**BEFORE THE HEARING PANEL**
**EMPOWERED BY THE**
**DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

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| **,** | **)** |
| | **)** |
| **Petitioner/Student** | **)** |
| **v.** | **)** |
| | **)** |
| **Festus R-6 School District,** | **)** |
| | **)** |
| **Respondent District,** | **)** |
| | **)** |
| **- and -** | **)** |
| | **)** |
| **State Schools For Severely Disabled,** | **)** |
| | **)** |
| **Respondent SSSD** | **)** |

**COVER SHEET**

1. ("Student") is the son of ("Parent"). The Student was born on.

2. At all times material to this due process proceeding, the Student resided with his Parent within the boundaries of the Festus R-VI School District ("District"), and attended Mapaville State School for the Severely Disabled in Mapaville, Missouri ("SSSD") or was home schooled.

3. During this proceeding, the Student and Parent were represented by Jonathan P. Beck, The Law Offices of Jonathan P. Beck, L.L.C., 3206 Shenandoah Avenue, St. Louis, MO, 63101 and at the due process hearing by Thomas E. Kennedy, III, Law Offices of Thomas E. Kennedy, III, LC, 230 S. Bemiston, Suite 800, St. Louis, MO 63105.

4. During this proceeding Respondent SSSD was represented by Denise Thomas, Assistant Attorney General, Office of the Missouri Attorney General, Suite 200, 815 Olive Street, St. Louis, MO, 63101.

5. During this proceeding Respondent District was represented by Ernest G. Trakas, Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C., 34 North Meramec Avenue, Suite 600, St. Louis, MO 63105.

6. The due process complaint was filed by the Parent with the Department of Elementary and Secondary Education ("DESE") on October 21, 2008. (HP Exh 1).

7. On November 3, 2008, Respondent SSSD filed its Notice of Insufficiency And Further Response Of Respondent SSSD. (HP Exh 11). On November 19, 2009, the Order Number 3 was issued by the Chief Hearing Officer dealing with the sufficiency of the Due Process Complaint which found that Petitioner's due process complaint lacked sufficiency, in part, and gave Petitioner an opportunity to file a First Amended Complaint. (HP Exh 18).

8. On December 1, 2008, Petitioner filed its First Amended Complaint. (HP Exh 21).

9. On December 8, 2008, Respondent SSSD filed a second Notice of Insufficiency. (HP Exh 22) On December 22, 2008, Order Number 6 was issued by the Chief Hearing Officer. (HP Exh 26).

10. On February 6, 2009, the parties jointly requested an extension of the time lines through June 30, 2009. On February 6, 2009, the Hearing Chairperson extended the time lines for the case through June 30, 2009. (HP Exh 31).

11. The due process hearing in this matter was held on April 13 through 16, 2009, in Festus, Missouri.

12. The Hearing Chairperson for the hearing was Ransom Ellis, III. The Hearing Panel Members were Dr. Gale Rice and Christine Montgomery.

**BEFORE THE HEARING PANEL**
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| **- and -** | ) |
| | ) |
| **State Schools For Severely Disabled,** | ) |
| | ) |
| **Respondent SSSD** | ) |

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

The Hearing Panel, after conducting the due process hearing in this matter on August 5-8, 2008, issues the following Findings of Fact, Conclusions of Law, Decision and Order:

## I. FINDINGS OF FACT

The Hearing Panel makes the following Findings of Fact:

### A. The Parties

1. At all times material to this due process proceeding, the Student resided with his Parent within the boundaries of the Festus R-VI School District ("Respondent District"), and attended Mapaville State School for the Severely Disabled in Mapaville, Missouri ("Respondent SSSD") or was home schooled.

2. Respondent District is located in Festus, Jefferson County, Missouri and during school year 2008-09 had an enrollment of approximately 3,100 students. (Missouri School District Directory).

3. The Mapaville State School for the Severely Disabled is one of seventy-five (75) state schools for the severely disabled operated by the Missouri Department of Elementary and Secondary Education ("DESE"). During all times material to this proceeding, the Superintendent for the State Schools for the Severely Disabled has been Charlie Taylor. The Mapaville facility is one of eleven (11) State Schools for the Severely Disabled which is in DESE's Region III. (*State*

*Plan*, Regulation X, p. 144). During all times material to this proceeding the Director of Region III has been Clark Powell.

4. During this proceeding, the Student and Parent were represented by Jonathan P. Beck, The Law Offices of Jonathan P. Beck, L.L.C., 3206 Shenandoah Avenue, St. Louis, MO, 63101 and at the due process hearing by Thomas E. Kennedy, III, Law Offices of Thomas E. Kennedy, III, LC, 230 S. Bemiston, Suite 800, St. Louis, MO 63105.

5. During this proceeding Respondent SSSD was represented by Denise Thomas, Assistant Attorney General, Office of the Missouri Attorney General, Suite 200, 815 Olive Street, St. Louis, MO, 63101.

6. During this proceeding Respondent District was represented by Ernest G. Trakas, Tueth, Keeney, Cooper, Mohan & Jackstadt, P.C., 34 North Meramec Avenue, Suite 600, St. Louis, MO 63105.

7. The Hearing Panel for the due process proceeding was:

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| Ransom A Ellis, III | Hearing Chairperson |
| Dr. Gale Rice | Panel Member |
| Christine Montgomery | Panel Member |

8. During all times relevant to this proceeding the following persons were employed by Respondent SSSD, contracted with Respondent SSSD, or were employed by Respondent District and have provided educational services to the Student:

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| Mary Schilling | Principal |
| Darin Siefert | Principal (District) |
| John Palmer | Supervisor of Instruction |
| Melissa Coahuilas | Representative of LEA (District) |
| Joyce Courtois | Representative of LEA (District) |
| John Palmer | Supervisor for Instruction |
| Debbie Sanderson | SPED Classroom Teacher/Administrative Representative |
| Karen Shepherd | SPED Classroom Teacher |
| Sally Shang | SPED Classroom Teacher |
| Alecia Glore | SPED Classroom Teacher |
| Lynn Suiter | Physical Therapist (Contractor) |
| Cindy Riley | Physical Therapist (District) |
| Ann Poisson | Speech-Language Pathologist |
| Linda Haislup | Speech-Language Pathologist |
| Peggy Seltzer | Speech-Language Pathologist |
| Debbie Lever | Speech-Language Pathologist (District) |
| Laurie Bohn | Occupational Therapist |
| Krista Green | Occupational Therapist (Contractor) |
| Margaret Jansen | Occupational Therapist |
| Sheila Foster | Occupational Therapist (District) |

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|---|---|
| Rob Self | P.E. Teacher |
| Russ Deal | P.E. Teacher |
| Sherri Crowe | SPED Classroom Aide |
| Marsha Adams | SPED Classroom Aide |
| Angie Ames | SPED Classroom Aide |
| Sheila Scott | SPED Classroom Aide |
| Barbara Poposky | SPED Classroom Aide |
| Sally Zhang | Nurse |
| Nancy Simpson | Home School Coordinator |
| Jane Dycus | School Psychologist (District) |
| Pamela Howard | Educational Diagnostician (Cooperative) |

## B. Procedural Background

9. The Student's Mother filed the due process complaint with the Department of Elementary and Secondary Education ("DESE") on October 21, 2008. (HP Exh 1).

10. On October 21, 2008, Ms. Pamela Williams notified the Hearing Chairperson (HP Exh 2) that he had been selected to serve on the hearing panel for the due process filed by the Parent.

11. On October 31, 2008, Respondent SSSD filed a Motion Requesting Additional Time to Respond to the Due Process Complaint. (HP Exh. 8). On November 3, 2008, the Hearing Chairperson issued Order Number 1, which granted Respondent SSSD additional time to file a Response to Petitioner's due process complaint. (HP Exh 9).

12. On November 3, 2008, Respondent SSSD filed a Notice of Insufficiency And Further Response. (HP Exh 11). On November 7, 2008, Respondent District filed its Motion To Dismiss Second Amended Due Process Complaint. (HP Exh 13). On November 10, 2008, Petitioner filed its Response to Respondent District's Motion to Dismiss. (HP Exh 14). On November 14, 2008, the Hearing Chairperson issued Order Number 2 (Regarding the District's Motion To Dismiss). (HP Exhibit 17). On November 19, 2008, the Hearing Chairperson issued Order Number 3 (Regarding the Sufficiency of the Due Process Complaint). (HP Exh 18).

13. On November 24, 2008, the Hearing Chairperson issued Order Number 4 (Regarding Petitioners' Request for Reconsideration of Order Number 3). (HP Exh 20).

14. On December 1, 2008, Petitioner filed its First Amended Due Process Complaint. (HP Exh 21).

15. On December 8, 2008, Respondent SSSD filed its Notice of Insufficiency and Further Response To Petitioner's First Amended Complaint. (HP Exh 22) and its Motion To Dismiss First Amended Complaint. (HP Exh 22). On December 11, 2008, Petitioner filed its Memorandum In Opposition To DESE Motion To Dismiss. (HP Exh 24). On December 17, 2008, the Hearing Chairperson issued Order Number 5 (Regarding Respondent DESE's Notice of Insufficiency and Motion to Dismiss). (HP Exh 25). On December 19, 2008, Respondent District filed its Motion To Dismiss First Amended Complaint. (HP Exh 26). On December 22,

2008, the Hearing Chairperson issued Order Number 6 (Regarding Respondent District's Notice of Insufficiency and Motion to Dismiss). (HP Exh 27).

16. On January 12, 2009, Respondent District filed its Response To First Amended Due Process Complaint. (HP Exh 28).

17. On January 28, 2009, the Hearing Chairperson issued Order Number 7 (Order Setting Pre-Hearing Conference). (HP Exh 30). On February 2, 2009, the Hearing Chairperson conducted a Pre-Hearing telephone conference with the parties in the case.

18. On February 6, 2009, the parties jointly requested that the time lines in the case be extended through June 30, 2009. On February 6, 2009, the Hearing Chairperson extended the time lines of the case through June 30, 2009. (HP Exh 31).

19. On February 12, 2009, Respondent District filed its Cross Complaint. (HP Exh 32).

20. On February 16, 2009, the Hearing Chairperson issued Order Number 8 (Order Following Pre-Hearing Conference). (HP Exh 33).

21. On February 19, 2009, Respondent SSSH filed its Request For Extension Of Time To Respond to Cross-Claim of Respondent District. (HP Exh 34).

22. On February 20, 2009, the Hearing Chairperson issued Order Number 9 (Notice of Hearing), setting the hearing for April 13 through 17, 2009. (HP Exh 35).

23. On February 26, 2009, Respondent SSSD filed its Response to Cross-Claim of Respondent District. (HP Exh 36).

24. On March 2, 2009, Respondent SSSD filed its Objection To The Addition Of Issue Number 5. (HP Exh 38).

25. On March 3, 2009, the Hearing Chairperson issued Order Number 10 (Amended Pre-Hearing Conference Order). (HP Exh 39).

26. On April 6, 2009, Respondent SSSD filed its Motion for Leave To Substitute Exhibit 62. (HP Exh 40).

27. On April 8, 2009, Respondent District filed its Motion to Modify Pre-Hearing Conference Order No. 10. (HP Exh 42).

28. On April 9, 2009, Respondent District filed its Motion For Leave To Supplement Exhibit List. (HP Exh 43).

29. On April 10, 2009, Respondent District filed its Motion In Limine To Prohibit Photographic, Video Or Audio Recording of the Due Process Hearing. (HP Exh 44).

30. On April 10, 2009, Respondent District filed its Motion in Limine. (HP Exh 45).

31. On April 10, 2009, Respondent SSSD filed its Objections To Exhibits and Witnesses (HP Exh 46); its Motion In Limine and Suggestions In Support of Objections To Exhibits and Witnesses. (HP Exh 47); and, its Objections To Respondent District's Motion To Modify Pre-Hearing Conference Order No. 10. (HP Exh 48).

32. On April 13 through April 16, 2009, a due process hearing in this matter was held in Festus, Missouri, with all parties in attendance.

33. Petitioner, Respondent SSSD and Respondent District exchanged exhibits prior to the hearing in compliance with the IDEA Regulations, 34 C.F.R. § 300.512. Formal exhibits were prepared by the Hearing Chairperson and presented to the parties at the due process hearing. During the due process hearing, the following exhibits were received into evidence: Petitioner's Exhibits ("PEX") 1 through 20, 21 (except page 199), 22 through 39 and 41; Respondent SSSD Exhibits ("R-SSSD") 1 through 64; Respondent District Exhibits ("DEX") 1 through 51; and, Hearing Panel Exhibits ("HP Exh") 1 - 48, (Tr. Vol. 1, pp. 58-71; 170-171; 198-199).

## C. Time Line Information

34. The Student's Mother filed the due process complaint with the Department of Elementary and Secondary Education ("DESE") on October 21, 2008. (HP Exh 1).

35. On November 3, 2008, Respondent SSSD filed a Notice of Insufficiency And Further Response. (HP Exh 11). On November 7, 2008, Respondent District filed its Motion To Dismiss Second Amended Due Process Complaint. (HP Exh 13). On November 10, 2008, Petitioner filed its Response to Respondent District's Motion to Dismiss. (HP Exh 14). On November 14, 2008, the Hearing Chairperson issued Order Number 2 (Regarding the District's Motion To Dismiss). (HP Exhibit 17). On November 19, 2008, the Hearing Chairperson issued Order Number 3 (Regarding the Sufficiency of the Due Process Complaint). (HP Exh 18).

36. On December 1, 2008, Petitioner filed its First Amended Due Process Complaint. (HP Exh 21). On January 12, 2009, Respondent District filed its Response To First Amended Due Process Complaint. (HP Exh 28).

37. On January 28, 2009, the Hearing Chairperson issued Order Number 7 (Order Setting Pre-Hearing Conference). (HP Exh 30). On February 2, 2009, the Hearing Chairperson conducted a Pre-Hearing telephone conference with the parties in the case.

38. On February 6, 2009, the parties jointly requested that the time lines in the case be extended through June 30, 2009. On February 6, 2009, the Hearing Chairperson extended the time lines of the case through June 30, 2009. (HP Exh 31).

39. On February 20, 2009, the Hearing Chairperson issued Order Number 9 (Notice of Hearing), setting the hearing for April 13 through 17, 2009. (HP Exh 35).

40. On April 13 through April 16, 2009, a due process hearing in this matter was held in Festus, Missouri, with all parties in attendance.

### D. The Issues and Proposed Remedy

41. The following issues were presented to the Hearing Panel:

**Issue No. 1.** Whether Respondent District and/or Respondent SSSD failed to provide the Student with a free appropriate public education:

A. When the Student's IEP Team refused the request of the Student's Parents that the Student be provided a personal aide as described in Respondent District's Notice of Action dated September 24, 2008, which was issued on behalf of the IEP Team; and/or,

B. When the Student's IEP Team refused to grant the request of the Student's Parents in February and March, 2008, and on September 24, 2008, that video and audio monitoring be initiated at the Mapaville facility, and that such monitoring be incorporated into the Student's IEP as a disability-related supportive/auxiliary service or as an accommodation.

**Issue No. 2.** Whether the goals in the Student's September, 2008, IEP were reasonably calculated to provide the Student with a free appropriate public education.

**Issue No. 3.** Whether Respondent District and/or Respondent SSSD failed to implement the terms of the Student's IEPs between October 21, 2006 and October 21, 2008. If so, did Respondent District and/or Respondent SSSD fail to provide the Student with a free appropriate public education.

**Issue No. 4.** Whether Respondent District and/or Respondent SSSD failed to provide the Student with an appropriate placement for the Student in the least restrictive environment

**Issue No. 5.** Whether the following conduct occurred:

A. Whether on or about October 5, 2007, Respondent SSSD convened Student's IEP Team, conducted an IEP meeting and discussed the Student's educational programming and placement without the presence of a representative of Respondent District;

B. Whether on or about January 31, 2008, Respondent SSSD conducted a teleconference, which discussed the Student's educational programming and placement without the presence or participation of a representative of Respondent District;

C. Whether on or about February 4, 2008, Respondent SSSD failed to notify and consult with Respondent District concerning a decision to issue a Notice of Action to the Student's Parents which indicated that the Student's educational placement would be the State School for the Severely Disabled at Mapaville, Missouri;

D. Whether on or about May 19, 2008, Respondent SSSD convened the Student's IEP Team by teleconference, and provided Respondent District with notice shortly before the meeting and failed to provide Respondent District with copies of records or documents relating to the Student's IEP and/or educational programming prior to the teleconference; and/or,

E. Whether on or about October 5, 2007, January 31, 2008; February 4, 2008; and/or May 19, 2008, Respondent SSSD conducted IEP meetings concerning the Student without the presence and/or input of representatives of Respondent District.

If so, did such conduct: (1) impede the Student's right to a free appropriate public education; (2) significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the Student; or, (3) cause the Student to suffer a deprivation of an educational benefit? And if so, to what extent does such conduct constitute an affirmative defense for Respondent District for any conduct found to violate the IDEA or State Plan?

42. The Petitioner proposed the following remedy:

A. The Respondents should be ordered to develop an Individualized Education Plan in consultation with the Student’s physicians which incorporates former Goal Number 4 on the Student's May, 2007 IEP and includes speech therapy, occupational therapy and physical therapy, up to an amount of services that will benefit the Student each day.

B. The Student should receive an appropriate award of compensatory services which is "flexible enough to immediately benefit the Student by tailoring services to address his greatest need, his inability to communicate."

C. Special education and related services should be provided to the Student, at least in the beginning, in a homebound setting. Once the Student is able to remain seizure-free at school and otherwise tolerate the educational programming, his special education placement should continue in an educational program at Respondent District.

(Petitioner's Proposed Findings of Fact and Conclusions of Law, pp. 26-27).

## E. Background Facts

43. The Student was initially evaluated by the Cape Girardeau Public Schools on or around November 12, 2002. (R-SSSD 24, p. 108). At that time, the Student had medical diagnoses of spastic Quadriplegia secondary to hypoglycemia and Medium-Chain Acyl-Coenzyme A Dehydrogenase Deficiency ("MCAD"). The evaluation conducted by the Cape Girardeau Public Schools resulted in an educational diagnosis for the Student of Young Child With A Developmental Disability, based upon significant delays in the areas of cognitive/adaptive, communication and fine/gross motor functioning. (PEX 4). In January, 2003, the Student and his family moved to the DeSoto 73 School District in Jefferson, County, Missouri, where the

Student continued to receive Early Childhood Special Education ("ECSE") services. (R-SSSD 24, p. 108). On May 24, 2004, the DeSoto 73 School District referred the Student to DESE, which determined that the Student was a "severely handicapped child" and was eligible to receive services provided by the State Schools for the Severely Handicapped.[1] (R-SSSD 24, p.108). During the Summer of 2004, the Student and his family moved to Respondent District. The Student began attending the Mapaville State School in August, 2004. (R-SSSD 24, p. 108; Tr. Vol. I, pp. 136, 194-195).

44. The Student was enrolled as a full-time Student in the State School for the Severely Handicapped at Mapaville, Missouri, from August, 2004, to May 6, 2008. The Student's last attendance day at Mapaville was February 28, 2008. (Tr. Vol. 1, pp. 91, 104, 187, 231). Since May 6, 2008, the Student has been home schooled by the Parent. (R-SSSD 19-20; 24; Tr. Vol. 1, pp. 106-107, 187).

45. On December 15, 2005, a reevaluation was completed on the Student by the Special Services Cooperative of Jefferson County.[2] (R-SSSD 24, p. 108). The reevaluation was completed when the Student was six years, six months old. The reevaluation revealed that, at that time, the Student was at the 0-3 month level in cognitive, personal and social skills, language skills and motor skills, and that the Student's overall developmental age equivalence was at the 0-3 month level, indicating that he was severely delayed for a child of his chronological age. On December 15, 2005, the Student's Team determined that the Student continued to be eligible for special education under the educational diagnosis of Mental Retardation. (PEX 4).[3] The Student's medical conditions cause him to have seizures lasting 3 to 4 minutes 2 to 3 times per day. These seizures are not predictable and may be brought on by startling or physical handling. (PEX 2).

46. The Present Level of Educational Performance section of the Student's December 14, 2005, IEP states in pertinent part, as follows:

> "[The Student] displays minimal movement response to external stimuli such as hand over hand assistance to use simple musical instruments. He has demonstrated protesting by pushing, pulling or turning away and crying. He is beginning to smile more frequently when receiving mild vestibular stimulation. [The Student] is non-verbal and uses no communication devices to make his wants or needs known. According to his mother, he demonstrates a differentiated cry for the following feelings: scared/upset, mad and tired and sometimes will cry for no known reason.

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[1] Subsequently, DESE changed the name of the State Schools for the Severely Handicapped to the State Schools for the Severely Disabled.

[2] At that time, Respondent District was a member of the Special Services Cooperative of Jefferson County.

[3] The Missouri State Plan for Special Education (2007) has now changed the terminology for an educational diagnosis of "mental retardation" to "mental retardation/intellectual disability".

> [The Student] allows light massaging to his arms and legs without pulling away and showed a response to the stimulation by lifting his left leg up and holding it out. When placed prone over a wedge with a 4-6 inch height [the Student] raised his head up in response to pressure on his spine but does not do this on a consistent basis. When repositioned from sitting, side lying or prone he maintains a relaxed state. [The Student] tolerates standing in a supine stander for up to half an hour at a time. [The Student] holds his head to the right and down and needs physical manipulation to turn to midline and hold his head in an upright position. [The Student] has shown no skills in the area of balancing. [The Student] is dependent on others for all of his self-care skills. . . . He is a slow eater but can finish at least half of his lunch within the scheduled lunch period. [The Student] has a specialized diet form in place. . . .
>
> [The Student] makes minimal eye contact with auditory or visual stimuli. He has not reached for objects but has maintained grasp of small musical instruments placed in his right hand. After the instructor places his hand on a pressure switch, [the Student] will maintain touch to activate a radio/tape player.
>
> [The Student] has not displayed any skills in the area of science which include measuring, phone skills or computers.
>
> [The Student] has not displayed any skills in the area of math which include time, money or sorting.
>
> [The Student] has a seizure disorder for which he is taking medications. He has been observed to have seizures when startled by noise or movement which have lasted up to three to four minutes, sometimes two to three times per day. After the seizures, [the Student] will fall asleep. If he has more seizures than described, he will begin receiving intermittent homebound services. When seizure activity decreases to previous level he will resume educational services at school.
>
> Parental concerns as stated in [the Student's] IEP dated 2/20/04 are for [the Student] to develop some form of communication, increase neck control and the ability to sit upright. . . ."

(PEX 2, p. 9).

47. In the December 14, 2005, Individualized Education Plan ("IEP"), the Student's Team determined that the appropriate educational placement for the Student was Public Separate (Day) Facility. (PEX 2, p. 12). The IEP Team also determined that the Student was eligible to receive one thousand eight hundred (1,800) minutes of special education services per week in the appropriate placement (PEX 2, p. 12) and determined that the Student was eligible for extended school year services including Physical Therapy (270 minutes); Occupational Therapy (270 minutes); Speech Therapy (180 minutes) and Special Education Instruction (5, 220 minutes). (PEX 2, p. 13).

48. In the Fall of 2005, the Student's Reassessment Team met to conduct a reevaluation of him. On September 29, 2005, the Team conducted a Review of Existing Data meeting during which the Team determined that further data was needed in the areas of cognitive, adaptive, academic, language and fine/gross motor functioning in order to consider and/or provide appropriate programming for the Student. (PEX 4, p. 30). On December 15, 2005, the Team met to finalize the Student's reevaluation. The Student's Team determined that the Student continued to be eligible for special education and related services in the area of Mental Retardation. (PEX 4, p. 35)

49. On December 15, 2005, due to medical treatment for his physical disabilities, the Student began receiving intermittent homebound services of five (5) hours per week. (PEX 6, p. 43). During the period from November 7, 2005 through March 24, 2006, the Student missed thirty-four (34) days of school.[4] (PEX 6, p. 43).

50. On or around April 24, 2006, the Student began intermittent homebound services again. (PEX 15, p. 100).

51. On May 12, 2006, the Student's IEP Team met to review and/or revise his IEP. Present at this meeting were: the Student's Mother, Debbie Sanderson, Mary Schilling and Krista Green. The following decisions were made during this IEP meeting:

A. An educational program was developed for the Student that provided 1,800 minutes per week of special education and related services during the regular school year (school year 2006-07) to be provided at the Mapaville facility.

B. The Student would receive sixty minutes per week of direct Physical Therapy, Occupational Therapy and Speech/Language Therapy at the Mapaville facility.

C. The Student's placement for school year 2006-07 was "Public Separate (Day) Facility."

D. The Student was eligible for Extended School Year services for the Summer of 2006 and would receive three hundred sixty minutes per week of direct Physical Therapy, Occupational Therapy and Speech/Language Therapy and one thousand eighty minutes per week of Special Education instruction in a Homebound setting.

(PEX 12; R-SSSD 4).

52. The Present Level of Academic Achievement and Functional Performance section of the Student's May 12, 2006, IEP indicates that the Student had the following changes in current functioning since the prior IEP:

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[4] During this period, but prior to December 15, 2005, the Student missed the following school days: September 30; October 7, 24-28, 31; November 4, 7, 15-18, 21, 28-30; and, December 1-2, 5-7, 12-15. (PEX 4, p. 35).

> "[The Student] has a seizure disorder in which he has been observed to have seizures lasting 3-4 minutes, 2-3 times per day. The seizures are not predictable and may be brought on by startling or physical handling. He began intermittent homebound services in December 2005 receiving special education instruction of 5 hours per week. When being placed in different positions [the Student] has held his head upright for up to seven (7) seconds but not on a consistent basis. He tolerates positioning of weight bearing on upper extremities with physical assist to maintain."

( PEX 12, p. 76; R-SSSD 4, p. 13).

53. The Student's May 12, 2006, IEP (PEX 12; R-SSSD 4) established the following goals and benchmarks for the Student:

Goal 1 The Student will hold head in upright position for 7 seconds.

- Benchmark 1.1 The Student will hold head in upright position for 5 seconds.

Goal 2 The Student will partially participate in a variety of sensory motor activities.

- Benchmark 2.1 The Student will maintain touch of an object when using tactile stimulation for 10 seconds.
- Benchmark 2.2 The Student will maintain grasp of an object placed in hand for 2 minutes.
- Benchmark 2.3 The Student will maintain loosened muscle tension when placed in a variety of therapeutic positions for 3 of 4 opportunities.
- Benchmark 2.4 The Student will interact with different people and peers in various environments within 10 seconds.

Goal 3 The Student will complete the steps of a visual schedule.

- Benchmark 3.1 The Student will look at an object presented to the right visual field on 4 of 5 opportunities.

(PEX 12; R-SSSD 4).

54. On May 12, 2006, the Student's IEP Team determined that the appropriate placement for the Student was Public Separate (Day) Facility.

55. On May 18, 2006, a Notice of Action was provided to the Parent. (PEX 20; R-SSSD 5; REX 6). The Notice of Action indicates that the Student's IEP Team was recommending an increase of Occupational Therapy, Physical Therapy and Speech Therapy from forty-five minutes a week to one hour a week "to address motor/sensory goals as a homebound student." (PEX 20, p. 193; R-SSSD 19).

**F. Facts That Occurred During The Relevant Two Year Time Period**

56. During school year 2006-07, the Student's special education classroom teacher charted the Student's progress on his goals and benchmarks as follows:

A. Goal 1 -- The Student will hold head in upright position for 7 seconds -- The progress report on the Student's May 12, 2006, IEP indicates that the Student "Mastered" Goal 1 on his IEP on July 27, 2006. (PEX 15 p. 108).

(1) Benchmark 1.1 -- The Student will hold head in upright position for 5 seconds -- During the period between May 17, 2006, and June 14, 2006, the Student was only able to hold his head up for three seconds. By the end of the extended school year program, around August 11, 2006, the Student had mastered the benchmark and the goal and continued to improve including the ability to keep his head in an upright position during core balance activities and pulling his head up from a forward position while in his stander. (PEX 15, pp. 108-109).

B. Goal 2 -- The Student will partially participate in a variety of sensory motor activities -- The progress report on the Student's May 12, 2006, IEP indicates that Goal 2 was "discontinued to revise goal on May 11, 2007." (PEX 15, p. 111).

(1) Benchmark 2.1 -- The Student will maintain touch of an object when using tactile stimulation for 10 seconds -- During the period between May 17, 2006, and June 14, 2006, the Student was able to "participate" in maintaining touch of an object for up to 10 seconds. By the end of the extended school year program, August 11, 2006, the Student had mastered this benchmark and continued to exhibit this progress through the end of the data collection period on May 11, 2007. (PEX 15, pp. 110-111).

(2) Benchmark 2.2 -- The Student will maintain grasp of an object placed in hand for 2 minutes -- During the period between May 17, 2006, and June 14, 2006, the Student "inconsistently maintained grasp on objects placed in [his] hands." By March 16, 2007, the Student was holding items for longer lengths of time with his right hand over his left. At the end of the reporting period, May 11, 2007, the Student was maintaining his grasp of objects placed in his hands, but not for the full two minutes. (PEX 15, pp. 110-111).

(3) Benchmark 2.3 -- The Student will maintain loosened muscle tension when placed in a variety of therapeutic positions for 3 of 4 opportunities -- During the period between May 17, 2006, and June 14, 2006, the Student was able to

maintain loosened muscle tension 75% of the time. The Student continued to exhibit progress on this benchmark. When he dislocated his hip, the lower extremity range of motion exercises were stopped. However, the Student was determined to have mastered the loosened muscle tension benchmark on his upper extremities by the end of the reporting period on May 11, 2007. (PEX 15, pp. 110-111).

(4) Benchmark 2.4 -- The Student will interact with different people and peers in various environments within 10 seconds -- During the reporting period, the Student inconsistently interacted with other students and staff in the school environment due in part to the Student's vision problems and seizure activity. (PEX 15, pp. 110-111).

C. Goal 3 -- The Student will complete the steps of a visual schedule -- The progress report on the Student's May 12, 2006, IEP indicates that Goal 3 was "discontinued to revise goal on May 11, 2007." (PEX 15, p. 113).

(1) Benchmark 3.1 -- The Student will look at an object presented to the right visual field on 4 of 5 opportunities -- During the period between May 17, 2006, and June 14, 2006, the Student "looked at items presented in right field of vision from 50-100% of trials." During the school year, his performance varied from making progress to being inconsistent on this benchmark. By the end of the reporting period on May 11, 2007, Ms. Sanderson reported that the Student inconsistently [made] eye gaze with items representing scheduled activities," and further indicated that the Student had just been diagnosed with double vision. (PEX 15, pp. 112-113).

57. On May 11, 2007, the Student's IEP Team met to review and/or revise his IEP. Present at this meeting were: the Student's Mother, Debbie Sanderson and Karen Shepherd. The following decisions were made during this IEP meeting:

A. An educational program was developed for the Student that provided 1,800 minutes per week of special education and related services during the regular school year (school year 2006-07) to be provided at the Mapaville facility.

B. The Student would receive sixty minutes per week of direct Physical Therapy, Occupational Therapy and Speech/Language Therapy at the Mapaville facility.

C. The Student's placement for school year 2006-07 was "Public Separate (Day) Facility."

D. The Student was eligible for Extended School Year services for the Summer of 2006 and would receive thirty minutes per week of direct Physical Therapy, Occupational Therapy and Speech/Language Therapy and nine hundred minutes per week of Special Education instruction at the Mapaville facility.

(PEX 24; R-SSSD 9).

58. The Present Level of Academic Achievement and Functional Performance section of the Student's May 11, 2007, IEP indicates that the Student had the following changes in current functioning since the prior IEP:

> "[The Student] has a seizure disorder. The seizures are not predictable and may be brought on by startling or physical handling. *A recent eye exam showed [the Student] is having double vision. He will have surgery to correct this.* When being placed in different positions [the Student] has held his head upright for up to seven (7) seconds but not on a consistent basis. He tolerates positioning of weight bearing on upper extremities with physical assist to maintain. *[The Student] participates in a variety of sensory motor activities by maintaining touch of various tactile stimuli and maintaining loosened muscle tension when placed in therapeutic positions. [The Student] displays eye contact to items used throughout the day during the routine.*" [additions from previous IEP are noted in italics].

(PEX 24, p. 229).

59. The Student's May 11, 2007, IEP (PEX 24; R-SSSD 9) established the following goals and benchmarks for the Student:

<u>Goal 1</u> The Student will turn head to both sides while in sitting position through partial participation.

- <u>Benchmark 1.1</u> The Student will turn head toward sensory stimulation activity without dropping head forward or to the side on 2 of 3 opportunities.

<u>Goal 2</u> The Student will identify the relationship between force and motion through partial participation.

- <u>Benchmark 2.1</u> The Student will push switch to interact with computer software through partial participation.
- <u>Benchmark 2.2</u> The Student will cut with scissors for the duration of the activity.
- <u>Benchmark 2.3</u> The Student will wipe clean and dry table surfaces through partial participation.
- <u>Benchmark 2.4</u> The Student will engage in pattern-related activities in the every day environment during manipulative activities.

Goal 3 The Student will explore physical properties of objects using one or more of the five senses through partial participation.

Benchmark 3.1 The Student will lean at different angles while sitting without increased muscle tone.

Goal 4 The Student will use small body movements to communicate a message (eye movement, eye gaze, finger/hand/arm movement, facial expressions, head movement) with a variety of people.

Benchmark 4.1 The Student will use body movements or vocalizations to start or stop co-active movement 2 of 3 opportunities.

(PEX 24; R-SSSD 9).

60. The Student attended only five (5) days of the Extended School Year services in the Summer of 2007. The Student withdrew from those services on July 10, 2007. (PEX 24, p. 246; R-SSSD 15, p. 102).

61. On September 22, 2007, the Student had hip surgery. (Tr. Vol. 1, p. 183). The Student was in a cast for approximately six weeks (Tr. Vol. 1, pp. 219-220). During the recovery from his hip surgery, the Student received Homebound special education and related services.

62. On October 5, 2007, the Student's IEP Team met to amend his IEP. Present at this meeting were: the Student's Mother, Debbie Sanderson and Mary Schilling. No representatives from Respondent District were invited to attend the meeting or attended the meeting. During this meeting the Student's Team determined that his appropriate educational placement should be changed to Homebound. No changes were made to the Student's Goals and Benchmarks. (R-SSSD 9A). No evidence was presented that the failure to have representatives from Respondent District: (a) impeded the Student's right to a free appropriate public education; (b) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the Student; or, (c) caused the Student to suffer a deprivation of an educational benefit.

63. On November 20, 2007, the Student was released by his doctor to return to school and begin some limited range of motion activities. (R-SSSD 57, p. 408). It is unclear from the record when the Student actually returned to school although the Student did receive Homebound educational services until he was able to return to school.

64. On January 31, 2008, the Student's IEP Team met by telephone to review and/or revise his IEP. Present at this meeting were: the Student's Mother, Karen Shepard and Debbie Sanderson. No representatives from Respondent District were invited to attend the meeting or attended the meeting. During this meeting, the Student's May 11, 2007, IEP was amended. (R-SSSD 10). The Present Level of Academic Achievement and Functional Performance section of the Student's January 11, 2008, IEP amendment indicates that the Student had the following changes in current functioning since the prior IEP:

> "[The Student] has a seizure disorder. The seizures are not predictable and may be brought on by startling or physical handling. A recent eye exam showed [the Student] is having double vision. He will have surgery to correct this. When being placed in different positions [the Student] has held his head upright for up to seven (7) seconds but not on a consistent basis. He tolerates positioning of weight bearing on upper extremities with physical assist to maintain. *[The Student] has recently had hip surgery; therefore is being serviced through homebound instruction until the doctor releases him to return to school.* [The Student] participates in a variety of sensory motor activities by maintaining touch of various tactile stimuli and maintaining loosened muscle tension when placed in therapeutic positions. [The Student] displays eye contact to items used throughout the day during the routine." [additions from previous IEP are noted in italics].

(R-SSSD 10). The Student's IEP Team also determined that his educational placement should be changed to Public Separate (Day) Facility. (R-SSSD 10, p. 57). No changes were made to the Goals and Objectives and educational Benchmarks in his May 11, 2007, IEP even though the Student had been reported to have "mastered" Goal 4 and Benchmark 4.1 on January 4, 2008. (PEX 26, p. 248). No evidence was presented that the failure to have representatives from Respondent District: (a) impeded the Student's right to a free appropriate public education; (b) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the Student; or, (c) caused the Student to suffer a deprivation of an educational benefit.

65. On February 4, 2008, Respondent SSSD issued a Notice of Action to the Parent indicating a proposed change in the Student's educational placement from Homebound to Public Separate (Day) Facility. (PEX 33, p. 361; R-SSSD 11, p. 58). Respondent SSSD did not notify or consult with Respondent District concerning the decision to issue a Notice of Action to the Student's Parent. No evidence was presented that the failure to have representatives from Respondent District: (a) impeded the Student's right to a free appropriate public education; (b) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the Student; or, (c) caused the Student to suffer a deprivation of an educational benefit.

66. During school year 2007-08, the Student made the following progress on his goals and benchmarks, during the time he was receiving special education and related services from Respondent SSSD:

> A. <u>Goal 1</u> -- <u>The Student will turn head to both sides while in sitting position through partial participation</u> -- Between May 15, 2007, and June 15, 2007, the Student turned his head to the midline while having his left eye covered on 3 of 3 trials for 1 of 5 days. During school year 2007-08, the Student was only able to turn his head "slightly" 33% of the time except during feeding when he turned his head 75% of the time. After January 4, 2008, the Student's progress report indicates that there was no sufficient data to determine whether the Student progressed on this goal. (PEX 26, p. 246).

(1) Benchmark 1.1 -- The Student will turn head toward sensory stimulation activity without dropping head forward or to the side on 2 of 3 opportunities -- The Student's progress report does not indicate whether progress was made on this Benchmark. (PEX 26, p. 246).

B. Goal 2 -- The Student will identify the relationship between force and motion through partial participation -- The Student's Progress Report indicates that the Student continued to make progress on this goal through January 4, 2008. After that date, the Progress Report indicates that not enough data existed to determine progress. (PEX 26, p. 247).

(1) Benchmark 2.1 -- The Student will push switch to interact with computer software through partial participation -- The Student's Progress Report indicates that the Student made progress between May 15, 2007 and January 4, 2008 from initially only being able to "slightly" move his arm to activate a touch window in May, 2007 to being able to activate a touch switch 63% of opportunities in 4 data days by January 4, 2008. (PEX 26, p. 247).

(2) Benchmark 2.2 -- The Student will cut with scissors for the duration of the activity -- The Student's Progress Report does not indicate that the Student worked on this Benchmark. (PEX 26, p. 247).

(3) Benchmark 2.3 -- The Student will wipe clean and dry table surfaces through partial participation -- The Student's Progress Report states that the Student mastered cleaning his chair tray with assistance by not pulling away. (PEX 26, p. 247).

(4) Benchmark 2.4 -- The Student will engage in pattern-related activities in the every day environment during manipulative activities -- The Student's Progress Report does not indicate that the Student worked on this Benchmark. (PEX 26, p. 247).

C. Goal 3 -- The Student will explore physical properties of objects using one or more of the five senses through partial participation -- The Student's Progress Report indicates that the Student made progress on this goal through the end of school year 2006-07, but no work was done on the goal, and the goal was not modified, from the beginning of school year 2007-08 until January 4, 2008, because the Student had hip surgery and was unable to work on the goal. The Progress Report further indicates that there was "not enough data" to determine whether progress had been made during the period beginning January 7, 2008 through the end of the school year. (PEX 26, p. 248).

(1) Benchmark 3.1 -- The Student will lean at different angles while sitting without increased muscle tone -- The Student's Progress Report indicates that the Student made some progress on this Benchmark during May and June, 2007, but did not work on this Benchmark after that period due to his hip surgery. (PEX 26, p. 248).

D. Goal 4 -- The Student will use small body movements to communicate a message (eye movement, eye gaze, finger/hand/arm movement, facial expressions, head movement) with a variety of people -- The Student's Progress Report indicates that the Student mastered this goal on January 4, 2008. (PEX 26, p. 248).

(1) Benchmark 4.1 -- The Student will use body movements or vocalizations to start or stop co-active movement 2 of 3 opportunities -- The Student's Progress Report indicates that the Student mastered this goal on January 4, 2008. (PEX 26, p. 248).

67. In March, 2008, allegations were made by a number of persons that inappropriate actions were occurring at the Mapaville State School. With these allegations, a number of meetings took place between Clark Powell, State School Director, Charlie Taylor, Superintendent for the State Schools and parents of children at the Mapaville facility. (R-SSSD 15-16 and 18).

68. On or around February 28, 2008, the Student's Mother ceased taking him to school at the Mapaville State School facility due to the allegations made concerning the conduct of persons at the facility. (Tr. Vol. 1, pp. 91, 104, 187, 231).

69. On March 14, 2008, Respondent SSSD sent a letter to Respondent District's Superintendent concerning the Student. This letter states as follows:

> "[The Student] is a student in your district who is enrolled but not attending Mapaville State School. Based on repeated contacts and attempts to secure attendance, [the Student] is truant in attending school. To date, [the Student] has missed 10 consecutive days without a valid reason for absence. We currently have an IEP with separate day school placement. [The Student] is mandatory school age.
>
> As the referring district, we hereby request your assistance in securing school attendance. If you are able to contact the parent/guardian or have information regarding a change of placement, or regarding student attendance, please contact the State School building administrator."

(REX 18, p. 57).

70. On April 22, 2008, Respondent SSSD sent a letter to the Student's Mother concerning the Student. This letter states as follows:

> "Your child resides in the Festus R-VI School District and is enrolled in, but not attending the Mapaville State School. [The Student] is truant from school. To date, he has missed at least 30 consecutive days without a valid reason for absence. The investigation by the Department of Social Services, Children's Division found no abuse or neglect at the Mapaville State School.

> [The Student] is of mandatory school age and the law requires that he attend school. To avoid a report of truancy he should be attending school. Mapaville has a current Individual Education Plan (IEP) for him and is ready to implement the provisions of the IEP. If you are home schooling [the Student], please inform us so we can remove him from the enrollment."

(REX 19, p. 58).

71. On May 6, 2008, the Student's Parent notified Respondent SSSD that the Student was being home schooled. The Parent's note provided to the Respondent states as follows:

> "This notice is to inform you that I am currently home-schooling my son [the Student], and have no plans at this time to return him as a full-time student to Mapaville State School."

(R-SSSD 19, p. 85). This information was confirmed by Respondent SSSD during the IEP meeting on May 7, 2008. R-SSSD 20, p. 86). The Student's Parent testified she withdrew the Student from Mapaville due to the threat of being reported for truancy, including the March and April letters and a telephone call from representatives of Respondent District and SSSD. (Tr. Vol. I, pp. 104-106).

72. Between February 28, 2008, and May 7, 2008, the Student's Parent withheld him from attending school at the Mapaville State School. Between May 7, 2008 and October 21, 2008, the date of the filing of the due process complaint in this case, the Student was being Home Schooled by his Parent. Between February 28, 2008, and October 21, 2008, the Student received no special education and related services from Respondent District and/or Respondent SSSD.

73. On May 7, 2008, Respondent SSSD conducted an IEP meeting concerning the Student. Present at that meeting were: the Student's Mother (by telephone); Alecia Glore, Mary Schilling, Melissa Coahuilas and Joyce Courtois. As in previous meetings, the Student's Parent indicated that "she would like to see [the Student] communicate more clearly by looking at, reaching for or vocalizing his desires." (PEX 24, p. 229). During this meeting, the Student's Team prepared the following Goals and Benchmarks for the Student:

<u>Goal 1</u> The Student will maintain head erect in a variety of positions.

- <u>Benchmark 1.1</u> The Student will maintain head erect during an activity for 5 seconds.
- <u>Benchmark 1.2</u> The Student will maintain head control in supported standing for 5 seconds.

<u>Goal 2</u> The Student will bring hand to midline to participate in a functional activity.

Benchmark 2.1 The Student will understand object permanence through partial participation.

Benchmark 2.2 The Student will add one item to another item (combine items) with left hand and right hand.

Benchmark 2.3 The Student will wipe clean and dry table surfaces through partial participation.

Benchmark 2.4 The Student will engage in pattern-related activities in the every day environment during manipulative activities.

Goal 3 The Student will hold an object with left and right hands.

Benchmark 3.1 The Student will color simple pictures with left and right hands.

Goal 4 The Student will attend purposefully to reading of words or pictures/symbols/objects/actions.

Benchmark 4.1 The Student will make social comment to adults and peers on the first attempt.

(REX 22, pp. 67-69).

74. At the May 7, 2008, IEP meeting the Student's IEP Team determined that the appropriate educational placement for the Student was Private Separate (Day) Facility. (REX 22, p. 70).

75. On May 19, 2008, another IEP Meeting was held. Present at this meeting were: the Student's Mother, Joyce Courtois and Melissa Coahuilas. During this meeting, the Student's Team changed the appropriate placement to Public Separate (Day) Facility. (REX 24, pp. 73-74). Respondent SSSD gave notice of the meeting to Respondent District shortly before the meeting but failed to provide Respondent District with copies of records or documents relating to the Student's IEP and/or educational programming prior to the teleconference. The May 19, 2008, IEP Meeting did not add goals and objectives or educational benchmarks to the Student's IEP. No evidence was presented that the short notice about this meeting given to representatives from Respondent District: (a) impeded the Student's right to a free appropriate public education; (b) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the Student; or, (c) caused the Student to suffer a deprivation of an educational benefit.

76. On September 24, 2008,[5] Respondent District conducted a Review of Existing Data meeting concerning the Student. Present at the meeting were the Student's Mother, Joyce

[5] There appears to be a discrepancy regarding the dates of this IEP meeting which took place on September 24, 2008, and the dates on some of the Notice of Action forms which were generated during this meeting, which

Courtois, Melissa Coahuilas, Debbie Sanderson and Ernie Trakas, Attorney for Respondent District. After a review of the existing data for the Student, his Team determined that additional data was needed, prepared a form describing the Areas To Be Assessed and Known Tests To Be Used and requested that the Student's Mother provide consent for the additional testing. (PEX 34, pp. 363-368). On September 24, 2008, Respondent District provided the Student's Mother with a Notice of Action that "proposes to complete a three-year reevaluation of [the Student's] motor, cognitive, adaptive behavior, academic achievement and assistive technology skills and needs." (PEX 35, p. 369; DEX 35, pp. 100-101). On September 24, 2008, the Student's Mother provided written consent for the reevaluation. (PEX 35, p. 370; DEX 35, p. 101).

77. On September 24, 2008, Respondent District held an IEP meeting for the Student. Present at this meeting were the Student's Mother, Joyce Courtois, Debbie Sanderson, and Melissa Coahuilas. (R-SSSD 24, p. 116; DEX 37). The Student's Parent indicated during the meeting that she would like to see the Student "communicate more clearly by looking at, reaching for, or vocalizing his desires [and] would also like to see him improve head control and grasping skills." (R-SSSD 24, p. 117). The Student's September 24, 2008, IEP established the following goals and benchmarks for the Student:

Goal 1 Will maintain head erect in a variety of positions for 10 seconds.

Benchmark 1.1 Maintain head erect during an activity for 5 seconds.

Benchmark 1.2 Maintain head control in supported standing for 5 seconds.

Goal 2 [The Student] will maintain a grasp of objects and use them in a purposeful manner.

Benchmark 2.1 [The Student] will color simple pictures with his left hand.

Benchmark 2.2 [The Student] will color simple pictures with his right hand.

Goal 3 [The Student] will attend purposefully to reading of words or pictures/objects/actions.

Benchmark 3.1 Make social comment to adults and peers by using a single hit switch.

Goal 4 [The Student] will bring hand to midline to participate in a functional activity with partial participation.

Benchmark 4.1 [The Student] will understand object permanence by finding objects in the sand.

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bear the date of September 23, 2008. The Hearing Panel believes that the IEP meeting took place on September 24, 2008, and the Notices of Action referred to Issue Number 1 were issued that same day.

Benchmark 4.2 [The Student] will add one item to another item by grasping/releasing, cleaning up/putting away with left/right hands.

Goal 5 [The Student] will increase upper body strength by maintaining upper body posture when placed on a variety of objects.

Benchmark 5.1 [The Student] will reduce the amount of support to maintain support.

Goal 6 [The Student] will tolerate weight bearing activities on his feet and knees.

Benchmark 6.1 [The Student] will work on midline activities when kneeling.

Goal 7 [The Student] will attend purposefully to a spoon and open his mouth during feeding.

Goal 8 [The Student] will increase his time in a stander to two hours daily.

Benchmark 8.1 [The Student] will tolerate 30 minutes in a stander one time daily.

Benchmark 8.2 [The Student] will tolerate 30 minutes in a stander two times daily.

Benchmark 8.3 [The Student] will tolerate 30 minutes in a stander three times daily.

Benchmark 8.4 [The Student] will tolerate 30 minutes in a stander four times daily.

(R-SSSD 24, pp. 120-128; DEX 37). Of the eight goals and twelve benchmarks, only one benchmark (Benchmark 3.1), involves communication from the Student to others.

78. The Student's IEP Team determined that the appropriate educational placement for the Student was Public Separate (Day) Facility. (R-SSSD 24, p. 132; DEX 37, p. 124).

79. During the September 24, 2008, IEP Meeting, the Student's Mother made three (3) requests that were discussed and rejected by Respondent District. These requests were as follows:

A. The Student's Mother requested that the Student be provided with a personal aide during school time. The members of the Student's IEP Team from Respondent District and Respondent SSSD denied this request because "an aide is not warranted to enable

[the Student] to meet his specific educational goals. The level of support and teacher/student ratio at proposed placement is sufficient to enable [the Student] to meet those goals." The Notice of Action also notes that the Student's Mother requested a "Mapaville placement, but would like supervisory apparatus such as A-V surveillance or other independent monitoring." (DEX 32, pp. 94-95).

B. The Student's Mother requested that the Student be educationally placed in a Homebound placement. The members of the Student's IEP Team from Respondent District and Respondent SSSD denied this request because the Homebound Placement "is not deemed to be the most appropriate placement to meet [the Student's] specific educational needs." (DEX 33, pp. 96-97).

C. The Student's Mother requested that the Student be educated in Respondent District's Life Skills Classroom. The members of the Student's IEP Team from Respondent District and Respondent SSSD denied this request because placement in District's Life Skills Classroom[6] "is not deemed to be the most appropriate placement to meet [the Student's] specific educational needs." (DEX 34, pp. 98-99).

80. The Student's attendance record at school was as follows:

A. During school year 2005-06, during the regular school year, out of one hundred eighty (180) school days, the Student attended on sixty-four and two-tenths (64.2) days. During the extended school year, out of twenty-eight (28) days, the student attended five and one-tenth (5.1) days.[7] (PEX 39, p. 382).

B. During school year 2006-07, during the regular school year, out of one hundred eighty (180) school days, the Student attended on one hundred sixty-five and four-tenths (165.4) days. During the extended school year, out of twenty-eight (28) days, the student attended five (5) days.[8] (PEX 39, p. 383).

C. During school year 2007-08, during the regular school year, out of one hundred forty-eight (148) school days, the Student attended on seventy-four and eight-tenths (74.8) days. The Student did not attend the extended school year program.[9] (PEX 39, p. 384).

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6 It appears that the Student's Mother was requesting a change in the proposed educational placement to Outside Regular Class More Than 60% Of Time.

7 This equates to thirty-five and seven tenths percent (35.7%) of the time in the regular school year and seventeen and nine tenths percent (17.9%) of the time in the extended school year.

8 This equates to ninety-one and nine tenths percent (91.9%) of the time in the regular school year and seventeen and nine tenths percent (17.9%) of the time in the extended school year.

9 This equates to fifty and five tenths percent (50.5%) of the time in the regular school year.

### G. Facts That Occurred After The Filing Of The Due Process Complaint

81. On November 13, 2008, Respondent District conducted a diagnostic staffing to review the results of the Student's reevaluation. (R-SSSD 24, pp. 107-115; DEX 42). This reevaluation resulted in the following Diagnostic Conclusions:

> "Based on the evaluation information gathered and reviewed, [the Student] meets the eligibility criteria to be diagnosed as a mentally retarded student. This decision is based on [the Student's] cognitive ability falling in the newborn-3 months age range on the ELAP-R and his commensurate adaptive behavior skills based on the Vineland-II Scales. These measures show [the Student] to perform at least two standard deviations below his peers. [The Student's] educational problems are commensurate with the diagnosis of mental retardation. [The Student's] reduced measured cognitive ability and adaptive behavior do not appear to be primarily the result of visual or auditory acuity deficits, motor deficits, emotional disturbance, a learning disability, a lack of instruction in reading or mathematics, environmental or economic disadvantage, or cultural differences. There are relevant medical findings."

(R-SSSD 24, p. 114).

82. On November 17, 2008, Joyce Courtois, Director of Special Education for Respondent District sent a letter to Charlie Taylor which transmitted a copy of the Student's most recent reevaluation and IEP. The letter also enclosed a request for homebound instruction from [the Student's] physician. (DEX 43, p. 145). On January 22, 2009, Ms. Courtois again wrote Mr. Taylor indicating that Respondent District had not heard from Respondent SSSD concerning the status of the referral of the Student. (DEX 44, p. 146). On January 27, 2009, Merv Blunt, Director for Program Services for Respondent SSSD wrote Ms. Courtois requests that Respondent District "submit a confirmation" that the information provided by the Student's medical doctor "was reviewed and considered" by the IEP Team and that the Student's 'placement has been changed to homebound or will remain separate school placement." (DEX 45, p. 147). On January 31, 2009, Ms. Courtois responded to Mr. Blunt's letter and confirmed that the Student's IEP Team continued to recommend a placement of Public Separate (Day) Facility for the Student. (DEX 46, p. 148). On February 4, 2009, Mr. Blunt informed Ms. Courtois that the Student was eligible to be enrolled at the Mapaville State School. (DEX 27, p. 139). On February 5, 2009, Mr. Blunt notified the Student's Mother of this fact. (DEX 29, p. 145).

## II. CONCLUSIONS OF LAW

83. Respondent District is a Missouri Public School District which is organized pursuant to Missouri statutes.

84. The Mapaville State School for the Severely Handicapped is a part of the State's system of day school services in separate school setting which is operated by DESE. (State Plan – Regulation X, *State Operated Programs*, p. 144).

85. The Student is now and has been a resident of Respondent District during all times relevant to this due process proceeding, as defined by Section 167.020 RSMo. The Student is now and has been during all times relevant to this proceeding, a "child with a disability" as that term is defined by the IDEA Regulations, 34 C.F.R. § 300.8 and Section 162.675 (1) RSMo and a "severely handicapped child" as defined by Section 162.675(3) RSMo, which states as follows:

> "(3) "Severely handicapped children", handicapped children under the age of twenty-one years who meet the eligibility criteria for Missouri schools for the severely disabled, identified in state regulations that implement the Individuals with Disabilities Education Act."

86. The IDEA, its regulations and the *State Plan for Part B of the Individuals With Disabilities Education Act* (2007), ("State Plan") which constitutes regulations of the State of Missouri, further define the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as Respondent District and Respondent SSSD, in providing special education and related services to students with disabilities.

87. The purpose of the IDEA and its regulations is: (1) "to ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs;" (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." 34 C.F.R. § 300.1.

88. The IDEA requires that a disabled child be provided with access to a "free appropriate public education." ("FAPE") *Board of Education of the Hendrick Hudson Central School District, Board Of Education, Westchester County v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982). The term "free appropriate public education" is defined by 34 C.F.R. § 300.17 as follows:

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

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

89. The FAPE requirement is satisfied if the child with a disability is provided with "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Likewise, the educational program must be provided at public expense and in the least restrictive environment. *Rowley, supra.*, 458 U.S. 176 at 203-204, 102 S.Ct. 3034.

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

91. If parents believe that the educational program provided for their child fails to meet this standard, they may obtain a state administrative due process hearing. 34 C.F.R. § 300.506; *Thompson v. Board of the Special School District No. 1*, 144 F.3d 574, 578 (8th Cir. 1998)*; Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S.Ct. 1840, 140 L.Ed 2d 1090 (1998).

92. Article IX § 2(a) of the Missouri Constitution states in pertinent part that "[t]he supervision of instruction in the public schools shall be vested in a state board of education. . . ." The State Board of Education for the State of Missouri is the "State Educational Agency" ("SEA") for the State of Missouri, as that term is defined in the IDEA, 20 U.S.C. § 1401(28).

93. The burden of proof in an administrative due process hearing pursuant to the IDEA is placed on the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528 (2005). Here the Parent filed the due process complaint and she therefore bears the burden of proof on Issues 1 through 4. Issue number 5, was raised by Respondent District. Accordingly, Respondent District bears the burden of proof on Issue number 5.

94. The Regulations of the IDEA, 34 C.F.R. § 300.507(b) and § 300.511(e) establish a two year statute of limitations for due process proceedings, unless certain exceptions are present. (34 C.F.R. § 300.511(f)). In this case, no exceptions exist to deviate from the two year statute of

limitations. Therefore, the appropriate time period for review in this case begins on October 21, 2006, and ends on October 21, 2008, the day the Student's Parent filed the due process complaint. The review of the Hearing Panel is further limited by the scope and extent of the allegations contained in the due process complaint. Consistent with the State Plan, Regulation V, *Procedural Safeguards/Discipline*, pages 71-72, the Hearing Chairperson conducted a pre-hearing conference in this case during which the allegations contained in the due process complaint were formed into issues for the hearing. The decision of the Hearing Panel is restricted to the issues set forth herein.

95. On or around May 24, 2004, when Respondent SSSD determined that the Student was a "Severely Handicapped Child," it became responsible to provide direct special education and related services to the Student pursuant to 34 C.F.R. § 300.227(a). *Missouri Department of Elementary and Secondary Education v. Springfield R-12 School District*, 358 F.3d 992, 999 (8th Cir. 2004).[10]

96. Within thirty (30) days following the initial enrollment of a student, Respondent SSSD is required by the State Plan to conduct an IEP/placement review conference which should be attended by "the student's teacher, other appropriate professional personnel from the school, a representative of the referring district, and the student's parent. . . ". State Plan, Regulation X, *State Operated Programs*, page 147, paragraph 8. Thereafter:

> "IEP Teams will be convened annually or more frequently, if needed, to review and/or rewrite, if appropriate, the IEPs for all students enrolled in the State Schools for Severely Handicapped. These conferences will be conducted in accordance with State regulations on individualized education programs, and the least restrictive environment."

State Plan, Regulation X, *State Operated Programs*, page 147. paragraph 9.

97. The regulations of the IDEA and the State Plan require that a student's IEP Team be composed of the following individuals:

> "A. the parents of the child;
> B. not less than one regular education teacher of the child (if the child is or may be participating in the regular education environment);

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[10] In *Missouri Department of Elementary and Secondary Education*, *supra.*, 358 F.3d, 999, the Eighth Circuit stated:

> "If a child requires special education, the entity responsible for that child's education must form a team to formulate an individualized education program in light of the child's abilities and parental views about the child's education. 34 C.F.R. §§ 300.343(b)(2), 300.346(a)(1). The parents, the child's teacher, and a school official knowledgeable about special education must be included on the team that devises and reviews the individualized education program, and parents are free to invite other individuals with expertise to participate. [citation omitted].

.

C. not less than one special education teacher of the child, or, where appropriate, not less than one special education provider of the child;

D. a representative of the pubic agency who is qualified to provide or supervise the provisions of specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum, and is knowledgeable about the availability of resources of the public agency and able to commit the resources of the agency;

E. an individual who can interpret the instructional implications of evaluation results, who may be a member of the team . . ."

F. at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and,

G. whenever appropriate, the child with a disability."

State Plan, Regulation IV, *FAPE/IEP/LRE*, pages 45-46. See also: 34 C.F.R. § 300.321.

98. Respondent SSSD and/or Respondent District did <u>not</u> fail to implement the terms of the Student's IEPs between October 21, 2006 and May 11, 2007, in that:

A. The Student made meaningful progress on the goals and benchmarks contained in his May 12, 2006, IEP as follows:

(1) <u>Goal 1</u> -- <u>The Student will hold head in upright position for 7 seconds</u> -- The Student mastered this goal on July 27, 2006.

(2) <u>Benchmark 1.1</u> -- <u>The Student will hold head in upright position for 5 seconds</u> -- The Student mastered this goal by August 11, 2006 and continued to improve including the ability to keep his head in an upright position during core balance activities and pulling his head up from a forward position while in his stander.

(3) <u>Benchmark 2.1</u> -- <u>The Student will maintain touch of an object when using tactile stimulation for 10 seconds</u> -- The Student mastered this benchmark by August 11, 2006, and continued to exhibit this progress through the end of the data collection period on May 11, 2007.

(4) <u>Benchmark 2.2</u> -- <u>The Student will maintain grasp of an object placed in hand for 2 minutes</u> -- While the Student did not master this benchmark, he made progress and by May 11, 2007, he was able to maintain his grasp of objects placed in his hands, but not for the full two minutes.

(5) <u>Benchmark 2.3</u> -- <u>The Student will maintain loosened muscle tension when placed in a variety of therapeutic positions for 3 of 4 opportunities</u> -- During the period between May 17, 2006, and June 14, 2006, the Student was able to maintain loosened muscle tension 75% of the time and continued to exhibit

progress on this benchmark until he dislocated his hip and work on the benchmark was stopped.

B. Several of the Student's Goals and Benchmarks had to be discontinued due to the dislocation of the Student's hip.

C. Respondent District was not legally responsible for determining the appropriate persons to be invited to the Student's IEP meetings or for the development and implementation of the Student's May 12, 2006, IEP because the Student had been determined to be a "Severely Handicapped Child," and had been accepted and enrolled in the State Schools for the Severely Disabled.

99. Between October 21, 2006, and May 11, 2007, the Student's placement was Public Separate (Day) Facility, as determined by his IEP Team in his May 12, 2006, IEP. This placement was an appropriate placement for the Student in the least restrictive environment because during this time period, “the nature or severity of the disability of [the Student was] such that education in regular classes with the use of supplementary aids and services [could not] be achieved satisfactorily." See: Section 162.680.2 RSMo.

100. Respondent SSSD provided the Student with a free, appropriate public education between October 21, 2006, and May 11, 2007. Respondent District was not legally responsible for providing the Student with a free, appropriate public education during this time period because the Student had been determined to be a "Severely Handicapped Child," and had been accepted and enrolled in the State Schools for the Severely Disabled.

101. Respondent SSSD implemented the terms of the Student's May 11, 2007, IEP, during the period between May 11, 2007, and January 4, 2008, as evidenced by:

A. The Student's progress on some of the goals and benchmarks contained in his May 11, 2007, IEP as follows:

(1) Goal 2 -- The Student will identify the relationship between force and motion through partial participation -- The Student made progress on this goal through January 4, 2008.

(2) Benchmark 2.1 -- The Student will push switch to interact with computer software through partial participation -- The Student made progress on this Benchmark between May 15, 2007 and January 4, 2008.

(3) Benchmark 2.3 -- The Student will wipe clean and dry table surfaces through partial participation -- The Student mastered this benchmark.

(4) Goal 3 -- The Student will explore physical properties of objects using one or more of the five senses through partial participation -- The Student made progress on this goal through the end of school year 2006-07, but no work was done on the goal, and the goal was not modified, from the beginning of school

year 2007-08 until January 4, 2008, because the Student had hip surgery and was unable to work on the goal.

(5) Benchmark 3.1 -- The Student will lean at different angles while sitting without increased muscle tone -- The Student made some progress on this Benchmark during May and June, 2007, but did not work on this Benchmark after that period due to his hip surgery.

(6) Goal 4 -- The Student will use small body movements to communicate a message (eye movement, eye gaze, finger/hand/arm movement, facial expressions, head movement) with a variety of people -- The Student mastered this goal on January 4, 2008.

(7) Benchmark 4.1 -- The Student will use body movements or vocalizations to start or stop co-active movement 2 of 3 opportunities -- The Student mastered this goal on January 4, 2008.

B. Work on the Goals and Benchmarks contained in the Student's May 11, 2007, IEP was hampered by his absences from school. Specifically, during school year 2007-08, out of one hundred forty-eight (148) possible school days, the Student attended on seventy-four and eight-tenths (74.8) days and did not attend the extended school year program. The Student's absences in September, 2007 through January, 2008, resulted from his hip surgery and he received Homebound services during this time period.

C. On February 28, 2008, the Student's Parent ceased sending him to school at the Mapaville State School. On May 7, 2008, the Student's Parent officially withdrew him from school to Home School him. During the period between February 28, 2008, and May 7, 2008, the Student received no special education or related services due to his removal from school by his Parent.

102. Respondent District and/or Respondent SSSD did not fail to provide the Student with a free appropriate public education when the Student's IEP Team refused to grant the request of the Student's Parents in February and March, 2008, and on September 24, 2008, that video and audio monitoring be initiated at the Mapaville facility, and that such monitoring be incorporated into the Student's IEP as a disability-related supportive/auxiliary service or as an accommodation, in that:

A. The question of whether video and audio monitoring of the Student while he is present at the Mapaville State School facility if viewed by the Hearing Chairperson to be outside the jurisdiction of the Hearing Panel in that it is not a matter which involves an interpretation of the IDEA, its regulations or the State Plan. This issue is dismissed under the authority given to the Hearing Chairperson to dismiss any issue which is not subject to the jurisdiction of the Hearing Panel. (State Plan, Regulation V, *Procedural Safeguards/Discipline*, page 72).

B. Even if this issue was subject to the jurisdiction of the Hearing Panel, Respondent District and Respondent SSSD are required pursuant to the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, and its Regulations, 34 C.F.R. Part 99, ("FERPA") to insure that "personally identifiable information" regarding any present for former students remain private. Establishment of a video or audio monitoring system, even with safeguards, would potentially violate FERPA and expose Respondent District and/or Respondent SSSD to liability; and,

C. Petitioner has failed to meet his burden of proof to demonstrate that a video and/or audio monitoring system was requested or required in order for the Student to be able to receive benefit from his program of special education and related services.

103. Between May 11, 2007, and May 7, 2008, the Student's placement was Public Separate (Day) Facility, as determined by his IEP Team in his May 11, 2007, IEP except for a period of time when the Student's placement was Homebound due to his physical condition and upon the recommendation of this Medical Doctor. These placements were appropriate placements for the Student in the least restrictive environment because during this time period, "the nature or severity of the disability of [the Student] is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." See: Section 162.680.2 RSMo.

104. Respondent District was not legally responsible for determining the appropriate persons to be invited to the Student's IEP meetings or for the development and implementation of the Student's May 11, 2007, IEP because the Student had been determined to be a "Severely Handicapped Child," and had been accepted and enrolled in the State Schools for the Severely Disabled.

105. On January 31, 2008, the Student's IEP Team met by telephone to review and/or revise his IEP. This IEP: Respondent District was not legally responsible for determining the appropriate persons to be invited to the Student's IEP meetings or for the development and implementation of the Student's January 31, 2008, IEP because the Student had been determined to be a "Severely Handicapped Child," and had been accepted and enrolled in the State Schools for the Severely Disabled.

106. Respondent SSSD convened meetings to discuss the Student's special education and related services and his educational placement on October 5, 2007 and January 31, 2008, without inviting or advising representatives of Respondent District, and failed to notify or consult with representatives of Respondent District concerning its decision to send a Notice of Action to the Student's Parent on February 4, 2008. During the meetings, the Student's IEP Team, without the presence of representatives of Respondent District, discussed changing the Student's placement from Public Separate (Day) Facility to Homebound, due to his medical condition (October 5, 2007 meeting) and changing the Student's placement from Homebound back to Public Separate (Day) Facility due to his recovery (January 31, 2008 meeting). On February 4, 2008, Respondent SSSD sent the Student's Parent a Notice of Action confirming the change of placement decision made at the January 31, 2008 meeting. Respondent SSSD's failure to notify Respondent District of the October 4, 2007, and January 31, 2008, IEP meetings and its failure to

notify or consult with Respondent District concerning its decision to issue the February 4, 2008, Notice of Action, does not constitute a procedural violation of the IDEA or the State Plan in that the conduct did not:

A. Impede the Student's right to a free appropriate public education; or,

B. Significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the Student; or

C. Cause the Student to suffer a deprivation of an educational benefit.

107. On May 7, 2008, the Student's Mother officially notified Respondent SSSD and Respondent District that the Student was being home schooled. At that time, the Student became a "parentally-placed private school child with disabilities" (34 C.F.R. § 300.130) in that:

A. On May 7, 2008, the Student was removed from enrollment in Respondent SSSD, was not enrolled at Respondent District or any other public or private school and was being home schooled by his Parent.

B. There is no evidence on the record that there was a disagreement between the Student's Parent and Respondent SSSD or Respondent District regarding the availability of an appropriate program of special education and related services for the Student (See: 34 C.F.R. § 300.148(b).

C. There is no evidence on the record that the Student's Parent provided Respondent District or Respondent SSSD with notice concerning her concerns, if any, about the Student's program of special education and related services, including his educational placement as required by the IDEA and its regulations.

108. The right to file a due process complaint for matters that occur while the child is a parentally placed private school child with disabilities is limited to: (a) whether the local educational agency ("LEA") has failed to meet the child find requirements in 34 C.F.R. §300.131; and, (b) whether the LEA has failed to properly evaluate the student pursuant to 34 C.F.R. §§ 300.300 through 300.311. (34 C.F.R. § 300.140(a) and (b)). The Hearing Panel has no jurisdiction over matters that are alleged to have occurred to the Student after May 7, 2008. (See: *Carl D. v. Special School District of St. Louis County*, 21 F.2d 1042, 1057 (E.D. Mo. 1998)("school district is not required to develop and implement, on an annual basis, an IEP for a disabled student once he has been unilaterally placed in a private school by his parents.").

109. In the event it is found that the Hearing Panel does have jurisdiction over matters that occurred to the Student between May 7, 2008, and October 21, 2008, the date of the filing of the due process complaint, the Hearing Panel finds as follows:

A. On or about May 19, 2008, Respondent SSSD convened the Student's IEP Team by teleconference, and provided Respondent District with notice shortly before the

meeting and failed to provide Respondent District with copies of records or documents relating to the Student's IEP and/or educational programming prior to the teleconference. During this meeting, the Student's Team changed the appropriate placement to Public Separate (Day) Facility. (REX 24, pp. 73-74). Respondent SSSD's late notice of the meeting to Respondent District and failure to provide copies of records or documents for the meeting did not constitute a procedural violation of the IDEA or the State Plan in that the conduct did not:

(1) Impede the Student's right to a free appropriate public education; or,

(2) Significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the Student; or

(3) Cause the Student to suffer a deprivation of an educational benefit.

B. The Student's September 24, 2008, IEP was not reasonably calculated to provide the Student with a free appropriate public education, in that:

(1) The regulations of the IDEA, 34 C.F.R. § 300.324(a)(2) requires each IEP Team to consider the communication needs of the child. In this case, the Student's Parent had, for a number of years, included communication as her top priorities for inclusion in the Student's program of special education and related services (Tr. Vol. 1, pp. 110-111).

(2) There are no appropriate communication goals in the IEP.

(3) The nature of the Student's communications need requires his IEP Team, including his Parents, to participate in an augmentative communication evaluation so that a multi-modal augmentative communication system can be developed for him. The IEP Team should initially consider functional communication such as reliable choice-making, initiating, protesting and turn taking with a multi-modal augmentative communication system and provide the Student with multiple opportunities to use these modes throughout the school day and in his entire curriculum.

C. Respondent District and/or Respondent SSSD did not fail to provide the Student with a free appropriate public education when the Student's IEP Team refused the request of the Student's Parent that the Student be provided a personal aide as described in the Notice of Action dated September 24, 2008, and refused to change the Student's Placement to Respondent District's Life Skills classroom or Homebound status in that:

(1) At the September 24, 2008 IEP meeting, the Student's IEP Team recommended an educational placement of Public Separate (Day) Facility. The location of this educational placement was the Mapaville State School facility.

This educational placement was an appropriate placement for the Student in the least restrictive environment, as more fully discussed herein.

(2) At the September 24, 2008, IEP meeting, the Student's Parent proposed that the Student be educated in Respondent District's Life Skills Classroom, which would most likely have been an educational placement of Outside the Regular Class More than 60% of the Time. This educational placement was not an appropriate educational placement for the Student, as more fully discussed herein.

(3) The Mapaville State School facility has a very low faculty-to-student ratio and has educational programming for the Student in the classroom with a teacher, classroom aides, physical therapists, occupational therapists and speech therapists. The degree of programming provided for the Student at Mapaville eliminated the need for a one-on-one personal aide for the Student.

(4) Petitioner has failed to meet his burden of proof to demonstrate that the Student needed a personal aide in order to be able to receive benefit from his program of special education and related services.

D. On September 24, 2008, a Homebound placement was not appropriate in that the information provided to the Student's IEP Team during that meeting indicated that the Student was physically able to attend school and/or there was no medical reason for him to be placed on Homebound status.

110. In making its decision in this case, the Hearing Panel did not consider that it had jurisdiction over the following issues and did not, therefore, consider the following issues:

A. Whether the preparation of the Student's May 12, 2006, IEP met the requirements of the IDEA, its regulations and the State Plan.

B. Whether the content of the Student's May 12, 2006, IEP was reasonably calculated to provide the Student with a free appropriate public education.

C. Whether the preparation of the Student's May 11, 2007, IEP met the requirements of the IDEA, its regulations and the State Plan.

D. Whether the content of the Student's May 11, 2007, IEP was reasonably calculated to provide the Student with a free appropriate public education.

E. Whether the preparation of the Student's May 12, 2006, IEP met the requirements of the IDEA, its regulations and the State Plan.

F. Whether the content of the Student's January 31, 2008, IEP was reasonably calculated to provide the Student with a free appropriate public education

## III. DECISION

The Hearing Panel issues the following unanimous decision concerning the issues presented to it in this case:

**111. Issue Number 1. Whether Respondent District and/or Respondent SSSD failed to provide the Student with a free appropriate public education:**

**A. When the Student's IEP Team refused the request of the Student's Parents that the Student be provided a personal aide as described in Respondent District's Notice of Action dated September 24, 2008, which was issued on behalf of the IEP Team; and/or,**

**B. When the Student's IEP Team refused to grant the request of the Student's Parents in February and March, 2008, and on September 24, 2008, that video and audio monitoring be initiated at the Mapaville facility, and that such monitoring be incorporated into the Student's IEP as a disability-related supportive/auxiliary service or as an accommodation.**

**Decision:**

On or around February 28, 2008, the Student's Parent ceased sending him to school at the Mapaville State School facility due to reports she had heard concerning the treatment of other students at that facility. At an IEP meeting on May 7, 2008, the Student's Mother officially notified Respondent SSSD and Respondent District that the Student was being "home schooled." At that time, the Student became a "parentally-placed private school child with disabilities" (34 C.F.R. § 300.130).

On or around September 24, 2008, Respondent District contacted the Student's Parent and offered to conduct his three-year reevaluation and an IEP meeting in order to again provide special education and related services to the Student. On September 24, 2008, the Student's Parent met with Joyce Courtois, Debbie Sanderson, and Melissa Coahuilas. A review of existing data was conducted which determined that the additional information was needed to complete the reevaluation of the Student. The Student's Parent gave written consent for the reevaluation.

The Student's Mother made three (3) requests that were discussed and rejected by the representatives on the Student's IEP Team from Respondent District and Respondent SSSD. These requests were as follows:

A. The Student's Mother requested that the Student be provided with a personal aide during school time. The members of the Student's IEP Team from Respondent District and Respondent SSSD denied this request because "an aide is not warranted to enable [the Student] to meet his specific educational goals. The level of support and teacher/student ratio at proposed placement is sufficient to enable [the Student] to meet those goals." The Notice of Action also notes that the Student's Mother requested a

"Mapaville placement, but would like supervisory apparatus such as A-V surveillance or other independent monitoring."

B. The Student's Mother requested that the Student be educationally placed in a Homebound placement. The members of the Student's IEP Team from Respondent District and Respondent SSSD denied this request because the Homebound Placement "is not deemed to be the most appropriate placement to meet [the Student's] specific educational needs."

C. The Student's Mother requested that the Student be educated in Respondent District's Life Skills Classroom. The members of the Student's IEP Team from Respondent District and Respondent SSSD denied this request because placement in District's Life Skills Classroom "is not deemed to be the most appropriate placement to meet [the Student's] specific educational needs."

Of these three requests, Issue Number 1 deals with the request (A) above. Requests (B) and (C) are discussed below with respect to Issue Number 4.

With respect to Issue Number 1(A), the Hearing Panel finds that after May 7, 2008, the Student was a parentally placed private school student with a disability. Accordingly, the Hearing Panel has no jurisdiction over matters that are alleged to have occurred to the Student after May 7, 2008. (See: *Carl D. v. Special School District of St. Louis County*, 21 F.2d 1042, 1057 (E.D. Mo. 1998)("school district is not required to develop and implement, on an annual basis, an IEP for a disabled student once he has been unilaterally placed in a private school by his parents.").

Issue Number 1(A) is dismissed with respect to Respondent District and Respondent SSSD.

In the event it is found that the Hearing Panel does have jurisdiction over matters that occurred to the Student between May 7, 2008, and October 21, 2008, the date of the filing of the due process complaint, the Hearing Panel finds, with respect to Issue Number 1(A) that Respondent District and/or Respondent SSSD did not fail to provide the Student with a free appropriate public education when the Student's IEP Team refused the request of the Student's Parent that the Student be provided a personal aide as described in the Notice of Action dated September 24, 2008, in that:

A. At the September 24, 2008 IEP meeting, the Student's IEP Team recommended an educational placement of Public Separate (Day) Facility. The location of this educational placement was the Mapaville State School facility. This educational placement was an appropriate placement for the Student in the least restrictive environment, as more fully discussed herein; and,

B. At the September 24, 2008, IEP meeting, the Student's Parent proposed that the Student be educated in Respondent District's Life Skills Classroom, which would most likely have been an educational placement of Outside the Regular Class More than 60%

of the Time. This educational placement was not an appropriate educational placement for the Student, as more fully discussed herein; and,

C. The Mapaville State School facility has a very low faculty-to-student ratio and has educational programming for the Student in the classroom with a teacher, classroom aides, physical therapists, occupational therapists and speech therapists. The degree of programming and overlapping services provided for the Student at Mapaville eliminated the need for a one-on-one personal aide for the Student; and,

D. Petitioner has failed to meet his burden of proof to demonstrate that the Student needed a personal aide in order to be able to receive benefit from his program of special education and related services.

With respect to Issue Number 1(B), the Hearing Panel finds that Respondent District and/or Respondent SSSD did not fail to provide the Student with a free appropriate public education when the Student's IEP Team refused to grant the request of the Student's Parents in February and March, 2008, and on September 24, 2008, that video and audio monitoring be initiated at the Mapaville facility, and that such monitoring be incorporated into the Student's IEP as a disability-related supportive/auxiliary service or as an accommodation, in that:

A. After May 7, 2008, the Student was a parentally placed private school student with a disability. For the reasons stated above, the Hearing Panel has no jurisdiction over the request of the Student's Parent on September 24, 2008, that Respondent SSSD implement video and audio at the Mapaville facility.

B. The question of whether video and audio monitoring of the Student while he is present at the Mapaville State School facility if viewed by the Hearing Chairperson to be outside the jurisdiction of the Hearing Panel in that it is not a matter which involves an interpretation of the IDEA, its regulations or the State Plan. This issue is dismissed under the authority given to the Hearing Chairperson to dismiss any issue which is not subject to the jurisdiction of the Hearing Panel. (State Plan, Regulation V, *Procedural Safeguards/Discipline*, page 72).

C. Even if this issue was subject to the jurisdiction of the Hearing Panel, Respondent District and Respondent SSSD are required pursuant to the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, and its Regulations, 34 C.F.R. Part 99, ("FERPA") to insure that "personally identifiable information" regarding any present for former students remain private. Establishment of a video or audio monitoring system, even with safeguards, would potentially violate FERPA and expose Respondent District and/or Respondent SSSD to liability; and,

D. Petitioner has failed to meet his burden of proof to demonstrate that a video and/or audio monitoring system was required in order for the Student to be able to receive benefit from his program of special education and related services.

Issue Number 1(B) is dismissed with respect to Respondent District and Respondent SSSD.

112. **Issue Number 2.** **Whether the goals in the Student's September, 2008, IEP were reasonably calculated to provide the Student with a free appropriate public education.**

**Decision:**

The Hearing Panel finds that after May 7, 2008, the Student was a parentally placed private school student with a disability. For the reasons stated above, the Hearing Panel has no jurisdiction over Issue Number 2.

Issue Number 2 is dismissed with respect to Respondent District and Respondent SSSD.

In the event it is found that the Hearing Panel does have jurisdiction over matters that occurred to the Student between May 7, 2008, and October 21, 2008, the date of the filing of the due process complaint, the Hearing Panel finds, with respect to Issue Number 2 that the Student's September 24, 2008, IEP was not reasonably calculated to provide the Student with a free appropriate public education, in that:

A. The regulations of the IDEA, 34 C.F.R. § 300.324(a)(2) requires each IEP Team to consider the communication needs of the child. In this case, the Student's Parent had, for a number of years, included communication as her top priorities for inclusion in the Student's program of special education and related services (Tr. Vol. 1, pp. 110-111).

B. There are no appropriate communication goals in the IEP.

C. The nature of the Student's communications need requires his IEP Team, including his Parents, to participate in an augmentative communication evaluation so that a multi-modal augmentative communication system can be developed for him. The IEP Team should initially consider functional communication such as reliable choice-making, initiating, protesting and turn taking with a multi-modal augmentative communication system and provide the Student with multiple opportunities to use these modes throughout the school day and in his entire curriculum.

113. **Issue Number 3.** **Whether Respondent District and/or Respondent SSSD failed to implement the terms of the Student's IEPs between October 21, 2006 and October 21, 2008. If so, did Respondent District and/or Respondent SSSD fail to provide the Student with a free appropriate public education.**

**Decision:**

This is a very narrow issue which only deals with whether Respondent District and/or Respondent SSSD failed to implement the Student's IEPs.

During the period between October 21, 2006, and October 21, 2008, the Student was in attendance at the Mapaville State School from October 21, 2006, through February 28, 2008. After February 28, 2008, the Student's Parent ceased sending him to school at the Mapaville State School facility due to reports she had heard concerning the treatment of other students at that facility. After receiving at least two letters from Respondent SSSD which indicated that the Student was truant. On May 7, 2008, the Student's Mother "officially" notified Respondent SSSD and Respondent District that she was home schooling the Student. At the time of the hearing in this matter in April, 2009, the Student had not returned to school, and was still being home schooled by his Parent.

During the period between October 21, 2006, and February 28, 2008, the Student's IEP Team developed and/or implemented three IEPs which were written at meetings on May 12, 2006, May 11, 2007 and January 31, 2008.

With respect to the period between October 21, 2006 and May 11, 2007, the Hearing Panel finds that Respondent SSSD and/or Respondent District did not fail to implement the terms of the Student's IEP May 12, 2006 IEP.

With respect to the period between January 31, 2008, and February 28, 2008, the Hearing Panel finds that Respondent SSSD and/or Respondent District did not fail to implement the terms of the Student's IEP May 12, 2006 IEP.

It is also found that Respondent District was not legally responsible for determining the appropriate persons to be invited to the Student's IEP meetings or for the development and implementation of the Student's IEPs during this period of time because the Student had been determined to be a "Severely Handicapped Child," and had been accepted and enrolled in the State Schools for the Severely Disabled.

This issue was framed in a very narrow manner, consistent with the allegations in the due process complaint and at the hearing, there was a great deal of dispute over the scope of this issue. In considering the determination of this issue, the Hearing Panel is aware that Petitioner has filed a second due process complaint and the same Hearing Panel has been empowered to hear that Complaint. In fairness to the parties, the Hearing Panel did not believe it had jurisdiction in this matter over the following issues, and therefore did not consider the following issues:

A. Whether the preparation of the Student's May 12, 2006, IEP met the requirements of the IDEA, its regulations and the State Plan.

B. Whether the content of the Student's May 12, 2006, IEP was reasonably calculated to provide the Student with a free appropriate public education.

C. Whether the preparation of the Student's May 11, 2007, IEP met the requirements of the IDEA, its regulations and the State Plan.

D. Whether the content of the Student's May 11, 2007, IEP was reasonably calculated to provide the Student with a free appropriate public education.

E. Whether the preparation of the Student's May 12, 2006, IEP met the requirements of the IDEA, its regulations and the State Plan.

F. Whether the content of the Student's January 31, 2008, IEP was reasonably calculated to provide the Student with a free appropriate public education

Issue Number 3 is dismissed with respect to Respondent District and Respondent SSSD.

114. **Issue Number 4.** **Whether Respondent District and/or Respondent SSSD failed to provide the Student with an appropriate placement for the Student in the least restrictive environment.**

**Decision:**

Between October 21, 2006, and May 7, 2008, the Student's placement was Public Separate (Day) Facility, as determined by his IEP Team, except for times when the Student's placement was changed to Homebound at the request of the Student's Parent and with the recommendation of the Student's medical providers. The Hearing Panel finds that each of these placements was an appropriate placement for the Student in the least restrictive environment.

Petitioner also argues that Respondent District and/or Respondent SSSD failed to provide the Student with a free appropriate public education when the Student's IEP Team refused the request of the Student's Parent at the September 24, 2008, IEP meeting, that the Student's placement be changed, and his services be provided, in Respondent District's Life Skills classroom or that the Student be given a Homebound placement. As noted above, the Hearing Panel lacks jurisdiction over matters that occurred after May 7, 2008, when the Student became a parentally placed private school student with a disability.

In the event it is found that the Hearing Panel does have jurisdiction over matters that occurred to the Student between May 7, 2008, and October 21, 2008, the date of the filing of the due process complaint, the Hearing Panel finds that Respondent District and/or Respondent SSSD did not fail to provide the Student with a free appropriate public education when the Student's IEP Team refused the request of the Student's Parent that the Student be provided a personal aide as described in the Notice of Action dated September 24, 2008, and refused to change the Student's placement, and have the location of that placement be Respondent District's Life Skills classroom or Homebound status for the reasons set forth herein.

Issue Number 4 is dismissed with respect to Respondent District and Respondent SSSD.

**115. Issue Number 5.** **Whether the following conduct occurred:**

**A. Whether on or about October 5, 2007, Respondent SSSD convened Student's IEP Team, conducted an IEP meeting and discussed the Student's educational**

**programming and placement without the presence of a representative of Respondent District;**

**B. Whether on or about January 31, 2008, Respondent SSSD conducted a teleconference, which discussed the Student's educational programming and placement without the presence or participation of a representative of Respondent District;**

**C. Whether on or about February 4, 2008, Respondent SSSD failed to notify and consult with Respondent District concerning a decision to issue a Notice of Action to the Student's Parents which indicated that the Student's educational placement would be the State School for the Severely Disabled at Mapaville, Missouri;**

**D. Whether on or about May 19, 2008, Respondent SSSD convened the Student's IEP Team by teleconference, and provided Respondent District with notice shortly before the meeting and failed to provide Respondent District with copies of records or documents relating to the Student's IEP and/or educational programming prior to the teleconference; and/or,**

**E. Whether on or about October 5, 2007, January 31, 2008; February 4, 2008; and/or May 19, 2008, Respondent SSSD conducted IEP meetings concerning the Student without the presence and/or input of representatives of Respondent District.**

**If so, did such conduct: (1) impede the Student's right to a free appropriate public education; (2) significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the Student; or, (3) cause the Student to suffer a deprivation of an educational benefit? And if so, to what extent does such conduct constitute an affirmative defense for Respondent District for any conduct found to violate the IDEA or State Plan?**

**Decision:**

Respondent SSSD convened meetings to discuss the Student's special education and related services and his educational placement on October 5, 2007 and January 31, 2008, without inviting or advising representatives of Respondent District, and failed to notify or consult with representatives of Respondent District concerning its decision to send a Notice of Action to the Student's Parent on February 4, 2008. During the meetings, the Student's IEP Team, without the presence of representatives of Respondent District, discussed changing the Student's placement from Public Separate (Day) Facility to Homebound, due to his medical condition (October 5, 2007 meeting) and changing the Student's placement from Homebound back to Public Separate (Day) Facility due to his recovery (January 31, 2008 meeting). On February 4, 2008, Respondent SSSD sent the Student's Parent a Notice of Action confirming the change of placement decision made at the January 31, 2008 meeting.

It is the decision of the Hearing Panel that Respondent SSSD's failure to notify Respondent District of the October 4, 2007, and January 31, 2008, IEP meetings and its failure to notify or consult with Respondent District concerning its decision to issue the February 4, 2008, Notice of Action, does not constitute a procedural or substantive violation of the IDEA for the reasons set forth above.

With respect to the allegations regarding the May 19, 2008, IEP meeting, as noted above, the Hearing Panel lacks jurisdiction over matters that occurred after May 7, 2008, when the Student became a parentally placed private school student with a disability.

In the event it is found that the Hearing Panel does have jurisdiction over matters that occurred to the Student between May 7, 2008, and October 21, 2008, the date of the filing of the due process complaint, the Hearing Panel finds that Respondent SSSD's late notice of the meeting to Respondent District and failure to provide copies of records or documents for the meeting did not constitute a procedural or substantive violation of the IDEA or the State Plan for the reasons set forth herein.

Issue Number 5 is dismissed with respect to Respondent District and Respondent SSSD.

## IV. ORDER

116. The Hearing Panel issues the following Order:

A. Issue Numbers 1 through 5 are dismissed with respect to Respondent District.

B. Issue Numbers 1 through 5 are dismissed with respect to Respondent SSSD.

## V. APPEAL PROCEDURE

**PLEASE TAKE NOTICE** that these Findings of Fact, Conclusions of Law, Decision and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter and you have a right to request review of this decision pursuant to Section 162.962 RSMo. Specifically, you may request review by filing a petition in a state or federal court of competent jurisdiction within forty-five days after the receipt of this final decision. Your right to appeal this final decision is also set forth in the Regulations to the IDEA, 34 C.F.R. §300.512, and in the Procedural Safeguards which were provided to you at the beginning of this matter.

_/s/ Ransom A Ellis, III___ Dated: June 30, 2009
Ransom A Ellis, III

Hearing Chairperson

_/s/ Dr. Gale Rice_____ Dated: June 26, 2009
Dr. Gale Rice
Hearing Panel Member

_/s/ Christine Montgomery____ Dated: June 26, 2009
Christine Montgomery
Hearing Panel Member

## CERTIFICATE OF SERVICE

This Order has been served by regular United States Mail, with courtesy copies sent by facsimile or email (where facsimile numbers or email addresses were provided to the Hearing Chairperson) on the following persons on this 30th day of June, 2009:

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__/s/ Ransom A Ellis, III_____
Ransom A Ellis, III