINE FOR THE HEARING/ PROCEDURAL OVERVIEW**

The Department of Secondary and Elementary Education (DESE) received the Petitioners' initial Complaint on March 20, 2008. On March 31, 2008, the Chief Hearing Officer received from the Respondent, the State Schools for the Severely Handicapped, a notice of insufficiency and an answer to the complaint. On April 5, 2008, the Chief Hearing Officer found the complaint to be sufficient. The Petitioners amended their complaint on April 6, 2008. The Respondent filed another notice of insufficiency on April 14, 2008, and the Chief Hearing Officer ruled the complaint was sufficient on April 19, 2008. The hearing was then initially set for June 30, 2008. On June 12, 2008, the Petitioners filed their Second Amended Due Process Complaint and, by agreement of the parties, the June 30, 2008 date for the hearing was vacated. After a conference call with the Chairperson, the Petitioners filed a Third Amended Due Process Complaint on June 27, 2008. The Respondent moved for an extension that would allow the hearing to begin on September 8, 2008 and the Petitioners agreed. The hearing was then set for September 8, 2008 with the date of the final decision to be October 31, 2008 based on agreement by the parties. The Petitioners were asked to submit a clarification of issues before the hearing. The Petitioners submitted an "outline of the issues" on September 6, 2008.

The hearing was held from September 8, 2008 until September 11, 2008 in Festus, Missouri. At the hearing, the Petitioners' attorney stated that they were not pursuing claims beyond the two-year statute of limitations as had been included in the Third Amended Due Process Complaint. Therefore, the issues reviewed go back to March 20, 2006. Based upon an agreed-upon schedule for post-trial briefs, the Petitioners moved to extend the final date for the decision until December 5, 2008 and the Respondent did not object. The Chief Hearing Officer granted the extension. The Respondent later moved to extend the date to December 8, 2008 as an aid to the Panel and the Petitioner did not object. **The final date for the decision was therefore set to December 8, 2008.**

### **III. FINDINGS OF FACT**

#### **A. Background**

1. 's date of birth is. He will be referred to as "the Student" hereafter. 's Parents, and , initiated this Complaint. They will be referred to as "the Petitioners" hereafter. will hereafter be referred to as "the Mother" of the Student. DEX.18.
2. The Student's medical diagnoses include cortical vision impairment, brain malformation-schizencephaly with pachgyrial/lissencephaly, seizure disorder, severe developmental delay, hypotonia and visual impairment. He functions within the severe/profound range of mental retardation cognitively, academically, and adaptively, as well as in areas of gross and fine motor skills. DEX 18, at 12; PEX 8, at 69; Tr. Vol. I, at 261.
3. Due to the severity of the Student's disability and multiple medical conditions, he could not eat independently, and was fed liquid supplements or pureed foods. The Student is sensitive to loud sounds because of his seizure disorder, cannot tolerate heat because he has an inability to sweat, and is unable to communicate clearly if he is in pain and does not seem to cry. DEX 18, PEX 7, Tr. Vol. III, at 796-797, 812-813, Tr .Vol. II at 525.
4. The Student attended Mapaville from September 2005 until January 18, 2008. The Student was in Barb Popsky's classroom during the entire period he attended school at Mapaville. After January 18, 2008, the Student was placed in homebound instruction because of the events giving rise to this dispute. . Tr. Vol. III, at 787; PEX 5-8.
5. The IEPs that are relevant to the time period being covered in this dispute are the Student's 2005/2006 IEP, the Student's 2006/2007 IEP, the Student's September 2007/2008 IEP, and the Student's 2008 IEP which was developed in February 2008. There were minor changes to the February 2008 IEP, but those changes were not relevant to the dispute between the Petitioners and the Respondent. PEX 5-8.
6. According to his May 18, 2005 reevaluation report, the Student was administered the Lexington Development Scale. The Lexington is an informant-based scale, which measures

development in the areas of cognition, socialization, language and motor functioning. In the Cognitive area, the Student scored at the 3-month age level. The Student scored at the 3-month age level in the area of Socialization. The Student scored at the 6-month age level in the area of Language. The Student's Gross Motor Skills and Fine Motor Skills fell at the 3- to 6-month age level. Overall, the Student scored at the 3- to 6-month age level. DEX 18, at 13.

7. The Student's language skills are significantly delayed for his chronological age. The Student's overall language skills were assessed under the Rossetti-Infant-Toddler Language Scale. This scale was designed to assess the preverbal and verbal aspects of Communication and Interaction in the young child. In the Interaction-Attachment area, The Student scored at approximately the 6- to 9-month age level. DEX 18, at 15.

8. The Student scored at the 9-month level in Language Comprehension, which examines the Student's understanding of verbal language with and without linguistic clues. In the area of Language Expression, which examines the Student's use of preverbal and verbal behaviors to communicate with others, he scored at the 9-month age level. Id.

9. The Student exhibited significant gross motor delays, decreased strength and functional mobility. DEX 18, at 16.

### **B. The 2007-2008 School Year**

10. Most of the Petitioners' evidence at the hearing concerned the 2007-2008 school year and implementation of the September 2007/2008 IEP.

11. For a short period of time during the 2007/2008 school year, the Student's 2006/2007 IEP was in place. The goals on that IEP were as follows:

- Goal 1 - The Student will smile or vocalize in response to specific stimulus;
- Goal 2 - The Student will make a choice;
- Goal 3 - The Student will look at an object within field of vision;
- Goal 4 - The Student will respond to oral stimulation;
- Goal 5 - The Student will maintain touch/grasp of an object with hand;
- Goal 6 - The Student will maintain head erect;
- Goal 7 - The Student will participate in weight-bearing and muscle-strengthening activities; and
- Goal 8 - The Student will recognize or request more or less of an items or activity.

Physical therapy, occupational therapy, speech therapy, and vision services were also included within the Student's September 2006 IEP. DEX 13, at 111-20.

12. The agreed-upon goals on the September 2007/2008 IEP were as follows:

- Goal 1 - The Student will show partial participation in self-feeding;
- Goal 2 - The Student will participate in an exercise program to increase upper extremity strength;

- Goal 3 - The Student will exhibit head and trunk control in various positions;
- Goal 4 - The Student will move legs to interact with the environment;
- Goal 5 - The Student will reach for and/or grasp objects;
- Goal 6 - The Student will communicate through eye gaze; and
- Goal 7 - The Student will follow simple requests. DEX 9.

13. Physical therapy, occupational therapy, speech therapy and vision consultant services were also included in the Student's September 2007/2008 IEP. Each service was to be provided for 60 minutes per week. The Student was also to receive off-campus instruction in bowling skills. DEX 9, at 95-103.

14. The goals on the IEP are accomplished by specific benchmarks. There were specific benchmarks under Goals 3 and 5 in the September 2007/2008 IEP were at issue in this due process hearing. DEX 9; Tr. Vol. IV, 830-831,809-810, Vol., at 37.

15. The benchmarks under Goal 3, ("The Student will exhibit head and trunk control in various positions"), were as follows:

- Benchmark (1) - "The Student will head control in supported standing." The standard to achieve was set at "five minutes" and it was to be measured by data collection. Services listed were "classroom instruction; physical education, and extended school year instruction." The only equipment listed was the supine stander.
- Benchmark (2) - "The Student will maintain head erect during an activity." The standard was set for 30 seconds. It was to be measured by data collection. The services listed were "classroom instruction, physical education, physical therapy, and extended school year instruction." The equipment listed was the chair swing, the floor mat, the gait trainer, the tumble form scooter, the bolster, and the therapy ball.
- Benchmark (3) - "The Student will maintain trunk in upright position." It was to be done for 30 seconds and to be measured by data collection. Services listed were "classroom instruction; physical education, physical therapy, and extended school year instruction." The equipment to be used was the gait trainer, floor matt, and the therapy ball.

The goal direction was to increase. The goal was to be accomplished for 25% of opportunities and was to be measured by data collection. DEX.9.

16. Under Goal 5 ("The Student will reach for and/or grasp object"), the benchmarks were as follows:

- Benchmark (1) - "The Student will play with a simple toy." The services listed were "classroom instruction, occupational therapy, visual consultation and extended school year instruction." No equipment was listed.
- Benchmark (2) - "The Student will show responses to a variety of tactile activities." No equipment was listed.
- Benchmark (3) - "The Student will activate adaptive hardware to interact with the software programs." The equipment listed was a variety of switches, computer, adapted leisure device, and adapted toy. DEX.9.

17. The September 2007/2008 IEP and the 2006/2007 IEP also state as follows in the section entitled “Present Level of Academic Achievement and Performance.” It says that “[The Student] requires a structure learning environment to decrease distractions. He requires a 1:1 staff-to-student ratio to address his specific physical concerns, adapt his instruction, and prompt him to remain on task in terms of the students.”<sup>3</sup> All his IEPs also list the special health care procedures needed as “Gastronomy tube feeding, mechanical nebulizer, postural draining, and temperature precautions.” His seizure disorder is also noted in the summary of his evaluation. DEX 9, at 92 and 102; DEX 13.

18. A new IEP was developed at a January 29, 2008 IEP meeting with the implementation date of February 2, 2008. DEX 4. The goals on that IEP were as follows:

- Goal 1 – The Student will remove food from spoon when being fed;
- Goal 2 – The Student will participate in an exercise program to increase upper extremity strength;
- Goal 3 – The Student will exhibit head and trunk control in various positions;
- Goal 4 – The Student will reach for and/or grasp objects;
- Goal 5 – The Student will communicate through use of eye gaze;
- Goal 6 – The Student will attend purposefully to reading words or pictures/symbols/objects/action;
- Goal 7 – The Student will stand; and
- Goal 8 – The Student will push switch to interact with computer.

19. The new IEP listed the location for services as “homebound”. Physical therapy was to be provided for 120 minutes per week and occupational therapy was to be provided for 90 minutes. There was to be 300 minutes of additional instruction. The parent was to provide all special health care procedures, which were listed in the previous IEPs. PEX 8.

20. Some of this evidence concerned allegations of circumstances of the classroom and the School that the Petitioners believed were so inappropriate that the Student could not be safe in the classroom and would be detrimental to the Student, and therefore, the Student could not receive a free appropriate education. Tr. Vol. III, at 809-811.

21. Some of the evidence regarding circumstances at the school involved audio recordings of classroom time and testimony of witnesses.

22. Petitioners called the Mother of the Student to testify regarding the manner in which the audio recordings were made. Tr. Vol. I, at 154-55.

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<sup>3</sup> All of the Student’s IEPs say that the Student needs 1:1 assistance for his special health concerns, in order to prompt him, remain on task, and adapt his instructions. This requirement is listed up front in the Student’s present level of performance on all his IEPs. In a section near the bottom of the 2007/2008 IEP, there is a template for explaining why the Student is not in regular education, a justification required by IDEA. In that box, it says that since the Student needs a 3:1 to 1:1 ratio, it would be distracting to other students to have him in regular education. That remark does not occur on any of the IEP from previous years.

23. The Mother purchased an Olympus Digital Voice Recorder at Radio Shack that she used to make the recordings. She did not know the model number and did not have technical knowledge of its recording ability. She said that the device came with software for transferring it to a computer. Tr. Vol. I, at 155-57, 159-60; Tr. Vol. IV, at 887.

24. She tested it at home for about five minutes by placing the recording device under his chair and turning it on. The device picked up the voices of the people in the room. If someone was across the room or had their back turned, the voice would still be legible to the ear, but the listener would have to listen more closely. The recordings at home were transferred onto her computer. Tr. Vol. I, at 166-167.

25. The Mother testified that on January 22, 23, 24, and 25, 2008; she sent the digital recording device to school concealed under the seat of the Student's wheelchair directly under a vinyl flap. She placed the recording device in his chair around 9:00 a.m. in the morning and took it out when he came home. She did not program the device and just used the record button. She testified that she did not alter the recordings in any way, and that she did not think the device turned off, and then on during any of the recorded school days, since there were no stops or starts registered. She was not present during most of the time when the recordings were made and estimated that she was in the classroom for probably 30 minutes while she was helping to put her son in the gait trainer. Tr. Vol. I, at 155-158, 163, 165-166.

26. The only portions of the recordings that were admitted into evidence and to be cited in this opinion were the portions of the recordings that were played at the hearing and of which there was testimony identifying the voices that was heard by the Panel.<sup>4</sup>

27. The Mother was not present to know when the Student was in his wheelchair during the day, but thought she could clearly hear when the Student was being transferred out of his wheelchair. The Student is severely handicapped and, given an ability to only hold his head erect for several seconds, he would have had to be in a piece of special equipment with one-on-one supervision to have not been in his wheelchair. Tr. Vol. I, at 163; DEX 18, at 16.

28. The Mother transferred the data from the device to her computer, then from her computer to a "flash stick" device. She could describe what she did to transfer the information to the computer using a layperson's terminology, but she did not have technical knowledge about how the transfer worked or how the recording might be altered in the process. Tr. Vol. I, at 157, 161-62. No one else, either for the Petitioners or the Respondent, provided technical information about how the device and transfer process worked or malfunctioned.

## **1. Conditions in the Classroom and the School Impacting the Appropriate Implementation of the Student's Individual Educational Program**

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<sup>4</sup> The State objected to the recordings and the Hearing Officer required the parties to brief the issues regarding the surreptitious recordings. The Respondent did not argue that the recordings were illegal, but did argue that they were often confusing and garbled, consisted of hearsay, were irrelevant and did not meet the technical requirements for submitting audio recordings. The Chief Hearing Officer issued an order in a separate opinion on admissibility of the audio under Missouri law that will not be explained here in depth. Of four full school days of recordings offered into evidence, the hearing officer only allowed certain segments in which voices were identified through testimony at the actual hearing. Of those segments played at the hearing, only a handful was found to contain probative evidence. Most of the audio segments were not hearsay because they were not offered for the truth of the matter asserted.

29. Ms. Barb Poposky was the Student's teacher during the 2007/2008 school year. Ms. Poposky testified that she had 60 hours of credit towards an Associate's degree from Jefferson College in Hillsboro, Missouri. She did not have any type of degree as a result of that work. She testified that she did not have any educational classes in the 60 hours she completed and that she had no special education classes. She did receive training on special education instruction from Mapaville State School when she started as a summer school aide. She then became a long-term substitute teacher starting in the fall of 2004 for four years with full-time teaching responsibilities. Her supervisor was the Building Administrator. Tr. Vol. III, at 596-597, 627, 766-767.

30. Mr. Charlie Taylor is the Superintendent of the State Schools for the Severely Handicapped. Mr. Taylor holds a Bachelor's degree in education, a Master's degree in special education and a specialist degree in educational administration. Tr. Vol. IV, at 945. Mr. Taylor explained that the same guidelines, which apply for employing State School's teachers, also apply to other public school teachers. He said that you want someone with a Bachelor's degree and who has certification in the appropriate area, but that if you can't find someone, you use a substitute in the classroom and advertise for the position. He said that substitutes were often used when teachers were sick. Tr. Vol. III, at 966.

31. He also said that many teachers might not want to work for children with severe disabilities or the State Schools or the State of Missouri. He also said, in most cases, the staff could make more working for other public schools. Tr. Vol. III, at 967-968.

32. When asked if they had a teacher for the classroom now, he said they did. He did not know what exactly had been done during the 4-year year period in which they had a substitute teacher, but there were normal procedures in place to advertise vacancies. Tr. Vol. IV, at 972.

33. Ms. Poposky testified that she was having problems during the 2007/2008 school year and cried throughout her testimony. On multiple occasions throughout her testimony, she noted her own weaknesses in handling her classroom during the 2007/2008 school year. Ms. Poposky had two aides in her classroom. Those aides were Marsha Adams and Kathy Pope. At the end of her testimony, she clarified to the Panel that her hardships were personal in nature. Tr. Vol. III, at 603, 608, 770; Tr. Vol. III, at 588, 606-616

34. Ms. Poposky testified that she knew that during the Student's 2007/2008 school year she should have a 1:1 aide for him, but that he did not during that time. The requirement for the aide was to have been for (a) full physical assistance and health concerns (b) adaptation of instruction and (c) to help the Student stay on task. Tr. Vol. III, at 772-782; DEX 9 and 13.

35. Ms. Poposky believed he needed an aide and that was why it was in his IEP, but did not believe it was possible for him to get his own aide. Tr. Vol. III, at 770-771.

36. Ms. Poposky testified that she understood the 1:1 requirement to mean someone would always be assigned to work with him throughout the day. Tr. Vol. III, at 781.

37. Ms. Poposky said that the Student would sometimes fall asleep during the day and that an aide might keep this from happening. There were times she saw him fall asleep and then saw that if someone else engaged him, the Student would not fall asleep. Tr. Vol. III, at 782.

38. Ms. Poposky identified PEX 23 as a checklist that the Building Administrator had asked her to complete. She said the Building Administrator asked her to try to itemize areas of concerns and goals, fill these in when done and have the person doing the activity, along with a witness, initial the form. Ms. Poposky said there was only one week the checklist was used, and that was the week ending January 25, 2008. Tr. Vol. III, at 602-602.

39. She testified as to an inability to control her classroom, negativity in the classroom in general and towards working on IEP goals, and her own impaired functioning level:

- She said, “I should have been able to manage myself and my room better.” When asked if she could manage her aides in the classroom, she said, “Not by January 25.” Tr. Vol. III, at 604.
- When asked whether the aides were negative to the students, she said, “Looking back at it I would probably have to say so, yes, I would have to say yes.” Tr. Vol. III, at 604.
- In response to why the staff didn’t want to complete a checklist in January 2008, she said, “The mood we had gotten ourselves into, and that included myself, that included my aides as individuals – all of us as individuals in a group, we had become very negative.” Tr. Vol. III, at 602.
- In terms of her personal performance, she said the following: “I couldn’t holler help. I’m sorry. Do I think the kids would have been better off with a different teacher, yeah.” Tr. Vol. III, 752. When describing her state of mind in January 2008, she said, “Where I was at personally, there was a lot of stuff going on... And even though I was working on goals, I felt I could have done better.” Tr. Vol. III, at 603.
- After listening to the audio that was made in January 2008 and asked if the staff regularly complained about implementing IEP goals for the Student, she said, “By this point in time, yes.” Tr. Vol. III, at 625.

40. Ms. Poposky affirmed that the staff conducted aerobic exercise during class time with the students. She said they had a CD in the room of children’s dance music and the Student would watch them dance. She said that the Student’s educational benefit from the exercise time was that he would watch the movement and that would help him use his eye gaze in order to recognize dancing and make choices. Tr. Vol. I, at 616-618.

41. The allegations about conditions in the classroom (references provided below) included the lights being frequently out, the staff “working out” while they were supposed to be with students, the aides being rough with students, the staff in the classroom goofing off during class time, and the classroom being too hot for the Student.

42. One of the Student’s former aides, Ms. Judy Gibson, who was a teacher’s aide in another classroom during the 2007/2008 school year testified to seeing activities that seemed inappropriate occurring in the Student’s classroom. Tr. Vol. I, at 69-113.

43. Ms. Gibson testified her observations of the Student's classroom were sometimes made when she was working in the Sensory Room, which was straight across the hall from the Student's classroom. She could see into the classroom from across the hall, but could not see the entire classroom. She could also see the Student's classroom from the hallway and at times, the door was open to the Student's classroom. Tr. Vol. I, at 74, 77, 82-83.

44. She testified that the room was dark several times a day in the Student's classroom in the morning and a couple of times in the afternoon, and the room was quiet. She also said that she could hear activity occurring in other classrooms in comparison to the Student's classroom. Tr. Vol. I, at 77-79.

45. She testified that she could see the staff playing solitaire, doing puzzles, or reading magazines in the Student's classroom. Tr. Vol. I, at 77.

46. She was also told by the Building Administrator that the staff in the classroom was "dancerzing" and that it was "common knowledge." She also confirmed she did not personally witness it. Tr. Vol. I, at 75.<sup>5</sup>

47. She said she witnessed the Student being left alone and not being interacted with on four or five occasions. However, she also verified that she was not aware of everything that was happening in the room, and it was possible they just finished working with him. Tr. Vol. I, at 74, 81.

48. She witnessed the Student being brought to the Mother soaked in urine at the end of the day. She said that while she had seen other children who were wet at the school, the policy was to change them and bring them to the parent dry at the end of the day. She had never seen another student brought to a parent in that condition. She also confirmed she did not know if he had been checked and toileted ten minutes before the diaper was wet. Tr. Vol. 1, at 80, 84-85.

49. She thought the Student's demeanor was sad, tired, and not happy compared to when she was an aide in his classroom. However, she also did not know whether the change in his demeanor could be attributed to something like a "growth spurt." Tr. Vol. I, at 73.

50. She verified that she thought the Mother should bring a nanny cam to school to see what was going on in the classroom. Tr. Vol. I, at 80.

51. She also said while she could see in the classroom, she was not actually in the Student's classroom in the 2007/2008 school year and she did not know the classroom schedule. Tr. Vol. I, at 81-82.

52. Ms. Gibson worked in Deborah Sanderson's classroom. She testified that they usually went to the Sensory room during the 2006/2007 school year at 11:00 a.m. and thought the class was at lunch at that time, but also thought that Judy Gibson left the classroom at other times. Tr. Vol. II,

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<sup>5</sup> Some of the testimony involved what one staff person said to another witness and was objected to as hearsay by the Respondent. The evidence was admitted and considered probative if it was an admission by a party opponent that was made within that person's scope of authority.

at 529. The Student, an alternate feeder, did not go to lunch with the classroom. Tr. Vol. II, 483, 452.

53. Peggy Heilemann was the Student's physical education teacher during the 2007/2008 school year. She has worked at the school for two years and is presently employed at the school as the physical education teacher. Tr. Vol. I, at 121.

54. Ms. Heilemann has an undergraduate degree in special education and Master's degree in counseling. She has taught physical education for 11 years and was a part-time substitute for another 4 years before working at the Mapaville State School. During most of her career, she worked in a junior and senior high school. She had taught one year at a special education cooperative. Tr. Vol. I, at 182-183.

55. Physical Education was listed as a service to be provided under Goals 2 and 3 for the 2007/2008 school year. PEX 7.

56. She confirmed that after the Student's IEP meeting in January 2008, she told Craig Henning, the Executive Director of Disability Resources Administration and an advocate for the Student, that things she has seen at the school were not right. When asked what she thought wasn't right, she said her concerns were "about therapy, their way of keeping track of therapy and how often therapy was given and how long they worked." She said, "there was no check system in place." Tr. Vol. I, at 133, 135.

57. She said she told the Mother that she was concerned about the Student because use of the gait trainer had not been implemented. She also reported that one of the Student's aide's, Kathy Pope, said that she couldn't do it because her back hurt. Tr. Vol. I, at 128-129.

58. She said that when she had been new to the school, she had not been given all the information she needed on what to do and what her responsibilities were. Tr. Vol. I, at 136.

59. In response to whether she was familiar with the Student's IEP, she said. "she read through it briefly one time when I was first hired as the PE teacher, September 2007." After that, she did not look at the IEP and was not required to chart. She did not remember the Student's IEP goals off hand, but answered that she did have working knowledge of the IEP. She did remember that she was instructed by the classroom teacher to do stretching and exercising with the Student while the Student was enrolled in the 2007/2008 school year. Tr. Vol. I. at 122, 137, 139,

60. On January 25, 2008, one of the days the Student was sent to the classroom with the recording device, the Building Administrator, at the request of the Mother, had sent in a specific checklist for the staff to sign and verify time spent with the Student on IEP goals. PEX 22.

61. Ms. Heilemann recognized her voice on the audio. The audio time played was on January 25, 2008 from approximately 24 minutes to 38 minutes on PEX 21. Ms. Heilemann confirmed that she asked on the audio, the day she was to sign the checklist, that she said no one had ever showed her how to do arm work with the Student before and someone offered to show her. Tr. Vol. I, at 172-173.

62. Ms. Heilemann says she was trying to wake the Student up during the time period of the audio segment. Tr. Vol. I, at 173. During the audio portion, there is a period in which she says she is going to do range of motion with the Student and then says she will sign a form that says she spent 15 minutes with him on that activity. From the audio segment, it sounds like she spent approximately 4 minutes from the time she says she is going to work on the activity until the time she says she is going to sign the paperwork.. PEX 21-22.

63. On the same audio excerpt, she reported hearing her voice and the voices of one of the aides. She recognized saying “they don’t care” and her own voice responding, “they don’t know how to care.” Tr. Vol. I, at 177; PEX 22.

64. She saw the Student sitting alone in his wheelchair and not being engaged by staff. She said it could have been during transition periods or maybe the staff was toileting the children. Tr. Vol. I, at 89. She couldn’t recall the total number of times she witnessed the Student alone. Tr. Vol. I, at 190. She also said she witnessed other children sitting in wheelchairs unengaged, but also thought they may have been in a transition period, Tr. Vol. I, at 131.

65. When asked if she was comfortable with the way the Student was treated she said, “I don’t know. I-I- have mixed feelings.” Tr. Vol. I, at 182.

66. Rebecca Flowers testified that she was currently the Supervisor for Instruction for the State Schools for the Severally Handicapped. In this position, she rotates through five schools including the Mapaville State School. During the 2007/2008 school year, she became a classroom teacher in November 2007. This classroom was not the Student’s classroom, but the classroom with the next to oldest students in the school. The Mother was also employed as an aide in the classroom. Tr. Vol. III, at 565-566.

67. Ms. Flowers said that when she started “records had not been kept up.” However, at the time she started, they started implementing a schedule made up by the Mother. Tr. Vol. III, at 567-568.

68. She had several aides that rotated in and out of her classroom during the 2007/2008 school year. She said that she had seen aides act disrespectfully to students. Tr. Vol.III at 569. Two of those were Marsha Adams and Kathy Pope, the individuals that had also been aides in the Student’s classroom during the 2007/2008 school year. After the Student was moved from the classroom, a new teacher was hired for Barb Puposky’s classroom. Ms. Puposky stayed in that classroom to help the new teacher for a few weeks and the two aides took turns coming into Ms. Flower’s classroom. She then worked with each aide for one week apiece in her classroom. Any other observations she made were not in the Student’s classroom, but in the hallway. Tr. Vol. III, at 583, 584.

69. Her general observation of the aides in her classroom during the 2007/2008 school year was as follows: “What I saw mainly was just verbalization that could have been spoken nicer. And kids were spoken to maybe a bit rough, harsh from what I feel that institutes should be treated.” Tr. Vol. III, at 569.

70. She testified that she saw pushing and shoving of the students with disabilities in her classroom by Marsha Adams. When asked to clarify, she said that it was like “a little bit of emotion to kind of force him to go forward a little bit.” When asked to further characterize the type of push used by Ms. Adams, she said it was “an aggravated push.” She also said she heard the aides shouting commands at the students. Tr. Vol. III, at 589-590. She also said she would consider the treatment of the students to be derogatory. Tr.

Vol. III, at 592.

71. She saw the Student brought to the Mother in January at the end of the day soaked in urine. Tr. Vol. III, at 570.

72. In describing her experience in working with Kathy Pope in the classroom, she said the following, “Kathy did what I asked but no more. She didn’t, you know, she would do what she asked and then she’d stop. And Marsha when she was there definitely gave off vibes for not liking authority. She resented anything I asked her to do. She would do it but in a resentful type manner.” Tr. Vol. III, at 573.

73. She did not think Marsha Adam’s personality was suitable for teaching children with severe disabilities. Tr. Vol. I, at 575-576. She thought it would be detrimental to students to be in an environment where staff members made negative comments to students or were cold to the students. Tr. Vol. III, at 577, 587.

74. In describing how the students in her classroom responded to these staff people, she said, “I feel like there was a little bit of resistance from the students to do what, you know, if it was something they didn’t want to do they would hold back a bit.” Tr. Vol. III, at 590.

75. Specifically in regard to Marsha Adams, she observed her acting disrespectfully to students. Specific examples included the following: “I have a student who drooled a lot and she acted very disgusted about it towards him.” She made statements like “get away from me” and “that’s gross.” Tr. Vol. III, at 570.

76. Ms. Flowers also had Ms. Poposky as an aide in her classroom after the Student left school. She discussed the Student with Ms. Poposky and the situation that arose with the Student. Ms. Poposky told her that she felt bad about how she had not really focused on the objectives like she could have. Tr. Vol. III, at 578.

77. She thought that when Ms. Poposky became an aide in her classroom she treated the students well. Tr. Vol. III, at 596. She also thought the Mother was a conscientious aide and did not shout or shove the students. She thought her classroom could be controlled without shouting at or shoving the students. Tr. Vol. III, at 571, 591-592.

78. The Student’s Mother explained that from the time she enrolled her son (the Student) her main concern for him was safety issues related to his multiple disabilities. She stated that she explained her concerns to the school and demonstrated how he was to be handled. She explained that she “was apprehensive because of his health conditions and his frailty and his safety. So I made sure that I let them know that when you pick him up... he needed to be picked up like a

baby. You can't pick him up under his arms because his head would fall back. It's just a matter of treating him and handling him safely to prevent him from having any kind of injury." Tr. Vol. III, at 799-800.

79. The Student's Mother testified that she was not told that Ms. Popoksy was not certified. Tr. Vol. III, at 801.

80. The Student's Mother had worked as an aide in another classroom starting the last two weeks of the school year of 2007 and continuing on until January 18, 2008 when she pulled her son out of school. She said she never received training from the school. Tr. Vol. III, at 789-780, 805.

81. During the 2007/2008 school year, there were four different teachers in the classroom she worked in. She testified that IEPs were not being implemented in that classroom when she started in the fall of 2007. She made up a schedule for the classroom so that there would be some activity going on and that children were not just left to sit there. She was particularly concerned that students that were in wheelchairs were unattended. Tr. Vol. III, at 804-807.

82. While she was an aide at the school, she had other staff people coming to her with concerns about the Student and what was happening in the classroom. She said, "They were exercising in the classroom. That the Student was just sitting in his wheelchair. That the Student's face was really red. That the heat was too high. There were so many things." Tr. Vol. III, at 809.

83. When asked specifically who reported problematic conditions with the Student, she reported that the physical therapist, Krista Green, came to her and said that the Student's face was really red and another staff person named Gina. She said that Peggy Heilemann and Judy Gibson also told her they were concerned about the Student. Judy Gibson told her that the Student's equipment never left the hall. She said Judy Gibson also told her that there was a running joke about checking your heart rate when the music was on the classroom. Tr. Vol. III, at 812.

84. She said, "Everything just piled up, you know. I was getting nowhere. I had gone to Mary (the Building Administrator) several times. I felt like I had a good enough relationship with Barb. I trusted her." Tr. Vol. III, at 809.

85. When describing the Student's heat condition, she explained the following: "The "Student has a heat precaution in his IEP. Due to his condition, his body does not regulate his body temperature like ours does. He doesn't sweat....if he gets too hot, he doesn't have the normal body mechanism to cool him down." The School had specific procedures to follow that the IEP referred to. In those procedures, it was clear that the Student could have a heat stroke if he was allowed to get overheated, Tr. Vol. III, at 812-813, PEX 13.

86. She reminded the school nurse, Sally Forche, that the Student had a heat precaution in his IEP. She asked her to make sure that the heat in the Student's classroom was not set too high and she asked her to check his classroom along with the classrooms of other students in the building. She said the school nurse later approached her in the cafeteria and told her that she let the staff in the Student's classroom know that the Mother was complaining. Tr. Vol. III, at 814.

87. She also explained that on January 16, 2008, they brought him to her at the end of the day soaked in urine. She said, “if you touched his pants it was cold. It wasn’t, you know, fresh.” After that, she called the Building Administrator on January 18, 2008 to let her know she was not coming back. At that point, she explained she felt that she couldn’t be an employee at the school and also fully advocate for her son. Tr. Vol. III, at 810-811.

88. The Mother also said that she thought the Student was lethargic after he came home from school. Tr. Vol. III, at 924. She was not sure why the Student was lethargic, but she did have a specific concern that he was not being fed. When listening to one of the recorded days, she did not hear the sounds she associated with him being fed, like the shaking of his Pedisure can, a pop, and the sound of it being poured into the syringe. She said he also became very vocal when he was being fed. Tr. Vol. III, at 850.<sup>6</sup>

89. The Mother identified voices on the audio from PEX 22, January 25, 2008, Tr. Vol. IV, at 842-843, and explained what she heard. The first segment played during the Mother’s testimony was from approximately 5:15 to 5:20 on the audio. The Mother said she recognized the voices of Barb Popsky, Marsha Adams and Kathy Pope, the classroom aides. During this portion of the audio, you hear the voice identified as one of the classroom aides, telling the voice identified as the other aide, say that she heard the Building Administrator tell the Mother that she thought the Student might be able to walk. The two women can be heard to mock the idea that the Student might walk and can be heard saying the Building Administrator was putting ideas into the Mother’s head. The Mother said the aides sounded as if they were taking the Student out of his wheelchair while they were talking and it sounds like they are referring to moving the Student on the audio.

90. During this same portion of the audio, the aides were talking to each other in a normal tone of voice, but were also talking to the students in the classroom in a way that sounded like they were shouting and barking commands. You could hear one of the aides interject commands to the students as they were talking to each other such as “Sit down!”, or just “Sit!”, “Scoot up!” and “Don’t you dare get up!”. One aide said to a student in a harsh tone of voice, “That’s nasty!” and screamed at him for “eating his boogers.” The tone of voice of the aides cannot be completely conveyed by the written word. The Panel characterizes the voices as harsh from the beginning of the audio, but the voice of one aide became increasingly aggressive and threatening. Meanwhile, the staff in the classroom kept speaking to each other in a normal tone of voice, as if it was entirely normal to talk to the students in the harsher tone of voice. No one corrected another’s behavior or remarked on the harshness of the conversation. PEX 22.

91. In the second audio portion played, which was January 25, 2008 at approximately 5:22 to 5:24:30, the Mother again identified the voices of those of the two aides, Kathy Pope and Marsha Adams, and the Student’s teacher. Tr. Vol. IV, at 844-866. The voices were talking about filling out a form. The Mother believed the form to be PEX 23, the checklist the staff was to have filled out at the instruction of the Building Administrator in order to verify what activities the Student

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<sup>6</sup> The Petitioner was not allowed to use the audio for the proposition that the Student was not fed. The testimony itself was only admitted to allow them to show the Mother’s state of mind and concerns and not whether the Student was actually fed or not.

had worked on that day and how he performed. In the conversation, one of the voices was heard to say the Student was sleeping the whole time they were to have been worked with him on the computer. PEX 24.

92. The Mother said that she also knew that the IEP said the Student needed a one-to-one aide, but she did not know she could still actually get the Student his own aide in the classroom. She did not understand the legalities of the IEP document. She never objected to the fact the Student did not have an aide at any IEP meeting. Tr. Vol. IV, at 872-873.

93. Exhibit 24 contains a list of different activities that the Student was to have worked on during the school day. There is space by each activity for the staff to complete a brief notation of what was done and when it was done. By the word "computer" it says, "Slept thru, Marsha used full H-O-H, no resistance due to sleeping." PEX 24.

94. During the January 25, 2008 audio portions at 5:22 to 5:24:30 the aides were also using a harsh tone of voice towards the students, although not as harsh as the time starting on the same day at 5 hours and 15 minutes. PEX 22.

95. Sally Forchee was the school nurse at the Mapaville State School during the 2007/2008 school year and had worked there for 16 years. She has a Bachelors of Science in Nursing and is currently working on her Master's degree in public health and education. Tr. Vol. I, at 222.

96. She described her duties to generally "take care of the kids." She specifically said she trained staff, made rounds in the morning, called parents if a child was sick and dispensed medications. She also said she was on the safety committee to watch for things such as dangerous sockets. She verified that she was CPR certified and could perform the Heimlich maneuver. Tr. Vol. I, at 222.

97. When asked if she was aware of the Student's medical diagnoses she said she was and then said the diagnoses were severe mental retardation, seizure disorder and she knew he had a heart problem. There is nothing in the Student's recent school records that would indicate a heart problem. DEX 18 and 9. Tr. Vol. I, at 223.

98. Ms. Forchee was asked to listen to an excerpt from PEX 22, starting at approximately 5:52 on January, 22, 2008. After listening to the excerpt once, she stated she recognized her voice and that she was ringing a bell, but couldn't remember what she said. The same audio was played a second time. After listening to the audio again, Ms. Forchee recognized that she said "watch me throw him into a seizure." She was then asked whether she was aware that children with epilepsy could be induced into a seizure through auditory stimuli and she said yes. Tr. Vol. I, at 225.

99. Ms. Forchee said that she made the remark about sending him into a seizure "after she realized that was what was going to happen." When asked if she stopped ringing the bell, she said she thought she did. Tr. Vol. I, at 227.

100. On PEX 22, at this time period, you can hear, for a little less than two minutes, a bell ringing. At first, it is faint, but it gradually becomes louder. It is not clear whether it becomes louder because it is being rung louder, but it sounds like it is coming closer to the microphone.

From the conversation in the room, it sounds like Ms. Forchee is at least in part trying to see if she can get the Student to pay attention. The bell is rung at least 15 to 20 times before Ms. Forchee makes the remark about sending the Student into the seizure and then laughs. By the time Ms. Forchee makes the remark, the sound of the bell on the audio device is so loud that it is uncomfortable to listen to on the recorder. The bell continues to ring approximately 30 more times. Some of the rings blend together, so it is hard to have an exact count.

101. The Mother said she saw the nurse with the bell when she picked the Student up at the end of the day, but did not think the nurse was ringing the bell close to the Student at that time. Tr. Vol. IV, at 894-899.

102. Ms. Forchee described the circumstances in which the bell was rung. She said John, the teacher who played Santa Claus, was looking for the bell and she had just found it. She said she was not in the same area as the Student, but was in the office and she was talking on an intercom.

103. When asked to estimate how far she was from the Student, she said six to eight feet. She said it was no further than the size of a standard table set in the room, not more than eight feet. Tr. Vol. I, at 227-229.

104. Later, Ms. Forchee stated she was “at least 12 feet” from the Student. Tr. Vol. I, at 265. However, after that comment, when asked if she was 12 feet from the Student the whole time, she said she “didn’t know.” She just remembered the part about the intercom. Tr. Vol. I, at 272.

105. When asked if it would be her responsibility to let other staff people at the school know that ringing a bell around the Student could induce a seizure, Ms. Forchee said it was, but then she further explained, “if I knew for sure that was the day it was going to happen.” Tr. Vol. I, at 233.

106. When asked if she had ever read the Student’s IEP, Ms. Forchee said no. She reiterated that she did not read the IEPs. She said, “I only run on what they have on the physical.” Tr. Vol. I, at 229. She said the students have a physical when admitted to the State Schools for the Severely Handicapped. She said she was aware that a number of years might go by before another physical was submitted, but she would use a newer physical submitted it to the school by the parent. Tr. Vol. I, at 235, 239.

107. Ms. Forchee clarified that she did read each student’s special health care procedures and maintained a copy of the procedures in the nurse’s office. Additionally, each classroom also had a copy of the procedures. Tr. Vol. I, at 236, 252-253, 264; PEX 13.

108. Ms. Forchee said that special health care procedures for students were authorized once both the parent and a doctor completed the necessary paperwork, which explains exactly what needed to be done. The school had in its possession detailed paperwork about the health care procedures and dangers to watch for with the Student. Tr. Vol. I, at 250-252; PEX 13.

109. Ms. Forchee said she visited the Student’s classroom each day. When asked how long she would spend in the classroom, Ms. Forchee said that she would often just stand at the door and read notes that were put in the door. If a student was having a particular problem, she might be called into the classroom. Tr. Vol. I, at 247.

110. She reported that she did not see the Student being abused or neglected. Tr. Vol. I, at 247.

111. Krista Green was the occupational therapist while the Student was attending Mapaville State School. She worked there from August 2005 until August 2008, but as a contractor and was employed by Powder Lane Associates. She was his therapist for three years. Tr. Vol. II, at 336, 407-408.

112. Ms. Green is licensed and registered as an occupational therapist. Tr. Vol. II, at 339.

113. Separate counsel, Christine Vaporean, represented Ms. Green. Tr. Vol. II, at 335. Ms. Green could be characterized as a reluctant witness. Her answers were very brief; she spoke very softly and was sometimes hard to hear. At first, when asked questions, her answers were sometimes unresponsive or seeming to try to avoid a response. She also said, "I have been told to only answer relevant questions." Tr. Vol. II, at 339.

114. She said she had seen the Student sleeping in his wheelchair. She affirmed that he sometimes shut down based on lack of interaction and would sometimes come out of it when he was interacted with. Tr. Vol. II, at 340.

115. She said she had once witnessed aides; Marsha and Kathryn, exercising while the students were in the classroom. She said they had turned the CD on while the physical education teacher was in the classroom, but continued to dance after she left. She "interpreted" their dancing as "working out." Tr. Vol. II, at 341.

116. When asked if the students in the classroom were participating in any way with the dancing activity, she said "at times." Tr. Vol. I, at 351. When asked to clarify further the amount of staff engagement with the students while dancing, she said, "If the kids were up and walking around and dancing then they would approach them and clap with them or help them out. But once the kids went to sit on the floor or back at their chairs they didn't actively try to engage them and pull them back into an activity." She then went on to explain in terms of how much participation there was to the dancing on behalf of the students, she said, "Off and on. If they wanted to. They ...the staff wasn't really being very active to encourage them to come up but if they wanted to stand up and dance they could." She said she engaged the Student during the particular time she witnessed the exercising, but that the other students who were not engaged at the time were just, "sitting there." Tr. Vol. II, at 412-413.

117. She said that during that time she had tried to put the Student into his stander. She was told by Kathy Pope to wait 10 or 15 minutes, but was not given a reason why. She denied being specifically told that it was so that Kathy Pope could keep her heart rate up. Tr. Vol. II, at 341-342.

118. She said that she had witnessed students being taken into therapy rooms and left to sit while their therapists were reading their books. She had seen the Student being taken to the therapy room, but had not specifically seen someone reading a book while they were with him in the therapy room. Tr. Vol. II, at 342.

119. She verified that she thought students in wheelchairs were more easily neglected than other students in the school. She said she thought this happened because it was harder for the students in wheelchairs to get up and walk around. Tr. Vol. II, at 343.

120. She said that she had expressed concern to the Mother about the heat in the Student's classroom. She was working with him one day when the Student's cheeks became really flushed and she went to get the Mother to tell her the Student was overheated. Tr. Vol. II, p. 343.

121. Krista Green said that when she told Ms. Poposky that the Student's cheeks were hot, Ms. Poposky said something indicating she knew it was hot, but at the time, nothing was done about it. Tr. Vol. II, at 353.

122. She verified that she saw a change in the Student's demeanor since he had been receiving services at home. At home, he seemed more relaxed and alert. He was usually more responsive and happier. Tr. Vol. II, at 344.

123. She affirmed that she thought that the staff in the Student's room was one that needed rearranging. She said that there was not a good leader in the classroom. She said staff was "struggling as far as they -- putting together a routine and making sure things got done in a timely matter." Tr. Vol. II, at 344.

124. Ms. Green said that she was aware that the Student's IEP called for a one-on-one aide. Tr. Vol. II, at 484. She described overall care as "fine" and that "she wanted Student in the gait trainer more" but other than that "I didn't see anything that I can recall." Tr. Vol. II, at 484.

125. Lynn Suiter was a physical therapist who worked at the school for 12 years. Her own counsel, Ms. Christine Vaporean, also represented her. Tr. Vol. II, at 335. She was licensed and certified to provide physical therapy. She stopped working at the school at the end of the last summer school session. She was the Student's physical therapist the entire time the Student was at the school. Like Ms. Green, an outside contractor actually employed her. Tr. Vol. III, at 443-444, 456

126. When asked if she witnessed the Student being abused or neglected she said "not to her knowledge". Tr. Vol. III, at 484.

127. Ms. Suiter didn't recall if she saw the Student sitting alone unattended in his wheelchair. Tr. Vol. III, at 485.

## **2. Implementation of Specific IEP Goals During the 2007/2008 School Year and Delivery of Related Services**

128. Barb Poposky, the Student's teacher, thought the Student made progress on some of his goals during the 2007/2008 school year. Tr. Vol. III, at 678.

129. On Goal 1 (“The Student will show participation in self feeding skills”), Ms. Poposky stated she was the primary person to work with the Student on this goal. She described how they worked with foods with different textures, starting with pudding-like foods and moving up to grainier textures. She explained that they were trying to increase his oral feeding skills, although they had done some work with him in this area before. She explained that the idea was for the Student not to choke when being spoon-fed. She also said that she had worked with him on this goal several times a week. Tr. Vol. III, at 668- 669.

130. She said that the reason the goal was marked “mastered” on January 22, 2008 was because the Mother thought the Student had made progress and was going to continue to work with the Student at home since he wasn’t going to be in school anymore. Tr. Vol. III, at 670.

131. When asked to describe what they had done on Goal 2 (“The Student will participate in an exercise program to increase upper extremity strength”), she said, “They were looking at increasing the amount of time. Stretching and upper body exercises were as described previously.” She also identified the work they had done when they went bowling. When asked why the comment says, “End evaluation results,” Ms. Poposky said that this goal was discontinued on January 29, 2008 in order to revise the goal. She said that this decision was made at the January 29, 2008 IEP meeting and she had a melt-down at that particular meeting, so she couldn’t identify what exactly happened in terms of that goal. Tr. Vol. III, at 671.

132. When asked if she thought the Student had received any benefit under Goal 2 during the IEP period, she said, “I believe he had.” Tr. Vol. III, at 670.

133. Ms. Poposky was then asked about Goal 3 (“The Student will exhibit head and trunk control in various positions”). For Goal 3, she said that they continued with the supine stander and believed they had increased the amount of time shown beneath the “Under How Well” heading for that one goal as well. She said that Benchmark (3) of that goal was “maintaining his trunk erect in an upright position” and “we had different equipment for that.” Tr. Vol. III, at 673.

134. When Ms. Poposky was asked if the Student had progressed under this goal, she said, “with certain pieces of equipment, yes.” She thought he did well with the floor mat and bolster wedge. However, she added, “On the gait trainer, because it had not been utilized as had been asked by the Mother, [the Student] was not improving as he should have been.” Tr. Vol. III, at 673.

135. There were no further specifics provided by the testimony of Ms. Poposky on how the Student was progressing on these goals from just her memory. Tr. Vol. III, at 668-673.

136. Ms. Poposky then described her work under Goal 4 (“The Student will move legs to interact with the environment”). She said that they would mainly do this when changing his diapers. She said they would either help him position his legs with his feet and would see if they could get him to lift his bottom with a verbal prompt and by touching against the sides of his hips. Ms. Poposky said that she personally tried to do this every time she tried to change his diaper and when asked about whether he progressed she said, “I felt he did when he was changing with me.” She then explained that because of the rotating schedule, she did not know how consistent either Kathy or Marsha were because “when they changed him, she would be working with another

student.” She explained further, in terms of his progression on this goal, “I don’t know. All that I could go by with that for certain would be what was in the charting, what they charted.” Tr. Vol. III, at 675.

137. When asked about how they implemented Goal 5 (“The Student will reach and grasp for objects”) during this IEP period, she said, “as before, but we were looking for more independent grasping with this in a variety of situations, different things, different setting.” Tr. Vol. III, at 675.

138. She was then asked to look at Benchmark (3) under Goal 5 and explain which pieces of the equipment they utilized and to be more specific about how they implemented this goal. Her response was that they had “a variety of switches which would activate the adaptive toys or leisure devices.” She then said they had “a computer with a touch screen that the PT had brought up.... as a goal,” and further explained, “and I am not – but and that would have been getting his attention on the computer.” Tr. Vol. III, at 676.

139. The touch screen had not been set up in the classroom. Tr. Vol. III, at 356,389.

140. This was the most specific information she offered on how they worked on this IEP goal from her memory in the 2007/2008 school year. Tr. Vol. I, at 676.

141. When asked about how they worked on Goal 6 (“The Student will communicate through eye gaze”), she explained that the Mother brought pictures from the previous year and they had taken some pictures of items in the classroom. She said she did not remember the timing on this. Tr. Vol. I, at 676.

142. When she was asked by Respondent’s counsel how they were working on Goal 6, Benchmark (1), which involved matching pictures with objects, she said, “As I said, I don’t know that we had started on that yet. The plan that I had was to have the object and have him looking at the pictures.” Tr. Vol. I, at 676.

143. When asked if she had started on Benchmark (2) of Goal 1, she did not answer whether they had started working on that goal, but just identified what they were supposed to do. Tr. Vol. III, at 677.

144. She was also asked to describe how they were working on Goal 7 (“The Student will follow simple requests”), she described giving the Student directions when feeding and changing him, and she also said they read books and tried to get his attention. Tr. Vol. III, at 678.

145. When asked to go through for the Panel and explain more specifically which goals the Student was making progress under, she referred back to what she had said about changing his diapers, as far as responding to directions and use of his legs. She then explained that they had put an activity mobile in the classroom and, although he was not actively reaching for objects, she thought there was some arm movement towards favored pieces. However, it was “not full arm movement” and “it just may have been what I was seeing.” She added simply that “he

continued with the trunk and therapy ball,” but then did not explain further what improvement she was seeing on that or any other activities from her memory. Tr. Vol. III, at 678-679.

146. Ms. Poposky explained what progress charts were as part of her testimony. She stated it was basically a form based on the IEP that “let people know how to work with the Student on a particular goal. And take data on what we see in the classroom as progress, no progress, or just continuing.” Tr. Vol. III, at 680.

147. She also explained how they used progress charts to specifically measure the Student’s progress based on the IEP and use the guidelines based in the Student’s IEP. Tr. Vol. III, at 686. She used the progress charts to see if the Student was making progress. Tr. Vol. III, at 695, DEX. 8. She also verified that the progress reports were one of the ways that the parent was kept in the loop as to what was happening with the Student. Tr. Vol. III, at 698-699.

148. The progress reports for the early fall, which were before September 25, 2008 when the new IEP went into effect, just say, “Goal mastered per criteria” for each goal and there is no other data reported. DEX 12. However, not all goals and benchmarks were mastered on the 2006/2007 IEPs and there were some goals that were continued on the September 2007/2008 IEP. No data was provided in the exhibits for the period before September 25, 2008. DEX 9 and 13.

149. Ms. Poposky said she made up the progress charts and that the classroom staff, including her, filled out the charts and initialed their entries. She gave instructions to her aids on how to fill out the data charts. Tr. Vol. III, at 681-690. For the 2007/2008 school year, most of the data charts are initialed by people other than Ms. Poposky. DEX 8.

150. In the 2007/2008 school year, the staff was only required to chart two times a month. Before that, staff was required to chart once a week. Tr. Vol. III, at 694.

151. When asked if the therapy staff also used the progress charts, she said, “Yes, sir. I asked all the therapists to please chart as they worked. Not all of them did. And they did not always chart when they had [the Student] and were working with him.” Tr. Vol. III, at 697.

152. Ms. Poposky was asked to review DEX 8, the reports of the Student progress for the 2007/2008 school year. When she was asked if the documents were true and correct to the best of her knowledge, information and belief, she responded as follows, “At the time, yes, sir. Again, reflecting on where I was at the time, I don’t want to say anything without looking at the charts and everything, too.” Tr. Vol. III, at 700.

153. Ms. Poposky testified that the Mother first complained to her about the IEP implementation in the fall and was specifically concerned about the use of the gait trainer and the computer. Tr. Vol. III, at 697.

154. Ms. Poposky said that the Mother complained because she wanted the Student to be put in the gait trainer daily and that the Student was not put in the gait trainer every day. She said in response to the Mother, she tried to give her reasons, but looking back, “it was just excuses.” Tr. Vol. III, at 698.

155. In early January 2008, Ms. Poposky verified that the Mother had come to her with concerns about the IEP implementation and had also approached the Building Administrator. The Building Administrator talked to Ms. Poposky about the Mother's concerns. Tr. Vol. III, at 702.

156. She said in response to the Mother's concerns, "I reacted negatively to [the Mother] and I was sorry I did." However, she said the staff continued to work on the Student's IEP after the complaints. Tr. Vol. III, at 703.

157. When asked how often she would use the gait trainer, she said, "I don't recall an exact number. But it wasn't often. I don't know for a while if it was even weekly." Tr. Vol. III, at 735. Later, she said, "she didn't know if there were a couple of times." Tr. Vol. III, at 741.

158. Ms. Poposky thought Benchmark (2) under Goal 3 ("The Student was to maintain head erect during an activity") was a necessary component of Goal 3 and that use of the gait trainer was necessary to carry out Benchmark (2). She said that the other equipment listed under the goal, such as the floor mat, were there for protection or used to work on neck or head stability, but not to directly keep the head erect during an activity. Tr. Vol. III, at 736-741. She also said that for the Student to have benefited from the use of a gait trainer, it would have had to been used regularly. Tr. Vol. III, at 741; DEX 9.

159. Ms. Poposky testified that the gait trainer was also a necessary piece of equipment for Benchmark (3) under Goal 3 ("The Student will maintain trunk in upright position"). The only other equipment listed was the floor mat, which she confirmed was used for safety, and the therapy ball. Tr. Vol. III, at 744.

160. The system that Ms. Poposky described for making sure IEP goals were addressed was that she would work with him on the oral feeding and otherwise staff would be rotated. Whichever staff person was working with him that week would be responsible for all the other goals and benchmarks. She had previously described the rotation system as a schedule where one person would be assigned to three students with the other staff people assigned to two students, and then, they would change either every week or once every two weeks. Tr. Vol. III, at 745.

161. When asked earlier if Kathy Pope, one of the two aides, knew the Student's IEP goals, she said, "By rotating you might not remember details of a goal or a benchmark, but as far as a general idea, I think Kathy should have known because it wasn't his first year." Tr. Vol. III, at 615.

162. Ms. Poposky was then asked to listen to PEX 22 on January 23, 2008, from approximately 3 hours and one minute to three hours and 30 seconds. She identified the voices in the audio as her own voice and the voice of Kathy Pope. On the audio, you can hear the voice that has been identified as Kathy Pope talking to Barb Poposky and saying a few times that she did not know that the Student's goals involved the computer and you can hear the teacher explaining to the aide how the activity is related to the goal. Tr. Vol. III, at 615; PEX 22.

163. The Mother was especially concerned about implementation of Goals 3 and 5 during the 2007/2008 school year. Tr. Vol. III, at 865

164. The 2007/2008 data charts for Goal 3, “maintaining head and trunk erect,” reflected the following for Benchmark (1), “the Student to hold his erect in the supine stander for 25% of opportunities.” The Student was shown to have held his head erect in the supine stander for five minutes for 50% of the time during seven charting opportunities and for 25% of the time for two of the opportunities. The aides, Marsh Adams and Kathy Pope, and the teacher, Barb Poposky, initialed the notations. The data charts put into the record by the Respondent do not start until October 17, 2007. DEX 8, at 339.

165. In contrast to the data charts, Barb Poposky actually testified that the Student could not hold his head erect for five minutes in the supine stander. Tr. Vol. III, at 735.

166. The data charts for Goal 3, Benchmark (2), also started on October 17, 2007, showed that the Student was holding his head erect in a variety of activities for more than 30 seconds from between 25% to 75% of the time for all dates that were charted, with the exception of October 17, 2007, in which the Student was only shown to hold his head erect for 10 seconds. There is nothing in the records to indicate that the measurement included the use of assistance as with some of the other benchmarks. There are no initials as to who charted the student’s progress. DEX 8. The Mother testified that he could hold his erect without support for maybe two, three or five seconds. Tr. Vol. III, at 788. The homebound teacher, Deborah Sanderson, also said he could only hold his head erect for about five seconds without assistance. Tr. Vol. III, at 519

167. The Report of the Student’s progress on Goal 3 for the period of September 25, 2007 until October 26, 2007 showed that, because it was a new IEP, there was not enough data to report. From October 27, 2007 until January 4, 2008, the progress charts stated the Student maintained appropriate head control for up until 5 minutes while in the supine stander and for 30 seconds or more when using other equipment, with the exception of the gait trainer. DEX 7, at 210.

168. The Report of Student progress for Goal 5 says the Student was regularly reaching and grasping toys for 25% of the time with reducing levels of assistance. The report shows the student to need full hand-over-hand to use switches to activate toys and life skills equipment. The computer touch screen is not mentioned in the Report. In the progress data charts for Goal 5 (“The Student will reach for and grasp objects”) and for Benchmark (1), “the Student will play with a simple toy,” the evaluators were to have looked for “reaching” and “grasping” skills. The charting also denoted the amount of assistance given by the person working with the Student, with full assistance being “hand-over-hand (h-o-h)” then scaling down to  $\frac{3}{4}$  to  $\frac{1}{2}$  to  $\frac{1}{4}$  to none. The charting shows that the Student reaching and grasping but then any tracking of grasping seems to fall off the chart in late December and the amount of assistance needed is often not designated or there are two different staff people tracking the amount of assistance needed on the same day, with one staff person representing that the Student needed no assistance. DEX 8, at 349.

169. Ms. Poposky first said that she did not remember whether the Student could reach and grasp for an object. She later said that he could not reach full out, but that they could put his arm

on a tray with it elevated and move his hand with the switch. She then said he could not “literally” hold an object on his own. Tr. Vol. III, at 747.

170. For Goal 5, Benchmark (3), the Student was to activate hardware to interact with the software program. The data charts showed he was using full hand-over-hand most of the time with the touch screen. This was only charted on one occasion at the end of January and the Student having 0% success. DEX 8, at 351.

171. When Ms. Poposky was asked if the Student had progressed under Goal 5, Benchmark (3), she said, “Not really, no. I don’t think so. I don’t know.” Vol. III, 748.

172. She could not recall or guess how many times they had worked on that benchmark, but she agreed that the Student would need repetitive activity on that benchmark to exhibit progress. Tr. Vol. III, at 748. When asked what the purpose of the activity was or what skills they were trying to teach the Student, she said that it was a “leisure activity” several times or was “fine arts.” Tr. Vol. III, at 749.

173. Krista Green said that she had 60 minutes of occupational therapy a week with the Student the whole time he was at the school. Tr. Vol. II, at 356. The 60 minutes were usually broken up into two 30-minute sessions. Tr. Vol. II, at 358.

174. Ms. Green explained DEX 21, which were bubble sheets that she used when she worked with the Student. She said the bubble sheets showed the amount of time spent with the Student, the activity and whether it was a direct service, consult, or training. Tr. Vol. II, at 364-374.

175. Ms. Green described the specific progress she saw the Student make on his goals under his 2005/2006 and 2006/2007 IEPs. Tr. Vol. III, at 357-365, 398-399. She was then asked to identify what progress the Student had made “since that time” which would have included the entire 2007/2008 school year and the time she served the Student in homebound education. She said he made progress with his oral motor skills and made progress using his left hand to interact with the environment. Tr. Vol. II, at 400.

176. Ms. Green was asked to review the Student’s September 2007/2008 IEP DEX 13. She verified that she worked on all the goals and benchmarks that she was supposed to work on. She explained how the services had changed between this IEP and the last one. Tr. Vol. III, at 366. She then went on to describe her work when the Student was under in the homebound program. She did not describe what happened or what progress the Student made specifically during the beginning of the 2007 school year until the Student was pulled out of school. Tr. Vol. II, at

177. When describing his progress he was making in relationship to his occupational therapy at the time the 2007/2008 IEP was developed, she said he was moving into small feeds of pureed textured food, and moving away from just simple switch toys and working towards using a computer, so he could understand cause and effect. Tr. Vol. II, at 366.

178. When Ms. Green was asked whether she had worked with the Student on Goal 5, Benchmark (3), she said she had only worked with the Student once at school because the computer was not set up in the classroom. Tr., Vol. II, at 356.

179. She did not know why it wasn't set up and never asked the staff why it wasn't set up. Tr. Vol. II, at 390.

180. When asked if daily repetition and repetitive actions were necessary for achieving Goal 5, Benchmark (3), she said "yes." Tr. Vol. II, at 388.

181. Ms. Green said that Goal 5, Benchmark (3) could have been worked on without the computer and by using different equipment. She explained the purpose of the Goal is related to cause and effect. She then said that the ultimate goal it to work with the software program and the other devices did not involve software. She then confirmed that the purpose was to eliminate the other equipment and lead up to the goal of working with the computer. Tr. Vol. II, at 401 - 404.

182. Ms. Green also said that the therapists did not collect the data for working on a goal because the therapists "worked on the underlying skills to help the classroom achieve the goal." She then said their work wasn't completely relevant to the goal and the "classroom is the one that doing the documentation." She also said that the therapists worked with the other staff as part of the team to achieve a goal. Tr. Vol. II at 410, 400.

183. Lynn Suiter, the physical therapist, was asked about the use of the gait trainer in implementing the Student's IEP. She said she remembered showing staff how to use the gait trainer, but was not sure how many times she had done so. Tr. Vol. II, at 444.

184. She said it appeared it was hard for them to do or might be awkward for them, so she showed the staff how to use splints when putting the Student in the gait trainer. Tr. Vol. II, at 444-445.

185. Ms. Suiter said she didn't specifically recall the staff complaining, but thought it might have been hard for them to use the gait trainer. Ms. Suiter said she thought maybe there was something she heard about it, like whether it was being done. She thought the Mother said something to her about it, and Ms. Suiter said she told the Mother she would go back to the class. Also, she talked to the Building Administrator. Tr. Vol. II, at 446.

186. She said she didn't remember specifically if the reason the staff didn't put the Student in the gait trainer was because of a certain person having back problems. She later said she thought she remembered asking if they had put the Student in the gait trainer on a certain day and "maybe they were having problems with their back that day." Tr. Vol. II, at 502.

187. She said she told the classroom staff that since the Mother had a stander at home, maybe they could use the time they had been using to work with him on the stander to work on the gait trainer instead. She had no recollection of the staff's response. Tr. Vol. II, at 447.

188. She said that the Building Administrator asked her to work with the Student on the gait trainer more. She explained that she had other goals to work with him on as well, and the classroom should help out. Tr. Vol. II, at 448.

189. Ms. Suiter said it “possibly” seemed liked they used it every other session. Tr. Vol. II, at 448.

190. She later said, after she showed the staff how to use it, she “maybe” used it every fourth visit. Tr. Vol. II, at 467.

191. She said she didn’t know if the classroom staff had put him in the gait trainer or not. Tr. Vol. II, at 453.

192. She thought it was critical that classroom staff work on goals that therapists and service providers are working on. Tr. Vol. III, at 452-453.

193. She reviewed the goals from his 2005/2006 IEP that were primarily worked on during the 2005/2006 school year. She explained how she worked on the goals. Tr. Vol. III, at 458-461; PEX 5.

194. She then explained what the Student generally worked on over the years. Tr. Vol. III, at 462.

195. Ms. Suiter identified the September 2007/2008 IEP, read the goals and explained how they differed from the past IEPs. She also generally described some activities she worked on under that IEP and also identified what she didn’t work on because it “wasn’t a goal she was assigned to work on.” Tr. Vol. III, at 465.

196. Without going through each goal and benchmark individually, when asked if she had worked on all of the goals and benchmarks on the September 2007/2008 IEP, she answered affirmatively. Tr. Vol. III, at 466.

197. She explained she trained the staff how to work on other goals and put up pictures with Krista Green for the staff to utilize with their sessions with the Student. Tr. Vol. III, at 470-471.

198. Ms. Suiter identified the bubble sheets she used to track her therapy with the Student. She said she sometimes filled out the bubble sheets at the time and sometimes she made notes and filled them at some other date, because she was going from kid to kid. Tr. Vol. III, at 473-475; DEX 20.

199. When asked if the bubble sheets were correct, she said to they were to her “best knowledge and recollection.” Tr. Vol. III at 476. She then also explained how the bubble sheets correspond with goals. Tr. Vol. III, at 477.

200. She verified that the bubble sheets were meant to reflect the time she spent with the Student. When she was asked if times recorded were true and correct, she says, "I believe to the best of my ability." Tr. Vol. III at 478.

201. Ms. Suiter did not know if she saw his charting on any particular goal or benchmark. Tr. Vol. III, at 488.

202. When Ms. Suiter was asked whether she saw the staff using the photos that she and Ms. Green had put together for the staff to use with the Student, she said she thought that she saw them "on the mat maybe doing some sitting and stuff." And beyond that she said, "Once they showed them they kind of showed them." She then explained, "I, as far as, you know, sitting and side sitting and weight bearing I don't recall specifics." Tr. Vol. III, at 496.

203. She had trouble recalling any specific questions the staff members asked her about implementing the Student's IEP goals relating to her role as a physical therapist or remember them reporting back to her on his progress. However, she did remember initiating conversations with the staff. Tr. Vol. III, at 498-501.

204. She said that when she provided homebound services she was able to initiate him to take some steps. She further explained that she did not see the student do step-over-step; she did see him do weight shifting and that she could feel his muscles pull through to do a step. When she witnessed him shifting his foot, it made her cry. Tr. Vol. III, at 449-451.

205. During the 2008 IEP period, Deb Sanderson was the Student's instructor at home from the period of February 2, 2008 until the time of the filing of the Third Amended Complaint on March 20, 2008. She also continued to be his home instructor at the time the due process hearing took place.

206. The Mother testified that the Student could not hold an object and could not grasp an object based on a prompt. She said that his head and trunk were underdeveloped and he could hold his head erect for five seconds at the most. In terms of reaching, the best she thought he could do is swipe at things and hit the object or bang it. The Mother demonstrated the ability of her son to hold a cell phone with her son at her side, and he demonstrated no ability to hold the cell phone at that particular time. Tr. Vol. III, at 789.

207. The Mother explained that she wanted the gait trainer to be used in addition to the stander because of the limitations of the stander. In the stander, she said the Student would be restrained at the feet, knees, chest and hip. She didn't expect the Student to walk in the gait trainer, but was not ruling it out either. Tr. Vol. III, at 815.

208. The Mother also approached Ms. Puposky about the gait trainer and the other goals in the Student's IEP. She explained that she took out the Student's new IEP and went through the IEP, asking Ms. Puposky why she hadn't started to work on the new goals. She said that Ms. Puposky gave her excuses for why the IEP goals had not been implemented, including the gait trainer. She said that Ms. Puposky told her that she was trying to get accustomed to the classroom

and the rambunctious boys. Tr. Vol. IV, at 840 and 842. The Mother thought that in terms of the Student's overall progress, he had progressed or gone forward. Tr. Vol. III, at 913.

### **3. Conclusion of Services at School at the End of January 2008 And Implementation of Homebound Services**

209. The Mother testified that she went to an IEP meeting on January 29, 2008 and read through a statement she had written out of all her concerns. Before going to the meeting, she had researched what would be necessary for her to provide home schooling and that was what she intended to do. She attended the meeting with Craig Henning, the Executive of Disability Resources Administration, who recommended at the meeting that she withdraw the Student from the school. She said that she addressed both IEP and safety issues, including not knowing if the Student would be fed while at school. The Building Administrator, Mary Schilling, asked the Mother whether she wanted Home Bound instruction and she agreed. Protecting the child from harm was her primary reason to agreeing to homebound instruction. Tr. Vol. III, at 894-895, 923.

210. Craig Henning, the Executive Director of Disability Resource Administration, also testified as to what happened at the meeting. He said that Mary Schilling the Building Administrator, was present, as well as several other staff member, including a one staff person who was crying and another that was apologizing to the family. He said the Petitioners had prepared a statement for wanting to withdraw the Student from the school, including the Student's lack of progress and other issues, such as the Student being left in his chair for long periods of time. He also said that the Building Administrator stated to him that she was so sorry, that they would fix the situation and it wouldn't happen again. Mr. Henning also testified that he thought audio-visual surveillance would be a good way to address the situation at the school. Tr. Vol. I, at 57-58.

211. There was no one at the hearing in an administrative position that testified as to what happened at the January 25, 2009 IEP meeting.

212. Mr. Charlie Taylor, the Superintendent for the State Schools for the Severely Handicapped, heard of the allegations at Mapaville towards the end of February 2008. After learning of the allegations, he met with parents at the school and conducted an investigation. Tr. Vol. IV, at 946-947.

213. He testified that Barb Stevens, a retired superintendent with over 30 years of experience, was hired on a contract basis to provide support to the staff at Mapaville. Tr. Vol. IV, at 948.

214. Since the filing of this complaint, Barb Poposky is not a classroom teacher and is now an aide at Mapaville. Marsha Adams and Kathy Pope are no longer employed by the State of Missouri and have no instructional responsibilities at Mapaville State School.

215. Mr. Taylor investigated the use of audio-visual surveillance at Mapaville. He thought that it would be a costly and complex undertaking, and would create many confidentiality issues, as well as a negative atmosphere. Tr. IV at 961, 969.

216. Mr. Taylor thought that the school was taking steps to rebuild trust with the parents and that they were heading in the right direction. Tr. Vol. IV, at 971.

217. Mr. Taylor testified that the Mapaville Student Handbook was a policy of the State Schools for the Severely Handicapped and the Handbook included a statement that treat Students with courtesy and respect. Tr. Vol. IV, at 953-954,\.

218. Ms. Deborah Sanderson was the Student's homebound instructor for the February 2008 IEP developed when the Student was pulled from the school. She spends five hours a week in his home. Tr. Vol. II, at 514-515

219. Ms. Sanderson has worked at Mapaville for 29 years. Ms. Sanderson has a Bachelor of Science Degrees in both special education and elementary education. She is also a certified teacher. Tr. Vol. II, at 514, 528.

220. Ms. Sanderson described specific progress she has seen in the Student while working with him at home. She has seen him take steps in the gait trainer and responds when he is encouraged to do so. She specifically described the lower extremity exercises she does with the Student and how he has progressed in that area. Tr. Vol. II, at 516. She also described specific ways she kept him engaged and encouraged him in other areas. Tr. Vol. II, at 521.

221. She thought the Student responded well to interaction. Also, she stated it would have a negative effect on him not to be interacted with for a 15- or 20-minute period and that he might shut down when he received no interaction. She also thought that the Student would pick up on a negative environment around him and thought it would be detrimental to be questioning why they were working with him on a certain activity or making remarks about his inability to do something. Ms. Sanderson also thought the Student needed an ongoing environment of encouragement. Tr. Vol. II, at 523-526.

222. She could not remember ever seeing the Student asleep while working with him. Tr. Vol. II, at 525.

223. She also testified that she worked with the Mother as a team when she made the homebound visits. Ms. Sanderson explained that the Mother assisted in positioning and lifting the Student, and had him in the equipment when she arrived at the house. She said the Student was already in the gait trainer when she arrives, they were ready to work. Tr. Vol. II, at 515-516.

224. The Mother believes Ms. Sanderson had the computer needed for one of the Student's IEP goals set up in one week. Tr. Vol. IV, at 865, 891.

225. The Mother thought Ms. Sanderson was "awesome" and had no problems with the implementation of IEP goals during the homebound period or his progress. She also thought that the occupational and physical therapies were delivered appropriately and she worked together with them at home also. However, she also noted that they did not have a physical therapist in place since late August. Tr. Vol. III, at 870, 910; DEX 2, 4, and 27.

226. The Mother observed the following about the Student after he started the homebound program. She said his “whole demeanor, his whole personality changed as far as being active and being interested again.” She continued to say that he was no longer lethargic. Tr. Vol. III, at 925.

227. The Mother said she wanted the following services as a remedy or compensatory education:

- One year of physical therapy from Jefferson Memorial Hospital, for 90 minutes a week, in addition to time rendered in his IEP
- Thirty minutes of physical education from Pro Rehab or another similar organization
- Independent observation by installation of cameras with audio for the parents to observe through the internet installed at the State Schools, which she thought was necessary to ensure his safety;
- She also asked that the Student’s IEP require that he has a certified teacher in his classroom

**C. Implementation of the Student’s IEPs from  
March 20, 2006 until the End of the 2006/2007 School Year**

228. Because of the Statute of Limitations, the only time period during the 2005/2006 school year that was at issue in this due process hearing would have started at the end of the year beginning on March 20, 2006.

229. The goals on the 2006/2007 IEP are stated above. The goals on the 2005/2006 IEP were as follows:

- Goal 1 - The Student will direct eye gaze when presented with two choices;
- Goal 2 - The Student will produce any vocal response, other than crying, when presented with stimuli;
- Goal 3 - The Student will operate a switch to activate a leisure or functional activity;
- Goal 4 - The Student will maintain grasp of various textures and objects;
- Goal 5 - The Student will open mouth for oral stimulation;
- Goal 6 -The Student will bear weight on arms and legs; and
- Goal 7 - The Student will maintain head erect in a variety of positions. PEX 5.

230. The Mother testified that she did not have a problem with IEP implementation during the 2005/2006 or 2006/2007 school years. Tr. Vol. III at 802, 861, 863-864, and 861.

231. As described above, Ms. Barb Puposky was the Student’s classroom teacher during this time period. As also outlined above, she was a long-term substitute teacher, had only 60 total hours of college credit and was not a certified teacher.

232. As described above, the Student’s IEPs said he should have a one-to-one aide (student to staff ratio) during the 2005/2006 and 2006/2007 school years.

233. The Mother testified to actively participating in all the IEP meetings. None of the goals she requested were rejected up until the 2007/2008 IEP meeting and she agreed to the goals that were put into each IEP. Tr. Vol. IV, at 853.

234. For the 2005/2006 school year, the following evidence demonstrated that the Student's IEP was being appropriately implemented:

- The teacher's aide, Judy Gibson, testified to having worked with the Student on his IEP goals daily and also testified to charting his progress weekly. Ms. Gibson had no concerns about IEP implementation in the classroom and also could recall specifics about his performance towards his goals. Tr. Vol. I, at 70, 86-89, 93-100, and 104-108; DEX 32-33.
- Ms. Poposky was able to specifically go through the goals on the 2005/2006 IEP and explain what they worked on and how the Student progressed. Tr. Vol. III, at 635-643.
- The Student was shown to have mastered many of the goals on the 2005/2006 IEP. PEX 5. The Parent was present when the 2006/2007 IEP was developed and the progress the Student made was documented on the new IEP and the new agreed-upon goals were also based on the progress during the 2005/2006 school year. PEX 5 and 6.
- There was no other evidence presented by either party that the parents did not approve of the IEP implementation during the 2005/2006 school year or disagreed with the progress the Student had made that was documented by the Respondent. Tr. Vol. I-IV.

235. While the Respondent's evidence covered the whole year and was not directed at just the period after March 20, 2006, there was also nothing to suggest that the end of the school year was different than the rest of the year.

236. The Petitioners did not for the most part contradict the evidence presented. However, the Petitioners did raise some questions as to whether the Mother now actually thought that progress marked on the goals was accurate. Specifically, she testified that she did not agree with comments written on the 2005 IEP that he could operate a switch for 60 seconds with his right hand without assistance. She also now disagreed that her son could maintain his head erect without assistance, as indicated on the 2005 IEP. Tr. Vol. III, at 828-830; PEX 5.

237. Ms. Poposky reviewed the IEP for the 2006/2007 school year and described the Student's progress on every goal. She gave specific examples on how they worked on specific goals and how the Student responded. For example, when she was asked how they worked on Goal 4, which involved responding to oral stimulation, she described working with a sponge stick, then working with a soft tooth brush and toothpaste, and working with different textures so that the Student could get accustomed to having different flavors in his mouth. Tr. Vol. III at 653-667; DEX 13.

238. The September 2007/2008 IEP showed the Student made progress in the previous year and based the new goals on the progress the year before. PEX 7. The progress reports and data charts indicated progress during this period of time. DEX 31-32.

239. The Petitioners did present evidence questioning how the classroom functioned during the 2006/2007 school year through a volunteer at the school, Karen Ford. Tr. Vol. II, 319-333. She volunteered from August 2006 until June 2007. Tr. Vol. III, at 331.

240. Ms Ford volunteered for parties and various administrative projects the school had for her to do, like cutting or putting together binders. She said that sometimes she was there anywhere between a 2-week to 1-month time period, depending on the project. Sometimes when she was working on a project, she would be there every day. Tr. Vol. II, at 320, 328.

241. Her granddaughter was a Student at the school and in the same classroom as the Student. For that reason, she testified she would go into the Student's classroom several times during the day for up to 30 minutes a day when she was volunteering at the school, maybe more than that. She also said she worked from 9:00 a.m. to 4:00 p.m. when she was there, and that, even when she wasn't volunteering, she would sometimes just stop by to see her granddaughter. Tr. Vol. II, at 328, 331.

242. While she was at the school, she said she thought the aides were "intolerant" of the students and "had no patience" for them. Tr. Vol. II, at 321.

243. She identified the aides by their first names as "Marsha" and "Kathy." Tr. Vol. II, at 321.

244. She said the aides said such things as "Sit down" and "Shut up." Tr. Vol. II, at 321.

245. She also saw them squirt one boy in the face with water on several occasions to control his behavior, stating it was not effective. She reported the behavior to the school principal. Tr. Vol. II, at 325 -326.

246. She thought the aides were "cold and mean" to the students and that they would literally "push the children away." She also said the staff would work on activities by themselves without the participation of the students. She was disheartened and thought the work with the students was a "waste of time." She also saw the aides put in videos and movies that the students did not watch. Tr. Vol. II, at 324.

247. Ms. Ford said that aides ran the classroom, not the teacher, and noted the teacher was not as mean as the aides. Tr. Vol. II, at 324.

248. Ms. Ford said that she only saw the staff work with the Student one time, and that was when he was in the stander. She only saw him in his wheelchair the rest of the time she was in his room. Tr. Vol. II, at 327, 330.

249. The Petitioners also questioned an incident involving the Student's arm being broken during the 2006/2007 school year. Tr. Vol. IV, at 901.

250. The Mother said she was called at work and told that something was wrong with the Student's arm. She said she picked the Student up and took him to the doctor. She explained that the Student does not cry and, to tell if he is in pain, you have to look at his face for a wince. Tr. Vol. IV, at 901.

251. The Mother said that she never received an incident report about the Student's arm popping while being put into a piece of equipment. Tr. Vol. IV, at 834.

252. She explained she took the Student to the doctor for an x-ray. She said she later heard reference on the audiotapes that the Student's arm had been broken at school. She also heard the physical therapist testify that one of the aides heard the Student's arm pop while putting him in a piece of equipment and that the aid went to get the physical therapist. She said she had not been told about the Student's arm popping when being put into a piece of equipment. Tr. Vol. IV, at 902-903.

253. Krista Green testified that in December 2006 the aide, Judy Gibson, called her into the classroom. The aide thought she heard a pop in his right arm when she was putting him into the stander. Ms. Green said that it seemed like he was indicating pain through weight bearing, so the mother was called. Ms. Green also said she had no personal knowledge that the Student's arm was broken at school. Tr. Vol. IV, at 386, 397.

254. Ms. Poposky testified that the Mother had told her in 2006 that she thought her son's arm was broken after having a seizure in an adapted chair at home. Tr. Vol. III, at 663-664.

255. Ms. Heilemann testified that the Mother had originally told her that the Student's arm was broken at home, but recently said the Mother said she wondered if the arm was broken at school. Tr. Vol. I, at 179.

256. Ms. Forchee, the school nurse, also said that when the Mother came back the next day, she told Ms. Forchee that the Student's arm was broken at home. Ms. Forchee said she would fill out an incident report if the Student was injured at school. Tr. Vol. I, at 248.

257. Ms. Sanderson later testified that if she heard a pop in an arm while working with a Student, she would file an incident report. Tr. Vol. II, at 535.

#### **IV. CONCLUSIONS OF LAW**

##### **A. The Burden of Proof and the Legal Status of the Parties**

This proceeding falls under IDEA (20 U.S.C. §1400 *et seq.*) and the regulations under IDEA at 34 C.F.R.300 *et seq.* The Mapaville State School for the Severely Handicapped is part of the State's system for day school services operated in separate school setting by the Department of Secondary and Elementary Education. The Student is now and at all times relevant to this proceeding be a "child with a disability" as defined by IDEA at 34 C.F.R. §300.8.

Under Missouri law, the Student has been a child that is “severely handicapped” under Mo. Rev. Stat. 162.675(3). The Missouri State Plan constitutes regulations in the State of Missouri for the implementation of IDEA.

In *Schaffer v. Weast*, 546 U.S. 49 (2005), the Supreme Court held that, as with most other civil proceedings, the petitioner bears the burden of proof in IDEA cases. The Court was silent as to whether a state could pass its own law under IDEA placing the burden of proof on a school district even when the district was a defendant. Regardless, in Missouri, there is no law which places the burden on school districts when they are defendants in a due process hearing.

The Petitioners here argue that the holding in *Schaffer* was narrow, and does not apply to cases in which the issue is the implementation of the IEP as opposed to the substance of the IEP. The same argument was rejected in *Van Duyn v. Baker School District*, 5J, 502 F.3d 811(9<sup>th</sup> Circuit, 2007) which held that even in a case involving IEP implementation, the burden of proof is on the petitioner. Likewise, since *Schaffer v. Weast*, courts have placed the burden of proof on the petitioners in a wide variety of cases. Even in *Schaffer*, a challenge to the content of an IEP does not, as argued by the Petitioners, only depend on the IEP meetings, which both parties attend, but also to what is actually happening to the student during the school day. Therefore, the Petitioners in this case, the Parents, have the burden of proof on all issues.

**B. Issue 1: Did the State School offer the Student a Free Appropriate Public Education under the Student’s operative IEPs from March 20, 2006 until June 27<sup>th</sup>, 2008?**

1. Legal Authority

Part B of the Individuals with Disabilities in Education Act (IDEA) provides that all children are entitled to a free appropriate public education (FAPE) to meet the child’s unique needs. 20 U.S.C. §1412. The child’s “individual educational program” (IEP) is the primary way in which a child receives a FAPE. 20 U.S.C. §1414. To fulfill IDEA’s mandate, each state has its own legislation which further defines the rights and responsibilities of parents and public schools in that state. The state can mandate more than what is required under the federal law but not less. In Missouri, R.S. Mo. §162.670 et seq. implements IDEA. The Department of

Elementary and Secondary Education (DESE) has adopted the *Missouri State Plan* for implementing Part B of IDEA.

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

In *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S.176, 102 S. Ct. 3034, 3037 (1982), the Supreme Court held that to comply with IDEA the school district did not have to offer the best possible education, but rather a “basic floor of opportunity designed to provide educational benefit to the handicapped child.” In *Rowley*, the Supreme Court summarized the statutory requirements under IDEA as follows:

"The term 'free appropriate public education' means *special education* and *related services* which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required.." *Rowley* at 204.

IDEA 2004 and its accompanying regulations continue to define a Free Appropriate Public Education as was defined at the time of *Rowley*. 20 U.S.C. 1401(9)(A-D) and 34 C.F.R. §300.17. Under IDEA 2004, the requirements for an individualized education program are defined at C.F.R. §§300.340-§§300.350.

The *Rowley* court went on to explain that the FAPE requirement is satisfied if the student with a disability receives “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Rowley* 203-204, 3034. The *Rowley* Court also explained that the IDEA does not require a school district to “maximize a Student’s potential” or provide “the best possible public education.” *Rowley* at 3047. The Eighth Circuit has interpreted *Rowley* as not requiring a school district to achieve “outstanding results.” *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8<sup>th</sup> Cir. 1998) or “superior results” *Fort*

*Zumalt v. Clines*, 119 F.3d 607, 612( 8<sup>th</sup> Circuit, 1997). The Eighth Circuit has also read *Rowley* to not require the school district to place the child in the placement the parents prefer if they can provide a FAPE in another setting. *Blackmun v. Springfield R-XII Sch. Dist.*, 198 F.3d 648,658 (8<sup>th</sup> Cir. 1999).

In determining what constitutes “a floor of education,” the Supreme Court looked to the reasoning of *Rowley* in deciding *Irving Independent School District v. Tatro*, 468 U.S 883(1984). In *Tatro*, the Supreme Court reviewed whether a school district had to provide clean intermittent catheterization (CIC) in order for a girl with Spina Bifada to attend school. The parents argued that the CIC was required under both IDEA and Section 504 of the Rehabilitation Act, but the Supreme Court based its ruling under IDEA. In ruling that the CIC had to be provided by the school district, the Supreme Court explained it looked back to *Rowley* and the legislative history of the Act and explained that “Congress sought primarily to make public education available to the handicapped children” and to “make such access meaningful.” The child needed the service to stay at the school during the day and without that service, the court held the child did not have “meaningful access” *Tatro* at 891.

In the case at hand, the Petitioners only challenge the content of the IEP in regard to one issue, the inclusion of audio surveillance at the school as an actual component of the IEP. Besides that claim, the Petitioners clearly do not challenge the content of the IEP, but its implementation. The Eighth Circuit has noted that failure to implement an IEP is “slightly different in posture” from other substantive IEP claims. *Neosho R-V School District v. Clark*, 315 F.3d 1022, 1027 n.3 (8<sup>th</sup> Cir. 2003). The facts presented to the Neosho Court involved an IEP that had attached documents that were supposed to be used to guide the school in controlling the student’s behavior. In footnote 3, the Court explained that neither party made the argument that the question was implementation, but thought that case was actually more similar in posture. The Court then explained that based on *Rowley* “we cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit.” *Id. at 1027*. The *Neosho* Court also explained that while the student was shown to be making at least some progress, that progress was not enough to offset

the detriment to the student for the failure of the school district to design and implement a comprehensive behavior intervention plan for the Student. *Id.* at 1029.

In footnote 3 of *Neosho*, the Court cited the standard articulated by the Fifth Circuit in *Houston Independent School District v. Bobby R.*, and explained it as follows: “to prevail on a claim under IDEA, the party challenging implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP.” *Neosho* at 1027, citing *Bobby R.* at 200 F. 3d 341, 349 (5<sup>th</sup> Cir. 2000).

The facts in the *Bobby R.* involved whether the IEP was properly implemented for a student with a learning disability. In that case, however, the Court emphasized that it considered not just what had or had not been implemented, but what progress the student was actually making during the time period in question. In holding that there had not been a material failure in implementation, the Court explained the student’s “test scores and grade levels in math, written language, passage comprehension, calculation, applied problems, dictation, writing, word identification, broad reading, basis reading cluster and proofing improved during his years in [the School District].” *Bobby R.* at 349.

In *Van Duyn v. Baker Sch. District*, the Ninth Circuit explained that “[i]n accordance with the IDEA itself, the Court’s decision in *Rowley*, and the decision of our sister circuits, we hold that a material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the Child’s IEP.” 502 F.3d 811 (9<sup>th</sup> Cir. 2007). The *Van Duyn* Court also looked at the actual progress demonstrated by a student that was autistic, and thought the evidence demonstrated actual improvements in the student’s behavior and social skills, as well as adequate progress in his academic skills despite some problems in IEP implementation.

In accordance with the aforementioned cases, this Panel looked for whether Petitioners demonstrated a “material failure” and more than a *de minimus* failure to implement the Student’s IEP. The Chief Hearing Officer allowed Petitioners to introduce evidence to the Panel that

mistreatment of the Student amounted to a denial of a FAPE. This theory also falls under the principles applied to issue one because it still involves implementation of the IEP and not the content of the IEP itself. Although the evidence was admitted, the Chief Hearing Officer had previously ruled that tort claims were not justiciable at a due process hearing, and that claims involving possible abuse or neglect were only being reviewed to determine if the allegations were related to the Student receiving a FAPE.

At the federal level, there are only a handful of cases that allege abuse or neglect as part of IDEA claims and the cases directly ruling on that issue involve the behavior of other students towards the child with a disability. The Eighth Circuit has indicated that a claim of abuse and neglect could be related to an IDEA claim. In *Stringer v. St. James R-1 School District*, the Court noted that “two circuits have ruled that harassment might be so severe and prolonged that it deprives the child of access to educational benefits.” 446 F.3d 799, 803 (8<sup>th</sup> Cir. 2006). However, the Court went on to hold that in that case there was no claim that harassment deprived the student of educational benefit. *Id.*

Likewise, in *M.L. v. Federal Way*, the Ninth Circuit observed that a teacher’s deliberate indifference to a child being teased at school could give rise to abuse so severe that the child would derive no benefit from the services offered by the District and thus lead to a denial of FAPE. 394 F.3d 634, 650 (9<sup>th</sup> Cir. 2004). However, in that case, the Court ultimately found that there was no evidence that the teasing had resulted in a denial of educational benefit. *Id.*

The previously mentioned cases can be distinguished from the present one because they involve student harassment of another student as opposed to the staff’s treatment of a student. However, in *Charlie F. v. Board of Education of Skokie School District*, the issue involved an IDEA claim regarding an allegation that a teacher repeatedly urged students to complain about a particular student and encouraged them to harass the student. 98 F.3d 989 (7<sup>th</sup> Cir. 1996). In that case, the Seventh Circuit held that the student had to first exhaust administrative remedies under IDEA before pursuing a claim under another cause of action. In so holding, the Court recognized that claims concerning a teacher’s behavior and his or her mistreatment of a student could be brought under IDEA.

It should also be noted that the Chairperson dismissed any matters that could not be decided under IDEA, including any tort claims. The question of whether any laws were violated in terms of what legally constitutes criminal or civil abuse or neglect under Missouri law is not for the Panel to decide. The evidence presented, specifically involving what the Petitioners called neglect, involved failure to interact with the Student on a regular basis, leaving the Student in his wheelchair for long periods of time, not conducting educational activities with the Student on a daily basis and not following school protocol in all matters involving the Student

The Petitioners' claims of abuse and neglect in this case can be further distinguished from *Stringer* and *M.L. Way* because it was the staff that was accused of abusing and neglecting the Student, and for that matter, the Petitioners' claims of abuse and neglect involved the only three people in the classroom that were primarily responsible for implementing the IEP and caring for the Student's welfare. The question's in this case are more reasonably related to *Rowley* and *Tatro* and whether the Student was denied reasonable access. Ultimately, the Panel has to decide whether the evidence demonstrated that the Student was denied FAPE during the time periods in question, regardless of whether the actions of any particular staff person abused or neglected the Student.

2. The Law as it Applies to the Time Period Starting on March 20, 2006 up until the Beginning of the 2007/2008 School Year

The only time period relevant in the 2005/2006 school year would have started on March 20, 2006. As noted earlier, the Petitioners almost dropped their allegations concerning anytime prior to 2007/2008. The Mother clearly verified at a number of different points in her testimony that she did not have any complaints about either the 2005/2006 or the 2006/2007 school year.. At times, the Petitioners' attorney elicited some evidence about goals not being achieved that went back to the 2005/2006 IEP, but it still was never clear that the Mother ever questioned his progress going back to March 20, 2006 even at the time of the hearing. In addition, the evidence demonstrated by both the Petitioners and the Respondents was that the Mother was an active participant in the IEP process and an active and involved parent to the Student. Many of the IEP goals were of the nature that the parents could have easily observed the Student's progress on them, such as "directing eye gaze to selection when presented with two choices" or "producing any vocal response, other than crying, when presented with stimuli." (PEX 5).

The IEPs show the Mother attending every IEP meeting. The IEPs that were developed in September 2006 were based on where the Student left off in terms of reaching his previous goals. There is no place in the record that suggests either of the parents registered any concerns with the Student's progress on IEP goals before 2007 and the Mother verified that she was satisfied with the Student's progress up to that point or did not agree to the new IEP based on his progress. The Respondent did also present the testimony of the teacher to demonstrate the progress the Student had made during both the 2005/2006 and the 2006/2007 school years. The teacher's testimony in regards to the 2005/2006 and the 2006/2007 school years was more coherent and described progress in more detail than she was later able to provide for the 2007/2008 school year. The Respondent also submitted progress reports and data charts for the 2005/2006 and 2006/2007 school years that did demonstrate progress overall. The teacher testified as to the accuracy of the data charts and progress reports. Similarly, the occupational and physical therapists both verified the bubble charts they made for those years and testified as to the Student's progress. While there may have been some minor problems or questions that the Petitioners raised about the progress reports or data charts, there wasn't clear evidence presented to contradict the evidence of the Student's progress during these two school years.

There were two factors in the 2005/2006 and the 2006/2007 school years that Petitioners now argue constituted a denial of FAPE: (1) the IEP called for the Student to have a 1:1 aide and (2) the Student's teacher was classified as a long-term substitute and did not have a college degree or any college level courses in special education. These same factors were also relevant to the 2007/2008 school year. For the 2006/2007 school year, the Petitioners also presented evidence that there were problems in the classroom through a volunteer at the school during that year. In addition for the 2006/2007 school year, there was also evidence that was presented for the proposition that the Student's arm might have been broken at school and the incident was not handled properly because the Mother did not know that an aide heard the Student's arm pop while he was put into a piece of equipment. The issue of the 1:1 aide, which were relevant to the entire time of the Petitioners' complaint, will be discussed first.

The Student's IEP stated that the Student should have a 1:1 aide during both school years. Both the Mother and the teacher said that despite that statement being in the IEP, neither one of them expected the aide to be provided. The teacher said she thought having an aide would be

better for the Student and it was in the IEP for that reason. It was her understanding that because of the resources available, it wasn't possible for the Student to have his own aide. In trying to explain why the comment was in the IEP, but the personal aide was not available for the student, the teacher seemed to completely misunderstand the purpose and importance of an IEP. As described in the statutes, regulations and summarized in *Rowley*, an education that provides a FAPE is done so by being "provided in conformity with the Student's Individual Education Program." The teacher seemed to think of the IEP as a wish list. The Mother also did not understand the importance of the IEP saying that the Student needed a 1:1 aide and also had no idea it was something she could actually get for the Student even though it was written right in his own IEP

The second issue was that the teacher did not have an undergraduate degree, let alone a degree in education or special education. The issue of whether the teacher was qualified raises the question of whether the education offered to the Student "met the requirements of the SEA" as required by 20 U.S.C. 1401(9) and 34 C.F.R. §300.17, as well as articulated by the Court in *Rowley*. Ms. Poposky had 60 hours of college level course work which did not include courses in special education. She was working as a teacher because the school deemed her "a long-term substitute" for four years. The teacher herself said she was not certified. Later, Charlie Taylor said that they attained certification for all the teachers they hired as "long-term substitutes" and substitutes were required to have 60 hours towards a college degree.

The lack of qualifications of a teacher or other professional rendering services can in itself be found to deny a Student in FAPE. For instance, in *Evanston Community Consolidated School v. Michael M*, 356 F.3d 798 (7<sup>th</sup> Circuit, 2004), the school was ordered to provide compensatory services to a Student because the occupational therapist was not licensed or supervised.

The *Missouri State Plans* for implementing IDEA that are applicable to the time period of this dispute are the 2005 and 2007 approved versions. Both state that a special education teacher should have four year degrees and also be certified by the State Board in one of eight specialty areas. *Missouri State Plan 2007 at pp. 99 and 105*, and *Missouri State Plan 2005 at pp. 75-80*. In the sections describing personnel qualifications in both the 2005 and the 2007 versions of the

State plan, there is no exception noted for “substitute teachers.” The Missouri laws applying to all students states, “No person shall be employed to teach in any position in a public school until he has received a valid certificate of license entitling him to teach in that position.” Mo. Rev. Stat. §168.011.1. Ms. Poposky testified that she didn’t have a certificate to teach. Later, Mr. Taylor said they received certificates for all their substitute teachers.

The *Missouri State Plan 2007* at p. 99 also states in the “Rules of Construction” personnel section that “Nothing in this part shall be construed to create a right of action on behalf of an individual student or a class or a students for a particular LEA or SEA employee to be highly qualified.” If the federal rules under IDEA requires a FAPE to be according to established state policies and allows for those claims to be brought to a due process hearing, the state cannot take that right away under its own state plan. However, the “Rules of Construction” under the State Plan mirrors the language of IDEA, which also specifically provides that the requirements for highly qualified teachers were not meant to create a personal right of action for students. IDEA states that “Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this part shall be construed to create a right of action on behalf of an individual student.” 34 C.F.R. §300.156.

The State Plan in 2005 seems to have been created before IDEA 2004 and the requirements for highly qualified teachers, based on the other wording in the section. The 2007 requirements that the teacher have a 4-year degree and have certification are similar or identical to the 2005 requirements. IDEA 2004 was not meant to take away rights from parents to pursue due process rights. However, the new requirements for highly qualified staff were passed with the intention of not starting new litigation in either regular or special education. Therefore, the law is ambiguous as to whether a parent can challenge the personnel qualifications in the State Plan since they may all be seen as compliance measures for highly qualified staff under IDEA 2004 or could constitute in whole or in part the requirements existing before the requirements for highly qualified staff was established.

Nonetheless, this Panel <sup>7</sup> does not find it necessary to determine whether the deficiencies in the teacher’s qualifications constituted a violation of FAPE in of itself. If every special

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<sup>7</sup> References to opinions of the Panel may refer to only a majority of the Panel members in this decision.

education could claim they have been denied a FAPE whenever a school or the state did not properly follow a policy, there would be countless due process complaints relating to everything from mistakes in calculating snow days to mistakes in following procedures for school outings. That is not to say that the issue of the teacher's qualifications isn't serious, but the Panel's thinks the focus should still be on ultimately whether there was proof that the implementation of the Student's IEP was harmed in some way that was defective.

For the 2005/2006 school year starting on March 20, 2008, the Panel did not think that the qualifications of the teacher and the failure to provide a 1:1 aide outweighed the evidence presented by the District that the Student was progressing or the evidence presented by both parties that the Mother was satisfied with the Student's progress at that time, and therefore, the Petitioners did not prove that the School District did not provide FAPE during the 2005/2006 school year.

During the 2006/2007 school year, there was evidence involving how the Student broke his arm and whether proper procedures were followed in regard to the broken arm. The Mother testified that she was called to school because the Student seemed to be experiencing pain in his arm. She took the Student to the doctor and learned that the Student had a minor fracture in his arm based on an x-ray. Several staff members testified that the Mother told them that she thought the Student had broken his arm at home. The Mother testified that she was not sure when the Student's arm was broken, but learned later that Judy Gibson had been working with the Student in a piece of equipment and heard a "pop" in his arm. Krista Green, the physical therapist, testified that Judy Gibson asked Ms.Green for assistance after hearing a pop in the Student's arm. Ms.Green had the Student moved to a floor mat where she thought she saw the Student experiencing some pain in relationship to his arm. The Mother testified that she was not told about the "pop" in the arm and she did not receive an incident report about the arm popping. She said she still was uncertain about whether the arm was broken at home or at school.

The Petitioners claimed that the school did not follow proper procedures in regards to hearing the arm pop at school and, at times, seemed to allege the school was responsible for breaking his arm. The evidence presented at the hearing did not in anyway establish that the school was responsible for breaking his arm. The remaining question is therefore whether the

school followed the proper procedures after the aide heard the arm pop. Ms. Sanderson testified that she would file an incident report upon hearing a pop in a Student's arm, but besides Ms. Sanderson, the Petitioners did not establish what exact procedures had been violated. In addition, the Petitioners had the aide, who was working with the student when the arm popped, testify without asking her any questions about the arm popping or what she said or did after she heard the arm pop. The evidence regarding the arm popping incident was too vague to tell whether any policy was broken. It wasn't clear what was said when the Mother went to the school to pick up her son. Surely, she would have at least asked some questions when she learned his arm must have been injured. It also isn't clear when the Mother first said she thought the arm was injured at home and how that impacted the follow-up procedures by the Staff. As presented, the "arm popping" incident did not constitute a denial of a FAPE during the 2006/2007 school year. The testimony in regard to the arm pop did help illustrate to some degree the concerns of the Mother about the Student's care at the school, the frail condition of the Student, and the difficulties involved in caring for a child who can not indicate pain in a normal manner.

Finally, the Petitioners presented testimony during the 2006/2007 school year from a Mapaville volunteer. The volunteer was not specifically a classroom volunteer in the Student's classroom, but would often visit the Student's classroom because her granddaughter was in the same class as the Student. She would also stop by just to see her granddaughter when she wasn't volunteering and would go to the class for special occasions. She made numerous visits to the Student's classroom during the 2006/2007 school year and testified to seeing harsh and inappropriate behavior by the aides, Marsha Adams and Kathy Pope, who were also the same aides during the 2007/2008 school year. She also testified to seeing the aides not attending to the students and not doing anything that she could tell as a layperson was educational.

During the 2006/2007 school year, the Panel thought there was again the evidence concerning the teacher's qualification and the failure to provide a 1:1 aide (that the Mother never complained about or realized she had a right to ask for) that was similar to the 2005/2006 school year. In addition, there was also the incident involving the arm popping that the Panel did not think was a failure to provide FAPE. However, there was additional evidence by a witness that the Panel deemed credible who witnessed grossly inappropriate behavior by staff and a lack of

structure in the classroom amounting to time not spent on educational activities. However, the Panel ultimately did not think that the testimony of the volunteer in addition to the other evidence outweighed the evidence provided in favor of the District. The teacher and the therapists through testimony and exhibits provided evidence that the Student made progress that was more than *de minimus* and the Mother did not question the progress the Student was making during the 2006/2007 school year or notice irregularities such as those she noticed in 2007/2008, like the Student being brought to her soaked in urine or the Student being lethargic. The question of to whether the Student was denied a FAPE during the 2006/2007 school year was a close one, and ultimately the decision was made in favor of the State Schools because the Petitioners bore the burden of proof. However, the testimony of the volunteer, was still considered probative evidence as to the 2007/2008 school year.<sup>8</sup>

### 3. The 2007/2008 School Year

During the 2007/2008 school year, the Petitioners presented evidence of widespread problems in the classroom and the school that the Petitioners believed made it impossible for the Student to receive a FAPE. The Petitioners also argued that the Student was not making progress on IEP goals and specific goals were not being implemented. The evidence presented for the 2007/2008 school year was much stronger than for the 2005/2006 school year. For the 2007/2008 school year, the Panel finds that the Mapaville State School failed to deliver the Student a FAPE from the first day of the school year, which was approximately August 20, 2007,<sup>9</sup> until early February 2008. In addition, as explained below, although the implementation of the Student's homebound IEP was appropriate, the Mother was forced into withdrawing the Student from school because she did not believe, for justifiable reasons, that it was safe for her child to attend the Mapaville State School, and therefore accepted homebound services because she had no option. The Mother also essentially acted as the Student's aide during the homebound period which factored into the success experienced after the Student was withdrawn from school.

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<sup>8</sup> The decision on whether there was a denial of FAPE in 2006/2007 was somewhat irrelevant because the Panel is ordering basically what the Mother asked for and a small amount more in terms of compensatory damages, as will be explained in the remedy section. The Panel is not ordering surveillance in the School, but the question of ordering surveillance did not hinge on the findings for 2005/2006 or 2006/2007.

<sup>9</sup> The first day of the school year was not clearly established in the records, but the data charts for the school year start on August 20, 2008.

The Panel looked at all the problems in the classroom as they related to the Student and how the factors came into play together, as opposed to ruling based on any one factor. The Student, as described above, has limited vision, a seizure disorder with sensitivity to loud sounds, is extremely frail and, as described by the Mother, has to be cradled if he was removed from his wheelchair. The Student was also tube fed and had a heat precaution in his IEP as he has an inability to sweat. In addition, the Student had health care procedures related for a mechanical nebulizer and postural draining. The Student's IEP documented his health care conditions and the health care procedures he needed as a result of his many disabilities. The Student could not use words and could not even show pain by crying.

As discussed above, the Student continued to have a teacher who had no college degree and no college level coursework in special education during the 2007/2008 school year. That teacher, Ms. Poposky, then testified repeatedly that she was experiencing a personal crisis during the 2007/2008 school year and that the crisis impacted her performance in the classroom. Ms. Poposky admitted to losing control of her aides in the classroom and, having trouble controlling her classroom, she questioned her own performance in working with the Student. She also testified that the classroom she was in charge of had become "very negative" and resistant to implementing IEP goals. Besides Ms. Poposky, there were two aides for the class, Marsha Adams and Kathy Pope.

Besides the testimony of the teacher in the classroom, other witnesses also had serious questions about the Student's classroom and services during the 2007/2008 school year. Mapaville's own employees and contract staff that worked with the Student during that period of time raised questions of efficiency in the classroom, the lack of checks and balances to make sure things got done, and the lack of a strong leader in the classroom. Only Ms. Suiter, the physical therapist, did not raise questions about the way the classroom functioned, but for the most part, she kept saying she couldn't remember anything except what she herself did during the school year.

One of the aides in another classroom, Judy Gibson, testified that she walked by the Student's classroom on at least a daily basis and sometimes walked by the classroom when the

door was open. Ms. Gibson explained that she had been an aide for the Student during the 2005/2006 school year. She witnessed the aides in the Student's classroom playing solitaire and reading magazines while the teacher was out of the classroom. Ms Gibson testified the Principal told her that staff was "dancerzing" in the classroom, but she did not actual witness the aerobic exercise. She did see the Student left unengaged and sitting in his wheelchair on multiple occasions, but did not know if the staff was in a transition period when the Student was left unengaged. Ms. Gibson would also witness the lights being off in the classroom on a daily basis. She also said she thought the Student seemed especially sad during the 2007/2008 school year.

Ms. Greene, the occupational therapist, was in the classroom while the staff was "working out" as she "interpreted it." The Panel believes that whether a group of people are "working out" is something that a normal person could determine without much "interpretation" being necessary. She was only in the classroom once while this happened, but while she was there, she did not describe the playing of music in the classroom as something that was done for the primary benefit of the students. In particular, she said that if a student tried to dance, they might try to include the student or dance with the student. However, she stated that some students just sat there and did nothing, and the staff did not make any special attempts to bring the students into the activity.

Ms. Greene also testified that she got the Mother, who worked in the school, because the Student's cheeks were red and appeared to be too hot. As noted, the Student body temperature did not cool down on its own, and the Student had a temperature precaution in his IEP, the special procedures were also spelled out for the school and indicated the Student could suffer a heat stroke. Ms. Greene also told the teacher, but according to her testimony, the teacher did nothing about the room temperature. The Mother was told by the staff on other occasions that the room was too hot and tried to address the situation with the school nurse who did not give her any additional assurances that the situation would be remedied.

The Panel also thought that the evidence regarding grossly inappropriate behavior by the aides in the classroom was probative of whether the Student received a FAPE. While the Respondent objected to testimony about the behavior of the aides, there were only seven pupils

in the classroom, one teacher and two aides. The evidence was that they would rotate every few weeks working with a particular student. The same two aides that were in the Student's classroom rotated for a week a piece to Ms. Flower's classroom during the 2007/2008 school year. Ms. Flowers also saw one aide be harsh and push a girl student in an "aggravated" way and did not think the aide was suited for work with disabled children. Her testimony characterized the other aide as unmotivated to work while in her classroom and resentful of being given anything extra to do. While the Respondent objected to the testimony regarding the behavior of the aides in another classroom, the Panel believes it is highly unlikely that the behavior of the same aides suddenly changed in a negative way when they entered Ms. Flower's classroom. This seems particularly unlikely since the teacher herself said that her classroom became negative. Therefore, the way the aides behaved in Ms. Flower's classroom has probative value as to how they behaved in the Student's classroom.

As noted above, a volunteer in the school during the previous year also saw the aides behave inappropriately. She reported they were harsh with the students and would often not interact with the students. Again, the evidence of how the aides behaved towards the Student during the 2006/2007 school year has at least some probative value of how they behaved in 2007/2008.

In addition, there was direct evidence of how the aides behaved in the Student's classroom during the 2007/2008 school year which was provided by audio evidence. One of the aides in particular is insulting a student and shouting commands in an increasing threatening tone of voice to one or more students in the classroom. The majority of the Panel thought the classroom audio of the classroom staff (especially January 25, 2008 from 5:15-5:20) seemed emotionally abusive. As explained previously, only the audio that was played at the hearing was admitted into evidence. The majority of the Panel members thought that if they heard a staff person at a school talk to a student in this manner, it would at least be appropriate to report the person for abuse and neglect to the appropriate authorities. (Emotional abuse and verbal abuse is more subjective than physical abuse and the Panel offers no opinion as to whether the recordings would legally be found to constitute abuse.) There is nothing in the audio segment to convey that there is anything unusual going on while the aide is screaming commands. They continued to

talk to each other in a conversational tone. While the screaming may not be directed at the Student directly, there are only a handful of children in the classroom, the recording device is in the Student's chair and it sounds as if they are moving the Student.

In addition, during the audio recording, the staff is talking about the Building Administrator putting ideas in the Mother's head about the Student walking; the conversation was related to using the gait trainer with the Student.

The Panel believes that ongoing exposure to such derogatory behavior towards the students in the classroom would be detrimental to the Student. The majority of the Panel believes that based on the audio, with the testimony of the teacher, Ms. Flowers, Ms. Gibson, and the volunteer, Ms. Ford, that the derogatory behavior towards the students, including the Student who is the subject of this dispute, was at least fairly routine. Other audio portions that the Panel deemed probative as to whether the Student received a FAPE included other staff talking about the Student not caring and not knowing how to care.

The audio also included a section in which the school nurse is ringing a bell and trying to get the attention of the Student, while remarking that she might send the Student into a seizure as she then continued to ring the bell. The school nurse changed her testimony several times as to how close she was to the Student and then finally said she did not know. However, on the audio, the bell sounds like it is coming closer and closer to the recording device and is finally so loud to listen to on the audio that it is uncomfortable to listen to. While the Panel was not particularly persuaded that the school nurse was trying to harm the Student, at the very least, it seemed remarkably poor judgment on the part of the person on staff who should be most equipped to ensure appropriate health care procedures are provided correctly for a medically fragile child.

Other evidence the Panel believed was that the Student was brought to the Mother at the end of the day in urine she described as "cold to the touch," and the testimony by several staff people that they saw the Student being left in his wheelchair with no interaction.

At the point the Mother pulled the Student from the school, the Panel thought she had no other choice and that no reasonable parent would have left the Student, given his highly special needs, in the classroom. The record demonstrated that the child had to be tube fed twice a day, he had a heat precaution due to an inability to sweat, and was unable to communicate clearly if he was in pain and unable to cry. He also had daily seizures and had to be moved with extreme care.

The Panel notes that the Student's IEP also required a 1:1 aide. If the aide had been provided, then perhaps some of the problems and mishaps that occurred would have been prevented. The aide may have made sure the Student's diaper was changed, that he wasn't left sitting alone, that the temperature in the classroom was appropriate, and that the Student was fed on time. But again, the Panel looked at the interplay of all the factors in deciding the Student was denied a FAPE.

In *Rowley* and *Tatro*, the Supreme Court emphasizes that IDEA is to provide a floor of opportunity and access to special education. In this case, the Mother removed the Student from the classroom because the school was failing to provide a floor of education and the classroom staff was not equipped to provide the Student access to a free appropriate education. In *Tatro*, the student needed CIC because he needed it for his own safety and well being. While *Tatro* involved what had to be written in the IEP, only the most tortured reading of *Tatro*, *Rowley* and the language of IDEA itself and its legislative history would lead one to conclude that what is written in the IEP is more important than what actually happens in the classroom.

The Student's IEP required special health care services and accommodations for his disability which were gastronomy tube feeding, mechanical nebulizer, postural draining, and temperature precautions. It would be almost impossible for the Petitioners to prove that the procedures were not being done properly on a daily basis without having audio surveillance. This Panel is not going to order such surveillance because in part the Panel does not believe any parent should have to need that degree of evidence to demonstrate that the school could not be trusted to implement the IEP in regards to provisions that involve the safety of a child. However, the Panel thinks if such proof was actually deemed necessary, it would support the Parent's request for audio/surveillance in the schools. The evidence was overwhelming that the classroom

was in disarray. The parent should not have to wait until her Student is rushed to the hospital or dies in order to have removed the student. If a parent could not safely leave her child at school for reasons related to the student's disability, and where it was reasonably possible for the school to deliver that IEP in the school setting, the school has essentially made access impossible and denied a floor of education.

The Panel was convinced that the FAPE was denied in 2007/2008 by the combination of factors in the classroom as described in the paragraphs above and in the facts above, and not by any one factor by itself.

Secondly, the Petitioners also succeeded in showing how the Student was not making progress on the Student's IEP goals during the 2007/2008 school year before he was put in homebound education. The implementation of the IEP goals cannot be logically disconnected from the disarray in the classroom. It is difficult to ascertain how aides who are disparaging to the Student and make comments in his presence that are negative about his progress on certain goals could then turn around and "appropriately" implement those very IEP goals.

However, the Petitioners also prevailed in showing that there was a material failure for Mapaville State School to implement IEP goals. The Mother testified that the Student was not progressing in general. She was also concerned about the Student coming home lethargic. She felt most strongly about the implementation of Goals 3 and Goals 5, and of those two goals she was very concerned the gait trainer was not being used to implement two of the Benchmarks on Goal 3 and that the computer touch screen was not set up for the third benchmark of Goal 5.

The testimony of the teacher was believable in regard to the Student's progress on Goal 1 (The Student will show partial participation in self-feeding) and Goal 4 (The Student will move legs to interact with the environment). She provided specific examples of how she was working on these goals and how the Student progressed on them. Most of the work relating to Goal 4 was done while changing the Student's diapers. However, on other goals, she was extremely general or just seemed to be reading off the actual IEP which was provided for her as an exhibit.

At times, she raised even additional questions about other IEP goals. For example, when asked about how she worked on Goal 6, Benchmark One, she stated, “As I said, I don’t know that we had started on that yet.” She described her process for working on goals as doing all the feeding skills herself, but then rotating with the two aides in the classroom about every two weeks to work with each student on the goals. When she heard one of the aides say on the audio recording at the end of January that she wasn’t aware the Student had a computer-related goal on his IEP and asked if the aides knew the specific goals and benchmarks, she said that they had a general idea of the goals from past years, but could not affirm that had more specific knowledge of the IEP goals.

When she was asked to specifically describe the Student’s overall progress during the 2007/2008 school year, she could only come up what she had said about changing his diapers, as far as responding to directions and use of his legs. She then explained that they had put an activity mobile in the classroom and, although he was not actively reaching for objects, she thought there was some arm movement towards favored pieces. However, it was “not full arm movement” and “it just may have been what I was seeing.” She added simply that “he continued with the trunk and therapy ball,” but then did not explain further what improvement she was seeing on that or any other activities from her memory.

The Respondent’s attorney also asked the teacher to verify her progress reports and underlying data charts she used to generate the reports for the 2007/2008 school year. While she verified that she created the forms for the reports and data charting, she also said she used the charting of the other staff to determine progress on the reports. Most of the data charts entries do not bare her initials and many of the entries were of the two aides who were shown to have highly inappropriate conduct. She did not verify that their entries were accurate and when asked to testify to the accuracy of her data reports in 2007/2008, she said she would have to look at the actual data because “where I was at the time,” referring to the crisis she experienced during the school year. However, she then never went back and verified the progress in the reports by looking at the data.

During part of her testimony describing the Student's progress she also said she wrote "mastered" on Goal 1 for the 2007/2008 school year not, because the goal was actually mastered, but because the Mother took the Student out of school and was going to work on the goal at home.

The physical education teacher was listed on Goal 2 and Goal 3, which were "the Student will participate in an exercise program to increase upper extremity strength" and "the Student will exhibit head and trunk control in various positions." However, she testified to only having seen the Student's IEP once and not really remembering the goals. She explained she went off of the instruction of the classroom teacher, which was to mainly work on stretching and exercising, but struggled to remember more specific instruction besides that.

The physical therapist, Lynn Suiter, and the occupational therapist, Krista Green, provided some credible evidence that they were working on the goals under the IEPs as instructed and actually providing therapy with the Student. However, Ms. Green explained that the role of the therapist was to provide the Student with some of the underlying skills to reach the goal and then the classroom staff was supposed to then work on the actual goals. Ms. Suiter also said that the staff was to continue working on the goals. Both therapists provided bubble sheets to document their work, but did not chart with the other staff. Even this was a point of confusion, because the teacher said she instructed them to chart on the goals and the therapists said they didn't need to chart. There is one question as to whether even the therapists was asked by the physical education teacher who said she had concerns "about therapy, their way of keeping track of therapy and how often therapy was given and how long they worked."

The Mother was most concerned about Goal 3, "the Student to exhibit head and trunk control in various positions" and Goal 5, "the Student will maintain touch/grasp of an object with hand." Two of the benchmarks under Goal 3 involved the Student using a gait trainer. The evidence demonstrated that the gait trainer was only used a few times by the classroom staff. The physical therapist used the gait trainer when she worked with the Student periodically, but she explained that she has other goals to work on when she was with the Student and expected the classroom staff to work with the gait trainer once she showed them how to use it. The

Respondent pointed out that the gait trainer was just one of the pieces of equipment that was listed under two of the benchmarks for the goal. However, of those, one benchmark only listed three pieces of equipment, and one of those was actually just the floor mat. At one point, the teacher said that the gait trainer was a necessary component of working on the goal. The testimony by the staff working with the Student also verified that repetition was needed to achieve success.<sup>10</sup>

More importantly, the Petitioners demonstrated that the Student was not progressing on Goal 3. While no school can guarantee the success of the Student on any particular goal, the school should at least be trying to implement the goal as described in the IEP. The Mother testified that the Student could only hold his head erect for a matter of seconds and the Ms. Poposky agreed to this finding when she testified. The actual data charts showed the Student holding his head erect for 30 seconds and there is no indication of assistance in the chart for reaching that goal. His homebound instructor also did not believe the Student could currently hold his head erect for 30 seconds. Likewise, the data charts for 2007/2008 showed that the Student could hold his head erect in the supine stander by the end of the January for five minutes thus achieving the goal, but when Ms. Poposky testified she said the Student could not do so.

Likewise, in relation to Goal 5, the Mother testified that the Student could not grasp a small object, but was still swiping at objects. This goal was on his IEP going back a few years. Ms Poposky's testimony in relationship to the Student's ability to reach and grasp for objects also basically describes the Student swiping at objects. The school personnel were working on goals related to reaching and grasping for toys and objects in past years with moderate success. Krista Green suggested that with this IEP, it was time to move on to the computer touch screen. So, the third benchmark was the new or different element that they were going to try in the new school year. However, the computer was set up only right before the Mother removed the Student from school. The computer was in the classroom and there was no reason given for why the computer did not get set up. Ms. Sanderson, the homebound teacher, was able to set up the computer with software after working with the Student for about a week in his home. Krista

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<sup>10</sup> The record demonstrated that once the Student worked on the Goal regularly with the homebound teacher, he made remarkable progress

Green, the occupational therapist, and then Ms. Sanderson, said that the Student needed ongoing repetition to make progress on the goal. The data charts for this goal are undecipherable, with some of the entries showing the Student making no or little assistance and some entries seeming to signify that the Student was progressing on reaching and grasping with no assistance.

Again, while a school simply can not guarantee progress on any goal, the school should at least be attempting to implement the IEP. At that point, it would be reasonable to conclude that the goal was not achievable or needed to be modified.

Finally, the IEP required a 1:1 aide. For the previous school years, the Panel did not find that the failure to provide the aide was a violation where the Mother never expected to have the aide and where there was a showing of progress by the Student. However, in the 2007/2008 school year, an aide might have been instrumental in the implementation of the IEP goals.

When considering the Student's progress on his IEP goals, under the standards articulated under *Bobby R.*, *Van Duyn*, and *Neosho*, as explained previously in this decision, the Panel believes there was a material failure to implement the goals on the Student's IEP during the 2007/2008 school year. The Student did receive physical and occupational therapy, but the therapy provided was to have been done closely in relationship with the activities of the classroom staff. The Panel believes the evidence showed the classroom staff did not regularly follow up on the work of the therapists or work on the goals. The teacher struggled to articulate the Student's progress or how the staff worked on the goals, and the data charts and reports the State Schools relied on were assuming the best inaccurate as opposed to purposefully false. In *Bobby R.* and *Van Duyn*, the students were shown to have made concrete and demonstrable progress. The Panel does not think that the State School was able to demonstrate such progress and, like the Court in *Neosho*, the facts here show that if any progress at all was made, it was mitigated by the detriment to the Student for the failures of the Mapaville State School as outlined in this opinion.

**C. Issue 2: Should the Student's present IEP include "independent observation" particularly, "audio/visual surveillance" in order for the Student to receive a "meaningful benefit" from his education?**

“Independent observation” was also a remedy that the Petitioners asked for because of their allegations that the State School denied the Student a FAPE. However, the Petitioners also insisted that on this one issue the content of the 2008 IEP was defective. Although the Petitioners used the words “independent observation” on the clarification of their complaint, the only “independent observation” that was mentioned at the hearing was audio/video surveillance. In the post-hearing brief, the relief asked for is an “audio/video feed” of all common areas in the school that goes to the parents and to DESE via confidential internet access. As stated above, the Panel agrees that the Student was denied a FAPE during the 2007/2008 school year, in part because of the classroom was in significant disarray and the staff behavior was grossly inappropriate. However, there was no clear evidence in the hearing that the Mother wanted audio/video surveillance in the 2008 IEP or at the January IEP meeting in which she said she was removing the Student from the school. The Mother did not testify to asking for such surveillance at the time or “independent monitoring.” In addition, no other witness testified that such a request was made at that time. The Petitioners bear the burden of proof of proving the allegations of their complaint. In addition, the Panel does not think audio/visual surveillance is the type of service that an IEP is designed to provide. To the extent that “independent monitoring” may mean something different than “audio/visual surveillance” and that the Petitioners are arguing that it should have been included in the 2008 IEP, the State School should not have been expected to include it if it was not asked for or defined in some way.

**V. Issue 3: If the Student’s rights were violated under Issues 1 or 2 above, what is the remedy?**

One of the suggested remedies was audio/visual surveillance in the school. As stated above, the Petitioners wanted surveillance of all public areas of the school available to DESE and to the parents. The Petitioners jumped from showing the violations of the State Schools to asking for the surveillance as a remedy. In addition, although the Petitioners also used the words “independent observation,” there was nothing at the hearing to suggest any alternative meaning of “independent observation” other than the surveillance. In addition, there was no expert testimony from the Petitioners to demonstrate how the surveillance would work or for that matter how any other independent observation would work in the school for the Student.

Furthermore, the remedy suggested jumps from the violations that were present while the Student attended to the school to a remedy needed for an indefinite amount of time in the future. The suggested remedy assumes that the situation at the school has not changed or cannot be changed by other means. The only evidence about the present functioning of the Mapaville State School was presented by Charlie Parker. The description of the changes was fairly general, but included a new principal being put in place, a teacher with a college degree and certification now teaching in the Student's classroom, and a retired former high-level administrator in the State School system working on a contract basis to improve services at the school. It was also not clear from the Petitioners' presentation of the evidence why that person might not be adequate for independent observation or why that person's role could include additional responsibilities that would meet the Petitioners' request.

The Panel also agrees with the Respondent's post-hearing brief that relief granted in an IDEA hearing should be "educational" or "related services" *Cedar Rapids* at 68, and that the relief granted may not always be the precise relief the Petitioners want. *Robb v. Bethel School District*, 308 F.3d 1047 (9<sup>th</sup> Circuit, 2002). The proposed relief of audio/visual surveillance would impact every student in the school and not just the Student. It would significantly change the entire environment and operations of the school and of DESE. The proposed relief also may violate the rights of other students under the Family Educational and Right and Privacy Act (FERPA) which protects the sensitive materials related to the privacy of all students. 20 U.S.C.A. §1232g(a)(3). Even to the extent the relief is permissible under FERPA, there are still general privacy concerns of the other students. For example, this Panel recognizes that needs of a student in his IEP may at times have impact on other students. An extra aide in the classroom or a dog for a visually impaired student may have impact on the entire classroom, but would not impact an entire school to the extent that audio/video surveillance would. This Panel does not believe that audio/video surveillance of a school is an available remedy in an IDEA due process hearing. The Panel believes that its jurisdiction is limited to the appropriate relief for the Student and does not have in its powers the discretion to resolve large systemic problems that go beyond the Student that is the subject of the hearing.

The Panel also does not believe it has the power to remove personnel from the school. To some extent, this issue is moot. There were two aides that were shown to have behaved in an

inappropriate manner, but they were removed by the school. There was no evidence about two of the other individuals that the Petitioners wished to remove (Judy Barber and Diane Stillwell). Barb Poposky is now an aide in another classroom, and while the school nurse may have used poor judgment, there is nothing to suggest that the nurse has to be removed from the school for the Student to receive a FAPE. There are also laws in place in regard to personnel actions, such as Mo. Rev. Stat. § 36.390 and the Panel believes it does not have the power to override these laws.

The Panel used the Parent's request at the hearing as a guide in arriving at the remedy for all services ordered except the requested audio/surveillance. The Panel thought that while the violation period was between Mid-to-late August of 2007 until early February of 2008, the violations as described in this decision were of a serious nature. In deciding that the violation occurred at the beginning of the school year, the Panel considered 1) in 2006/2007 there was already some disarray in the classroom; 2) Ms. said Ms. Poposky told her she was still having trouble getting the classroom as late as the early fall, and 3) the progress charts for the beginning of the year do not show that they continued to work on goals that were not accomplished in the 2006/2007 school year. The panel did not look beyond the June 27, 2008 date of the third amended complaint. To the extent there is any ambiguity on what point the jurisdiction of the panel ends, the evidence showed the 2008 homebound IEP was being implemented appropriately. There were a few weeks before the hearing in which the school did not have a therapist, but the Panel did not think that alone constituted a violation of IDEA.

The Panel did not think there was an exact way to compensate the child "apple for apple" for having been in the classroom environment described within this decision. The majority of the Panel thought that the violations might have justified a private school placement had the Petitioner's sought such relief and demonstrated an appropriate private placement. In granting equitable relief, the Panel also thought that although the Mother agreed to the homebound placement and that she was satisfied with the services under homebound instruction, she was forced into accepting homebound services because of problems at the school. She also acted as the Student's aide while homebound instruction was taking place. The Panel also notes that this decision does not determine whether the placement for the Student has to be homebound or at school. The Parents offered no alternative to returning to school other than surveillance and

the School presented no evidence that they think the Student's should return to school to receive services.

The Panel thereby orders the following remedies:

1) The Student will receive 90 minutes of physical therapy per week as compensatory education rendered by Jefferson Memorial Rehab or by another organization offering physical therapy services that are similar in nature to Jefferson Memorial Rehab for one calendar year, including the extended school year, in addition to the services currently being offered under the Student's IEP. The Respondent will make reasonable efforts to first attain the services from Jefferson Memorial Rehab.

2) The Student will receive an additional 30 minutes of physical education work from "Pro Rehab" or a agency that can offer similar services. The physical education work will include working on Goals 3 and 5 of the September 2007/2008 IEP and work with the equipment including the gait trainer listed under these goals. The Petitioners may also modify the physical education work to work on new goals or benchmarks or to incorporate new equipments. The Petitioners can decide to reduce the amount of time for physical education or discontinue it if they wish. The provider or providers of physical education will be asked to be part of the IEP team and other team members will work in conjunction with them.

3) If the Parent needs to travel in order to get the physical education services or the physical therapy for the Student, the State Schools will either provide the Parents with transportation or reimburse the Parents for mileage incurred at the State reimbursement rate.

4) If the Student remains at home with the Mother, the State School shall provide an aide to work with the instructional teacher at home, unless the Petitioners do not want the aide. If the Mother wants to act as the aide, then the State School has the option of either paying the Mother the same rate as an aide or providing another aide. If the Student returns to school, the State School will provide a 1:1 aide for at least two years from the date of this decision. Although this service may be necessary for his IEP, to the extent it goes beyond a floor of education, it should

be provided as compensatory education. If the Student returns to the State School, the Mother will be able to participate in interviewing the aide and her input will be solicited and considered in terms of who the State School hires, but the ultimate decision on what staff person is hired will be left to the State Schools.

5) If the Student returns to the School, then the State School shall develop and implement staff training for personnel who work or supervise others who work with the Student on treating students with disabilities with dignity and respect. The State School may in its discretion include other personnel who do not work with the Student in the training. The State School has discretion in determining the format, timing and duration of the training; except that the State School shall make a good faith effort to ensure the training is meaningful and effective.

6) If the Student returns to the School, all staff who work with the Student, or supervise others who work with the Student, shall receive training on scheduling and resource allocation in regard to the Student's IEP. The State School may include other personnel who do not work with the Student in the training. The State School has discretion in determining the format, timing and the duration of the training; except that the State School shall make a good faith effort to ensure the training is meaningful and effective.

In ruling that physical therapy services and physical education services be offered to the Petitioners as compensatory education, the Panel defers in part to the Parents' expertise on their child and what remedy would best suit their child. The Panel also notes that although physical therapy was offered at the school during 2007/2008, it was designed to be done in conjunction with the classroom staff and the Panel does not think the classroom staff carried out this responsibility which undermined the effectiveness of the physical therapy. The Panel also notes that the physical education teacher only read the IEP once, was only given minimal instructions on how to work with the Student under his IEP, and the evidence suggested she may have worked with the Student less than what was required by the IEP.

### **Appeal Procedure**

**NOTICE:** This is the final decision of the Department of Secondary and Elementary Education in this matter. A party has the right to request a review of this decision pursuant to the Missouri Administrative Procedures Act, Mo. Rev. Stat. §§536.010 *et seq.* A party also has a right to challenge this decision by filing a civil action in federal or state court pursuant to the IDEA, 20 U.S.C. §1415(i). A party must appeal within 45 days of receiving of receiving this decision.

Samara N. Klein  
Samara N. Klein  
Chairperson

Decision of other hearing officers:

Beth Mollenkamp agrees with this decision

George Wilson concurs in part and dissents in part with this decision. He will be writing a separate opinion.

Dated: December 8, 2008

Copies of this order will be sent by email and by mail to the parties and DESE. An emailed copy will be provided to George Wilson, Beth Mollenkamp. If requested, they will also be sent a hard copy.

DUE PROCESS HEARING PANEL Minority Decision

by and through his parents, and

v.

The State Schools for the Severely Handicapped

The majority opinion in this case is held by Samara Klein, Chief Hearing Officer, and Beth Mollenkamp, Panel Member. This minority opinion is held by George Wilson, Panel Member.

Based upon the facts presented into evidence, the testimony rendered during the hearing, and applicable law, I must respectfully disagree with the majority conclusions related to the following issues:

First, it is important to acknowledge that Respondent's were denied due process in this proceeding when the Hearing Chairperson failed to identify the issues in this case prior to the hearing. The Missouri State Plan for Special Education states at Regulation V, Procedural Safeguards; Section 6, Administrative Hearing Rights; Pre-Hearing Conference; that the Chairperson must "Identify the issues and eliminate claims and complaints that are frivolous or beyond a statute of limitations period upon proper motion of a party and an opportunity for response from the opposing party. The Chairperson shall include in the scheduling order a statement of the issues to be resolved by the hearing panel." The same section, under Hearing Procedures; A. Issues to be Addressed, allows the Chairperson to "narrow the scope of the hearing **at any time prior to** the presentation of the first witness at the hearing."

In this case, proper notice to Respondents regarding the issues in this case was not provided prior to the hearing. In fact, a clear statement of the issues to be resolved was not provided during the hearing, which is evidenced throughout the transcript including:

Volume I, pgs. 40-46, which indicates a lack of consensus between the parties regarding the issues.

Volume I, pgs. 114-120, which indicates the Chairperson's confusion regarding the issues and which prompted what the Chairperson characterized as a "pre-trial" meeting between her and counsel for both parties to clarify what was at issue.

Volume II, pgs. 422-441, which indicates the frustration of counsel for both parties, as well as the Chairperson and me, in continuing to try to determine what was at issue, including applicable timelines.

Volume IV, pgs 855-861, which demonstrates Respondent's counsel's frustration in understanding what was at issue in this case.

Additional evidence of the failure to identify the issues in this case exists in the post-hearing briefs, neither of which address the issues as identified in the decision issued by the majority.

Despite the submission of three amended complaints, including two amendments to the third amendment, and a pre-hearing conference at which the issues were discussed, and another conference during the hearing between the Chairperson and counsel for both parties to "clarify the issues", and despite a great deal of discussion between the representatives for the parties and

between those representatives and panel members during the hearing, the issues in this case were never decided until the Decision was rendered by the majority.

The failure to provide a proper notice of the issues to Respondent's was clearly prejudicial.

Secondly, I disagree with the majority decision regarding issues prior to the 2007-2008 school year, issues which the majority considered when determining its remedies. Petitioner's counsel made numerous attempts to clarify that their issues were limited to the 2007-2008 school year, including (see transcript):

Volume I, pg.89, lines 8-12: "I just wanted to make a quick stipulation to maybe save time. We're going to withdraw the issues as to the '06/'07 IEP. And stipulate that FAPE was provided during that time period."

Volume I, pg.90, lines 13-14: "We are stipulating that he received a FAPE for the '06/'07 school year."

Volume I, pg.91, lines 8-10: "All I am doing is saying we are not challenging implementation of the '06/'07 IEP."

Volume I, pg.91, lines 20-22: "All I'm saying is that we are stipulating to the implementation of the '06 IEP."

Volume I, pg.92, lines 6-7: "All I'm saying is that we're taking the September 26, '06 IEP implementation off the table."

Volume I, pgs.115-116: Petitioner's counsel states that none of his six primary issues (as they were being argued at that time) applied to any time prior to the 2007-2008 school year, except issue number six – which, at that time, alleged "abuse and neglect".

Additionally, as the majority notes in their opinion, "The mother clearly verified at a number of different points in her testimony that she did not have any complaints about either the 2005/2006 or the 2006/2007 school year."

Given Petitioner's stipulations and admissions, I find it difficult to understand, or accept, the majority findings of concern regarding the time period prior to September of 2007.

Third, the majority erred when it found that the Student's IEP required the provision of a 1:1 aide. The majority decision states, "The Student's IEP stated that the Student should have a 1:1 aide during both school years." The majority further faults the teacher for not providing a 1:1 aide, stating, "...the teacher seemed to completely misunderstand the purpose and importance of an IEP." However, it is apparent that the majority finding is not the result of a misunderstanding of the teacher, but rather by its own misreading of the IEP, together with a misunderstanding of IEP requirements by the majority. The IDEA regulations require IEP's to include a statement of "How the child's disability affects the child's involvement and progress in the general curriculum (i.e. the same curriculum as for nondisabled children)", see IDEA regulation 300.320 (a)(1)(i). The same requirement is stated in the Missouri State Plan for Special Education under Regulation IV.

The Student's IEP for the 2007-2008 school year (Respondent's Exhibit 9) addresses this requirement in the present level of performance on page 3, under a section titled "How the disability of the student affects involvement and progress in the general education curriculum"

and states, in its entirety, “ requires a structured learning environment to decrease distractions. He requires a 1:1 staff-to-student ratio to address his specific physical concerns, adapt his instruction, and prompt him to remain on task, which could cause non-disabled students to disengage from learning activities.” It is apparent that because the Student is not engaged in the general curriculum, this section is hypothetical, i.e. describes the affect of the Student’s disability **if** he were in a regular classroom setting. The actual staffing requirement is clearly stated on page 10 of the IEP, which indicates the student requires a 3:1 – 1:1 staff-to-student ratio.

Given the clear language of the Student’ IEP, I find it difficult to understand, or accept, the majority acceptance of the hypothetical need for 1:1 aide assistance instead of the Student’s actual 3:1 – 1:1 need as determined by the IEP team.

Fourth, I disagree with the majority findings regarding the qualifications of the classroom teacher. Petitioners admit that the Student received FAPE during the 2005-2006 and 2006-2007 school years when the Student was instructed by the same teacher. The only difference in her qualifications for the 2007-2008 school year was that she was more experienced and she had participated in additional professional development. It is difficult to imagine that a more experienced and trained teacher could be less qualified to provide FAPE. Additionally, the teacher satisfied the State’s requirements to function as a teacher.

This Panel can not invent its own standard for teacher qualifications and substitute it for the State’s adopted standard.

Fifth, I disagree that the Petitioner’s met their burden in proving that the Student was denied FAPE for the 2007-2008 school year. The majority relied upon a “number of factors” which, they opined, combined to result in their opinion. These factors included:

- The qualifications of the teacher. As explained above, the teacher met the standards of the State, and this issue should not have contributed to the majority decision.
- The testimony of an aide from a different classroom, which consisted partly of hearsay evidence and partly on her very brief and occasional glimpses into the classroom.
- The testimony of an occupational therapist, who testified that she saw, on one occasion, the classroom staff dancing to music, during part of which time they interacted with students in the class. She also testified that on one occasion, she thought the temperature in the classroom was too high.
- The testimony of a different classroom teacher, in whose room the Student’s classroom aides had worked for a week during the 2007-2008 school year. The testimony did not relate to the Student, or to the aides performance in the Student’s classroom.
- A volunteer who testified about the aides during the 2006-2007 school year, which was not relevant to the 2007-2008 school year.

-A limited number of selected minutes of audio recordings which, due to the manner in which the recordings were made, were of highly questionable evidentiary value.

-The fact that the Student was not assigned a personal aide, which, contrary to the majority opinion, was not required by the Student's IEP.

The evidence relied upon by the majority did not meet the standard adopted by the 3rd Circuit in *Melissa S v. School District of Pittsburg* (2006), or by the 5<sup>th</sup> Circuit in *Houston Independent School District v. Bobby R.* (2000), or by the 8<sup>th</sup> Circuit (via reference to *Bobby R.*) in *Neosho R-V School District v. Clark* (2003), i.e. that to prevail on a claim that a school failed to implement an IEP, the plaintiff must show that the school failed to implement substantial or significant provisions of the IEP. While the evidence in this hearing did illustrate that there were concerns in the school and in the student's classroom, the evidence directly related to the Student did not rise to a level to prove that the Student's IEP was not implemented.

Evidence that the Student's IEP was implemented included:

-No evidence that the Student's related services of physical therapy, occupational therapy, speech therapy, vision consultant, adaptive PE, and off-campus instruction were not provided in accordance with his IEP. Those services totaled over 6 hours per week.

-Evidence in the form of testimony from the teacher and supported by reports of student progress (Respondent's Exhibit 31), and student performance records and data collection charts (Respondent's Exhibit 8), that the Student did make progress toward meeting all of his IEP goals. While the progress was less consistent on some goals, it was clear that the Student received meaningful educational benefit from his instruction and that his progress was more than de minimus.

While it may be reasonable to conclude that the Student would have made more progress if the concerns that existed in the school and the classroom did not exist during the 2007-2008 school year, such a conclusion is beyond the scope of the Panel's responsibility. That the IEP was reasonably calculated was not at issue, nor was the parents' participation in the development of the Student's program. The IEP was implemented, the Student progressed toward meeting his IEP goals, and the standard for the provision of FAPE was met.

Finally, I disagree with the remedies ordered by the majority.

Remedies number 1-3 grant a significant amount of additional private physical therapy as "compensatory services". Curiously, there was no evidence that the provision of physical therapy by the school was inadequate, either in amount or quality. It is unclear for what these services would be "compensating".

Remedy number 4 orders that the school provide a 1-1 aide for the homebound services. In this situation, a teacher would already be engaging the student on a 1-1 basis, so it is unclear what an additional staff person would do in such a situation. This remedy further orders that a 1-1 aide be provided the Student in the event that the parents elect to send him to the school and that this

remedy would be provided as “compensatory”. As explained above, the Student received the services listed on his IEP (which did not include a 1-1 aide) so, again, it is unknown for what such a service would be “compensating”.

It is the minority opinion in this case that the majority has both exceeded and abused its authority, primarily by misinterpreting applicable law.

For all of the above reasons, I must dissent to the majority opinion.

Respectfully Submitted,

George Wilson  
Hearing Officer  
January 19, 2009.