BEFORE THE THREE-PERSON DUE PROCESS HEARING PANEL EMPOWERED BY THE MISSOURI DEPARMENT OF ELEMENTARY AND SECONDARY EDUCATION PURSUANT TO SECTION 162.961 R.S.MO.

XXXXXXXXXXXXXXXXX,	)	
	)	**Complaints Received by DESE on**
Petitioner,	)	**October 4, 2007 (#2),**[1]
	)	**January 8, 2008 (#3),**
	)	**June 19, 2008 (#4),**
v.	)	**June 25, 2008 (#5),**
	)	**July 8, 2008 (#6),**[2]
THE SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY,	)	**August 27, 2008 (#7),**
	)	**September 10, 2008 (#8), and**
Respondent.	)	**March 26, 2009 (#10)**[3]
	)	

UNANIMOUS FINDING OF FACT,
CONCLUSIONS OF LAW, DECISION AND ORDER

I. FINDINGS OF FACT

A. A Procedural Background and Timeline Information

1. Parent filed Complaints with the Department of Elementary and Secondary Education (DESE) on these dates:

October 4, 2007 (#2)

January 8, 2008 (#3)

June 19, 2008 (#4)

June 25, 2008 (#5)

July 8, 2008 (#6)

August 27, 2008 (#7)

[1] Parent's first Complaint was filed April 2007 and was voluntarily withdrawn. *See* Complaint #5 ¶ 2. Therefore, the October 4, 2007 Complaint is referred to as #2.

[2] When this Complaint was filed Parent asked that her Complaints be assigned numbers preceded by Parent's last name. Complaint #6 p.1. Previous Orders have honored Parent's request. This Order keeps the numbers but deletes Parent's last name for confidentiality.

[3] The Complaint received March 16, 2009 (sometimes referred to as received March 13, 2009) (#9) was dismissed "without prejudice" in that it was contained within the subsequent March 26, 2009 Complaint. Baker Order of April 15, 2009, p.6.

September 10, 2008 (#8)

March 26, 2009 (#9)

2. Hearing Chair Baker reported the following timeline events on June 12, 2009:

   a. October 4, 2007 – [Complaint] #2 filed, originally assigned to Pamela Wright, then assigned to Janet Baker upon Wright's recusal. Decision originally due December 13, 2007 per Wright.

   b. November 29, 2007 – Joint request to extend deadline through January 25, 2008, granted by Chairperson.

   c. January 8, 2008 – [Complaint] #3 filed, assigned to Janet Baker. Decision originally due March 23, 2008.

   d. January 15, 2008, Special School District (SSD) requests extension of decision deadline for [Complaint] #2 through March 20, 2008, granted by Chairperson.

   e. March 5, 2008, SSD requests extension of decision deadline for 60 days for [Complaint] #2 and #3, granted through May 19 and May 23, 2008.

   f. May 13, 2008, SSD requests extension of decision deadline for 60 days for [Complaint] #2 and #3, granted through July 18 and July 22, 2008.

   g. June 19, 2008 – [Complaint] #4 filed, decision originally due September 3, 2008.

   h. June 23, 2008, SSD requests extension of decision deadline for 60 days for [Complaint] #2 and #3, granted through September 16 and September 20, 2008.

   i. June 25, 2008 – [Complaint] #5 filed, originally assigned to David Potashnick, decision originally due September 9, 2008.

   j. July 8, 2008 – [Complaint] #6 filed, originally assigned to Patrick Boyle, decision originally due September 21, 2008.

   k. August 27, 2008 – [Complaint] #7 filed, decision originally due on November 10, 2008.

3. Complaints #2, #3 and #4 were assigned to Hearing Chairperson Baker. Complaint #5 was pending before Chairperson Potashnick. Complaint #6 was pending before Chairperson Boyle. Upon separate motions by Parent and SSD, SSD asked that all Complaints

be consolidated for hearing and Parent asked that the Complaints before other Chairpersons be assigned to Chairperson Baker.

4. Chairperson Baker found that all Complaints "have the same parties and involve the provision of a free appropriate public education to Student, in one manner or another." Baker September 2, 2008. Consequently, Chairperson Baker consolidated Complaints #2, #3, #4, #5 and #6. *Id.* Chairperson, in the same order, upon her own motion, consolidated Complaint #7 with the others. *Id.*

5. The timeframes applicable for [Complaint] #2 controlled all Complaints except Complaint #7, which was in the resolution period. *Id.*

6. As of September 2, 2008, the deadline for hearing decision for Complaint #2 was September 16, 2008.

7. September 5, 2008, SSD requests extension of decision deadline for 60 days for consolidated cases, granted by Chairperson through November 15, 2008.

8. September 10, 2008 – Complaint #8 filed, consolidated with consolidated Complaints cases *sua sponte* by order of Chairperson of September 19, 2008.

9. November 12, 2008, SSD requests extension of decision deadline for consolidated cases for 30 days, granted by Chairperson through December 14, 2008.

10. November 18, 2008, Parent requests extension of decision deadline for consolidated cases through January 30, 2009, granted by Chairperson.

11. January 14, 2009, Parent requests extension of decision deadline for consolidated cases through March 31, 2009, granted by Chairperson.

12. March 21, 2009, Parent requests extension of decision deadline for consolidated cases through July 31, 2009, granted by Chairperson.

13. The motion to consolidate Complaint #9 with the other Complaints was granted by Order dated March 23, 2009.

14. Parent filed Complaint #10, which she stated amended Complaint #9.

15. Complaint #10 was assigned to Chairperson Ellis.

16. Upon motion of Parent, Complaint #9 was dismissed without prejudice by Order dated April 15, 2009.

17. Parent's request to stay of all action in Complaint #2-#8, which was first denied, ultimately was granted by Order on April 28, 2009.

18. Chairperson Baker recused herself and Complaints #2-#8 were remanded to DESE for further assignment. May 26, 2009 Order.

19. On May 1, 2009 SSD requested an extension of the statutory timelines for Complaint #10 to and including September 30, 2009. That motion was granted and the timelines were extended to September 30, 2009 by Chairperson Ellis on May 6, 2009.

20. On May 26, 2009 Chairperson Ellis recused himself from Complaint #10 and the case was remanded to DESE for reassignment.

21. DESE assigned Complaints #2, #3, #4, #5, #6. #7, #8 and #10 to Chairperson Dean on June 3, 2009.

22. Parent requested an extension of the deadlines on June 10, 2009 and on June 12, 2009 Parent moved to consolidate Complaint #10 with the other Complaints pending before Chairperson Dean.

23. On June 15, 2009 the stay of Complaints #2-#8 was dissolved; Parent's motion to consolidate Complaint #10 with Complaints #2-#8 was granted; the separate motions by SSD

and Parent to extend the decision date were granted; and the decision date of the consolidated cases was set for October 15, 2009.

24. The hearing dates were set for September 9, 11, 30 and October 13 and 22, 2009.

25. On Parent's motion without objection from SSD the decision date was extended to October 31, 2009.

26. The hearing began on September 9, 2009, there were five hearing days before October 29, 2009 and it was apparent the testimony would not be completed by the decision date. Therefore, upon a joint motion of Parent and SSD and Order dated October 28, 2009 the decision date was set for 60 days after the post hearing briefs were filed.

27. The last day of the hearing was May 13, 2010. Post hearing briefs were due July 13, 2010 and the decision date is September 11, 2010. May 6, 2010 Order.

28. This Decision is issued within the current timeline.

29. Motions to dismiss were filed by SSD and the following claims were dismissed:

a. Request for an order to restrain, discipline, fine and re-educate the individual teachers and administrators involved with Student. Order on Motion to Dismiss October 4, 2007 Complaint #2 dated August 4, 2009.

b. Claim for retaliation. Order on Motion to Dismiss June 25, 2008 Complaint #5 dated August 4, 2009.

c. Claim for refusal to mediate claim. Order on Motion to Dismiss June 25, 2008 Complaint #5 dated August 4, 2009.

d. Requests for money damages, including punitive damages and requested relief against individuals. Order on Motion to Dismiss June 25, 2008 Complaint #5 dated August 4, 2009.

e. Parent's request for "damages and tuition/services to try address how failed her and far behind she is from failure to follow the IEP's, training on discrimination and need to accommodated persons with records of disabilities …" Order on SSD'S Motion to Dismiss August 27, 2008 Complaint #7 dated August 4, 2009.

f. Parent's request to be "compensated/reimbursed for the relocation expenses [Parent has] had for the alternate placement in another district; compensation for loss of rights, reimbursement for [her] time, supplies, and resources." Order on SSD's Motion to Dismiss the September 10, 2008 Complaint Amended January 30, 2009 #8 dated August 4, 2009.

g. Parent's request for "reimbursement of costs of the efforts to obtain copies, access and explanation and compliance as well as the cost of the new placement (including the cost of the relocation to a different school district …) and compensatory damages and the equivalent exemplary damages." Order Ruling on SSD's Motion to Dismiss [Complaint] #6 and #10 dated September 3, 2009.

30. The following issues were identified to be decided at the hearing:

a. Was Student denied FAPE between March 26, 2007 and November 20, 2008?

b. Were there procedural violations that resulted in the denial of FAPE?

i. Was Student's IEP implemented?

ii. Was Parent prevented from being an active participant on the IEP team from September 18, 2007 to November 20, 2008?

iii. Was Parent denied information from September 18, 2007 through November 20, 2008, which significantly impeded Parent from participating on the IEP team?

iv. Was Student deprived of educational benefits?

c. Was Student properly evaluated during the 2007 – 2008 school year?

d. Was there a change in Student's placement during the 2007 – 2008 school year?

e. Is Parent entitled to equitable relief?

Order Ruling on SSD's Motion to Dismiss [Complaint] #6 and #10 dated September 3, 2009; Revised Order on Issues to be Decided at the Hearing dated October 14, 2009.

B. Background Facts[4]

31. Student was born on, in and placed in an . Tr.II:213:15-23 (Parent);[5] R-11;[6] R-23 at 710. She was adopted by Parent in February of 2000, when she was 3 years and 5 months of age. Tr.II:213:15-23 (Parent); Tr.XVI:2753:11-2754:4 (Parent). Student did not speak any English at the time and "it took her a while to learn English." Tr.II:213:15-23 (Parent).

32. In 2000, soon after coming to the United States, Student started attending the Clayton Child Center. Tr.II:213:22-214:1 (Parent); Tr.XVI:2765:16-2766:2 (Parent). Student and her mother lived in University City, Missouri, at the time. Tr.II:214:5-17 (Parent).

33. An initial evaluation to determine eligibility for early childhood special education under the IDEA was completed on May 17, 2001, by the University City School District. Tr.XVI:2770:12-19; 2781:23-2783:21; 2788:12-2793:12 (Parent); R-23 at 711. The evaluation revealed "an ECSE (Early Childhood Special Education) diagnosis of significant delays in comprehension and expression of language, fine motor concerns, and cognitive/adaptive skills." R-23 at 711.

34. An initial individualized education program ("IEP") was developed. Tr.XVI:2796:3-2801:12 (Parent).

35. As detailed below, Student was served by the Special School District of St. Louis County ("SSD") as follows:

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[4] Parent and SSD provided background information about Student and her early education so that the relevant fats would be seen in context.

[5] There are twenty-five (25) volumes of transcripts. The pages are consecutively numbered. Citation to the transcript are to the transcript (Tr.) volume: page: line where citation starts – page: line where the citation ends. The last name of the witness is in parenthesis after the citation.

[6] Petitioner's exhibits have P- before the exhibit number. Respondent's exhibits have R- before the exhibit number. Both sets of exhibits have consecutively numbered pages. If a specific page of an exhibit is referenced, the page number is give after the exhibit number.

a. 2001-2002 ECSE

b. 2002-2003 Kindergarten

c. 2003-2004 First Grade

d. 2004-2005 Second Grade

e. 2005-2006 Third Grade

f. 2006-2007 Fourth Grade

g. 2007-2008 Fifth Grade

h. 2008-November 20, 2009 Sixth Grade

36. In August 2001, Student left Clayton Child Center. Tr.XVI:2766:23-2767:21 (Parent). An IEP was developed on August 28, 2001. R-15. During the 2001-2002 school year Student attended the Brentwood YWCA, with motor and speech/language services provided by SSD. Tr.XVI:2766:23-2767:6, 2806:23-2808:2 (Parent).

37. An IEP was developed on May 22, 2002. R-16. Although Student resided in the University City School District attendance area for the Delmar Harvard Elementary School, Parent requested that Student be allowed to attend Flynn Park Elementary School. R-16 at 0659 ("Resident District Home School Delmar Harvard"); Tr.XVI:2815:14-2816:19 (Parent). Parent's request was granted. *Id.*

38. In the 2002-2003 school year (kindergarten), Student began attending Flynn Park Elementary School in University City School District. Tr.II:215:20-25 (Parent); Tr.XVI:2816:17-19 (Parent).

39. Student's November 26, 2002 IEP noted that an evaluation to determine whether a school age diagnosis was appropriate was to be completed by the end of the 2002-2003 school year. R-19 at 679.

40. On May 22, 2003, a school age reevaluation was completed. Tr.XVI:2825:15-20 (Parent); R-23. The composite score for the Stanford-Binet Intelligence Scale was 102, which was within the average range. R-23 at 0712, 0715. The reevaluation determined that Student qualified under the disability categories of specific learning disabilities in basic reading and math calculation and language impaired in morphology and semantics. Tr.XVI:2832:23-2835:1 (Parent); R-23 at 0715.

41. Student was functioning below the bottom third of her class in the areas of reading, math, and written expression in kindergarten. Tr.XVI:2831:21-2832:8 (Parent); R-23 at 711.

42. While retaining her in kindergarten was discussed with Parent, Student was advanced to first grade. Tr.XVI:2832:9-22 (Parent); R-23 at 0716; R-145 at 0702.

43. An IEP was developed on May 28, 2003. R-24. During the 2003-2004 school year, Student attended first grade at Flynn Park with B.R. as her special education teacher. Tr.II:221:1-3 (Parent); Tr.XVII:2913:1-16; 2947:23-2948:13 (Parent). Ms. R. was Student's special education teacher until Ms. R. retired after Student's fourth grade year. Tr.XVII:2948:10-2849:14 (Parent).

44. On April 29, 2004, when Student was in first grade, her IEP was reviewed and a behavior intervention plan was developed. R-28 at 793-796. The behavior plan stated that the problem behaviors "may seem to be connected to significant environmental issues not directly associated with schoolwork." R-28 at 0793.

45. Student's fourth quarter report card for the 2003-2004 school year (first grade) noted that she was working below grade level in reading. R-145 at 0815.

46. During the 2004-2005 school year (second grade), Student attended Flynn Park. R-32 at 0849.

47. During the 2005-2006 school year (third grade), Student attended Flynn Park. R-34 at 0881.

48. On December 7, 2005, Student's IEP was reviewed and a Review of Existing Data for Reevaluation was completed. R-34; R-35. The IEP team maintained the same IDEA disability categories without testing and developed a behavior intervention plan. R-34; R-35.

49. The Developmental Reading Assessment ("DRA") is a part of the University City reading assessment protocol. Tr.XI:1960:25-1963:15 (D.B.). Until fourth grade, students are given the tests one-on-one with a teacher. *Id.* After that, students work more independently when taking the assessment. *Id.*

50. During the 2006-2007 school year (fourth grade), Student attended Flynn Park with D.F. and J.J. as her fourth grade teachers. Tr.II:222:22-223:3 (Parent); R-41 at 0971 and 0994.

51. D.F. was Student's fourth grade communication arts and social studies teacher. *Id.* He has been a teacher for fifteen years. Tr.XI:1841:17-18 (F.). Student showed enthusiasm and willingness to learn, and was a "typical average fourth grader" with the issues as described in her IEP. Tr.XI:1839:10-14; 19-25 (F.). At the first of the school year, Mr. F. reviewed Student's IEP with SSD personnel. Tr.XI:1843:10-22 (F.).

52. On December 8, 2006, Student's IEP was reviewed. R-41. The IEP team noted that Student was "more responsible," "taking notes on own," and "acting more mature." R-41 at 973. The IEP did not include a behavior plan. R-41. Language services were reduced from 120

minutes per week to 90 minutes per week, because Student had made "considerable progress in the areas of language semantics and morphology." R-41 at 991-992.

53. Student's IEP team met again on February 14, 2007. P-15; R-43. The IEP team again noted that Student was more responsible for taking class notes and was more willing to complete work independently. R-43 at 1008. The February 2007 IEP contained ten measurable annual goals for Student. P-15 at 221-230; R-43 at 1010-1019. Parent requested that the behavior plans developed when Student was in first and third grades be attached to the IEP. P-15 at 236; R-43 at 1025. The behavior plans were made part of the IEP and were attached to the IEP. P-15 at 220; 239-247; R-43 at 1009; 1028-1036.

54. The February 2007 IEP provided for Student to receive 150 minutes per week of special education instruction in reading in a general education setting, 150 minutes per week of special education instruction in reading in a special education setting, 150 minutes per week of special education instruction in math in a general education setting, and 150 minutes per week of special education instruction in math in a special education setting. P-15 at 231; R-43 at 1020. Student was to receive 90 minutes per week of language therapy as a related service. P-15 at 231; R-43 at 1020.

55. The February 2007 IEP listed approximately 43 accommodations/modifications. P-15 at 235-236; R-43 at 1022-1025.

C. *Facts Relevant to the Issues to be Decided*

56. Student made progress on her IEP goals during fourth grade. P-17 at 251-252; Tr.XI:1854:3-1857:12; 1859:8-1860:15 (F.); R-90 at 1402-11.

57. On May 18, 2007, Parent requested that Student's IEP be amended. P-21 at 269. L.A., SSD's compliance liaison, responded to the request. Tr.XIV:2434:1-2436:8 (A.); P-27; R-50. Ms. A. provided a copy of the portion of the Missouri State Plan for Special Education that

discusses the process to amend an IEP, which is different from the IEP meeting process. R-49, p. 1079. Ms. A. explained why SSD believed that Parent's requests to amend the IEP required an IEP meeting. R-50. Parent was advised that an IEP meeting would be scheduled in the fall when staff was available. Tr.XIV:2437:8-12; 2458:4-22 (A.); R-50.

58. Student and Parent liked Ms. R., who was a grandmotherly type person. Tr.XVII:2948:14-2949:3 (Parent); Tr.XXI:3544:24-3545:15 (Parent). Because Ms. R. had been her special education teacher from first grade through fourth grade, Student was used to the routine of Ms. R. Tr.XXI:3544:24-3545:15 (Parent). Student had difficulty making transitions when school personnel changed. Tr.XVII:2950:20-2951:21 (Parent). Ms. R. retired at the end of Student's fourth-grade year; M.W. took Ms. R. place. Tr.XVII:2949:12-17 (Parent).

59. M.W. has been employed by SSD as a special education teacher since 2003. Tr.VII:1116:16-1117:4 (W.); Tr.XXII:3735:14-23 (W.). Her first year at Flynn Park was the 2007-2008 school year. Tr.XXII:3735:14-17 (W.). Ms. W. was Student's special education teacher for Student's fifth and sixth grade years at Flynn Park. Tr.XXII:3735:24-3736:5 (W.).

60. Prior to the start of the 2007-2008 school year Ms. W. spoke with Ms. R. for thirty minutes to one hour about Student. Tr.VII:1117:5-1118:4 (W.). Ms. W. had Student's IEP out at the time. Tr.VII:1118:17-19 (W.). The meeting included going over the accommodations in the IEP. Tr.VII:1118:20-23 (W.). Ms. W. also spoke with J.K. about Student before the start of the school year. Tr.VII:1130:17-19 (W.).

61. Prior to the start of the 2007-2008 school year Ms. W. and others, including Ms. R., met with Student's teachers to talk about Student and the services in her IEP. Tr.VII:1130:23-1131:24 (W.); Tr.XI:1991:25-1993:1 (D.B.); Tr.XII:2028:25-2030:17 (G.B.); Tr.XXII:3737:2-22; 3846:4-8 (W.); R-51. Student's teachers signed a form acknowledging that they had met and

reviewed and discussed Student's educational diagnosis, individual needs, special services, and adaptations/modifications. R-51, R-95. Ms. W. provided the teachers copies of the accommodation pages of Student's IEP and the behavior plans. Tr.VII:1131:20-24 (W.); Tr.XXII:3840:25-3841:5 (W.); R-51. At those meetings, strategies that Ms. R. used that worked with Student were discussed. Tr.XII:2032:5-12 (L.S.). The same procedures were followed prior to the 2008-2009 school year. Tr.XII:2140:14-2141:18 (G.B.); Tr.XXII:3739:22-3740:17 (W.); R-95. University City teachers also are required to review each of their student's permanent file before the start of the school year. Tr.XI:1991:25-1993:1 (D.B.); Tr.XII:2134:10-20 (G.B.).

62. Student attended Flynn Park in 2007-2008 for her fifth grade year. Tr.II:223:4-7 (Parent); Tr.XXII:3735:24-3736:1 (W.). Her teacher was L.S.. Tr.II:223:4-7 (Parent). The special education teacher was M.W.. Tr.XXII:3735:24-3736:1 (W.).

63. On September 17, 2007, Student's IEP team met. R-56 at 1113. Student's strengths were noted to be "eager to learn, helping others, writing on topic, conversational language skills, and athletic skills." R-56 at 1114. Changes to the special education in math (decrease from 150 minutes per week in a special education setting to 75 minutes) and language services (decrease from 90 minutes per week to 60 minutes) were suggested by some of Student's IEP Team members. R-56 at 1129-1130. Some IEP Team members also suggested elimination of some accommodations/modifications, and the elimination of the behavior plan. R-56 at 1131-1133. Parent agreed with the suggested changes in the special education in math and language services. R-56 at 1129-30. Parent disagreed with changes to accommodations/modifications and to the elimination of the behavior plan. R-56 at 1133. The reduction in special education in math in a special education setting was made because Student was receiving instruction in math in a small group in the general education setting. R-56 at 1130.

64. Items that Parent wanted to have addressed by amendment to the IEP were discussed at the September 17, 2007 IEP meeting. R-58.

65. SSD prepared clearly marked draft IEPs presented at the IEP meetings. Tr.VII: 1153:5-12; 1174:14-21; 1189:1-4; Tr. XXII:3854:20-24.

66. After the September 17, 2007 meeting, by email dated September 18, 2007, Parent requested that the IEP team reconvene. R-56 at 1132. The request was denied because SSD believed there was no new information for the IEP team to consider. R-56 at 1132.

67. Parent filed a due process complaint, received by DESE on October 4, 2007, that alleged violations of the IDEA with respect to the September 17, 2007 IEP meeting. P-8 at 106-30. A resolution session was held on October 10, 2007, and an agreement was reached. P-103. In the Resolution Session Agreement, Parent confirmed her agreement on September 17, 2007, to the changes in the special education math and language services Student was to receive. P-103 at 489 ¶3. Other than those two changes, it was agreed that the February 2007 IEP would continue to be implemented. Tr.VII:1167:21-1168:15 (Parent). The February 2007 IEP with the changes Parent agreed to in September 2007 is the "Stay Put IEP."

68. L.S. was Student's fifth grade teacher and had been a teacher for 10 years. Tr.XII:2028:10-24 (L.S.). Ms. L.S. taught four subjects (science, math, social studies, and communication arts). Tr.XII:2036:12-2038:24 (L.S.). The vocabulary content for the fifth grade social studies and science was not easy for any student. Tr.XII:2041:14-2043:5 (L.S.).

69. Ms. L.S. and Ms. W. met weekly to talk about Student and what she was doing. Tr.XII:2050:14-16 (L.S.). Ms. L.S. kept a copy of Student's accommodations in her lesson plan book. Tr.XII:2033:19-24 (L.S.).

70. Ms. L.S. went on maternity leave abruptly, shortly before Halloween; it was not anticipated by the school that she would be going out that early. Tr.XII:2048:23-2049:6 (L.S.).

71. A.S., who was a teacher assistant in the fifth grade classrooms, including Ms. L.S.'s classroom, took over for Ms. L.S. as the classroom teacher. Tr.XII:2043:9-2044:6 (L.S.); Tr.XI:1921:6-1922:6 (D.B.). Ms. A.S. is a certified teacher. Tr.XI:1921:19-21 (D.B.). Ms. A.S. also taught social studies to Ms. L.S.'s class prior to the time that Ms. L.S. left. Tr.XII:2043:16-2044:6 (L.S.).

72. Ms. LS. returned to the classroom in early April 2008. Tr.XII:2048:23-2049:9 (L.S.).

73. Ms. L.S. had several small groups in math. Tr.XII:2044:24-2046:9 (L.S.). The groups got together after students received their assignment. *Id.* The student make-up of the groups would change based on individual needs and the unit being taught. *Id.* The groups included students who did not have an IEP. *Id.* Students worked in small groups for literature class based on reading levels. Tr.XII:2054:17-2056:15 (L.S.).

74. After Ms. L.S. left on maternity leave, there were plans to have the small math group be taught by Ms. P. in her general education classroom. Tr.VII:1170:1-1171:14 (W.); Tr.XXI:3666:25-3669:2 (Parent); R-111 at 1746-47. Ms. P. was another fifth grade teacher at Flynn Park. Tr.XII:2043:9-14 (L.S.); Tr.VII:1170:20-1171:4 (W.). This proposal was discussed with Parent during a conference and then Parent discussed it with Student. R-111 (Parent's 11/5/07 email to D.B. "Before you came into the conference I learned that the plan is for [Student] to be placed with Ms. P. for a small group. I am asking that placement be reviewed. When I mentioned it to [Student] so she would not be blindsided by it, she was visibly hurt and

just sobbed.") Parent requested that Student not participate in the small group that Ms. P. was to teach. Tr.VII:1170:16-1171:14 (W.); Tr.XXI:3668:8-3669:10 (Parent); R-111 at 1746-47.

75. After Parent decided not to have Student participate in Ms. P.'s small math group, Ms. W. increased the amount of time she spent working on math with Student in the general education setting. Tr.VII:1159:7-1161:3; 1175:23-1176:9; 1187:8-1188:5 (W.).

76. Ms. A.S. worked closely with Ms. W. to see that Student's IEP accommodations and modifications were provided. Tr.XI:1922:2-15 (D.B.).

77. J.K. is a speech pathologist employed by SSD who has provided services to Student since Student was in kindergarten. Tr.III:340:3-341:12 (K.). Ms. K. provided services in the speech room rather than in Student's classroom. Tr.III:344:15-345:3 (K.). Ms. K. has a degree in speech and a master's degree in speech and language. Tr.III:341:25-342:9 (K.).

78. Ms. K. worked with Student on semantics and morphology during the relevant time period. Tr.VII:1139:14-22 (W.).

79. Ms. K. observed that Student made "tremendous" improvement in her language abilities over the years and improved "a lot" with respect to communication issues that Student had exhibited in earlier years. Tr.III:340:3-341:2; 375:1-4 (K.). Ms. K. observed Student in Student's classroom on several occasions during fifth grade. Tr.III:389:7-13 (K.).

80. Ms. K. worked with Student on goals 7-10 of the February 2007 IEP and the Stay Put IEP, which addressed language issues. Tr.XXII:3747:2-9 (W.); P-15 at 221-230; R-43 at 1016-1019. Student made progress on those goals. Tr.XXII:3781:21-3783:11 (W.); R-90 at 1408-1411 (making progress on one goal, met other three). Based on her observations and working with Student, Ms. W. agreed that Student made progress on her goals. Tr.XXII:3782:22-

3783:8 (W.). Ms. K. also observed improvement in Student's reading during the time she worked with her. Tr.III:340:3-341:10 (K.).

81. Ms. K. did the language testing for the January 2008 reevaluation. Tr.III:354:23-355:2 (K.); R-80 at 1281-1285, 1298-1299. The January 31, 2008 reevaluation report showed that Student would not have qualified for language services at that time, if it had been an initial evaluation. Tr.III:340:3-341:12. Language services were continued because Student had "some" difficulties with content vocabulary and "a little bit of grammar." Tr.III:341:5-12 (K.). Student did not have difficulties with everyday vocabulary. Tr.III:391:11-18 (K.).

82. Ms. K. and Student's special education resource teacher met with Student's teachers before school started each year. Tr.III:351:13-352:15 (K.). They discussed Student's IEP, including the goals and accommodations and modifications. *Id.* (K.).

83. As noted above, at the September 17, 2007 IEP meeting and at the October 2007 resolution conference, Parent agreed to reduce the amount of language services each week to 60 minutes. P-103; R-56 at 1129. Ms. K. kept a log of the times when she met with Student and of the times she did not meet with Student. P-242 at 867-876; P-261. Although Student missed language services on some days, many of those were on days in which there were other classroom activities, Student did not come when called, school was out for a holiday, or there was individual or school-wide testing. P-242; P-261; R-46; R-91. Student's ability to benefit from her education program and to receive education benefit were not harmed by occasionally missing her scheduled language services.

84. G.H. is employed by SSD as an area coordinator for elementary schools in the University City School District. Tr.V:688:9-13 (H.). Ms. H. has been employed by SSD for 26 years. Tr.V:688:19-24 (H.).

85. R.S. has been employed by SSD as a school psychologist since 1988. Tr.VIII:1288:9-22 (R.S.). Ms. R.S. first met Student when Student was in kindergarten and Ms. R.S. was a member of the evaluation team. Tr.VIII:1289:11-23 (R.S.). Ms. R.S. did not attend any IEP meetings or discussions on Student's IEP from May 2003 until September 2007. Tr.VIII:1290:2-15, 1292:22-25 (R.S.).

86. An IEP meeting was held on September 17, 2007. R-56. Ms. R.S. attended the meeting because Parent had requested that testing be done. Tr.VIII:1290:8-19 (R.S.). A previous review of existing data for reevaluation of Student was completed on December 7, 2005. R-34; R-35.

87. A meeting was held on October 4, 2007, to discuss a reevaluation of Student. P-127 at 550; R-80 at 1301. Parent participated in the meeting by telephone. Tr.XI:1918:5-19 (B.). After the meeting, at Parent's request, Ms. R.S. provided additional information about testing that would be done. Tr.VIII:1295:12-1296:19, 1298:9-1299:3 (R.S.); P-86. Parent had the opportunity to provide input into the reevaluation and Parent provided input. Tr.VIII:1298:9-1299:3 (R.S.); R-72; P-67; P-67A; P-84; P-89.

88. Dr. S.S. has a dual Ph.D in counseling psychology, and school psychology, is a licensed psychologist and a certified school psychologist. Tr.IV:499:6-20 (S.). In October 2007 he communicated with Parent in response to questions she had about proposed testing and testing Parent wanted to be conducted. P-98; R-74; Tr.IV:505:15-506:19 (S.).

89. Ms. R.S. used a test selected by Parent. Tr.VIII:1298:9-1299:3 (R.S.). Tests used included an assessment that contained both nonverbal and a verbal component. Tr.VIII:1299:10-17 (R.S.). There is no difference between testing that is done for purposes of diagnosis and that done for developing an individualized educational program. Tr.VIII:1307:9-1308:6 (R.S.).

90. As part of the reevaluation, Ms. R.S. sought input from Student's teachers and service providers. Tr.VIII:1301:1-17; 1309:20-1310:2 (R.S.).

91. A meeting was held on January 31, 2008, to discuss the reevaluation results. P-127 at 528, 551; R-80 at 1279, 1302. Recommendations contained in the January 2008 reevaluation report were suggestions for the IEP team to consider. Tr.III:423:12-25 (K.); Tr.IV:565:5-566:6; 570:22-571:1 (S.); Tr.VIII:1315:4-1316:21 (W.). Ms. W. used the strategies that were suggested. Tr.VIII:1230:3-10 (W.).

92. The January 2008 report noted that Student's "motivation level depended on the tasks presented. When subtests were novel and more of a 'game' nature, Student was more engaged." P-127 at 540; R-80 at 1291. Student's cognitive functioning (General Intellectual Ability of 94), as assessed by the Woodcock-Johnson Tests of Cognitive Abilities-Third Edition, was in the average range. P-127 at 536-537, 544, 553; R-80 at 1288-1289, 1292, 1304. Student's long-term memory fell within the broad average range. Tr.IV:559:13-560:10 (S.). For the Woodcock-Johnson test, an average standard score is between 90 and 110; the mean is 100. Tr.IV:578:12-18 (S.). The same is true for the Wecheler; the mean is 100 with a standard deviation of 15. Tr.IV:584:8-19 (S.).

93. The team did not find that Student met the eligibility criteria for any new disability under the IDEA; her diagnosis remained the same. P-127 at 539; R-80 at 1290.

94. The January 2008 reevaluation provided the information needed to evaluate Student. Tr.IV:513:15-24 (S.). The tests that were administered to Student were appropriate, were comprehensive and provided the information that Parent requested. Tr.IV:516:8-518:10 (S.); Tr.VIII:1298:9-1299:3 (S.); Tr.IV:526-39, 594-596. The tests used were tailored to assess Student's specific area of educational need. Tr.IV:528:16-530:1; 535:4-19, 538:10-539:19 (S.).

95. After the reevaluation was completed, Dr. S. went to Parent's office to discuss the results with her. Tr.IV:535:20-536:22, 543:12-544:1 (S.). He took with him the actual tests used. Tr.IV:543:18-544:1. Parent relied on Dr. S. to learn about assessment of students to determine needs for special education. Tr.XVI:2751:20-2752:10 (Parent).

96. On February 6, 2008, Parent requested an independent educational evaluation ("IEE"), stating that she "would like to get a better or other measure of her intelligence by anon (sic) verbal test such as TONI." R-81 at 1315. SSD agreed to Parent's request for an IEE and Parent was advised to contact Dr. S.. R-81 at 1313.

97. Dr. S. arranged with the Community Psychological Service ("CPS") at the University of Missouri-St. Louis ("UMSL") to administer the nonverbal cognitive testing that Parent requested. R-84 at 1333. CPS completed an evaluation on April 30, 2008, administering the Wechsler Nonverbal Scale of Ability. R-84 at 1333. In its May 15, 2008 Psychological Evaluation, CPS stated that the test results were believed to be valid indicators of Student's non-verbal cognitive abilities. R-84 at 1335. Student's full scale score was 101, which was reported to be in the average range. R-84 at 1335.

98. For the 2008-2009 school year, G.B. was Student's sixth grade teacher for science and math. Tr.XII:2132:15-2133:22 (G.B.). He never observed Student to exhibit anxiety. Tr.XXII:2208:14-20 (G.B.).

99. Ms. W. had responsibility for implementing parts of Student's IEP. Tr.XXII:3742:4-3745:5 (W.). Ms. W. provided the special education instruction in reading and math in the general education and special education settings included in the February 2007 IEP. *Id.*; R-43 at 1020. She worked on goals 1-6. Tr.XXII:3745:16-3750:22; 3752:20-3757:7 (W.).

100. Ms. W. used the REWARDS (Reading Excellence, Word Attack and Rate Development Strategies) program as part of the reading services she provided to Student. Tr.XXII:3748:1-25 (W.). The program was used in a small group setting with two to three other students. *Id.* Ms. W. had used the REWARDS program previously and received training in the program prior to the start of the 2007-2008 school year. *Id.*; Tr.V:698:1-6 (H.). The REWARDS program was discussed with Parent. Tr.V:708:23-709:6 (H.); Tr.VII:1155:18-23 (W.). REWARDS is used for decoding, but is not just a program to work on decoding; it also addresses comprehension and fluency. Tr.VII:1139:3-13 (W.); Tr.XI:1971:19-1972:16 (D.B.). Ms. W. used the REWARDS program with Student during fifth grade and the beginning of sixth grade. Tr.VII:1139:23-1140:1 (W.).

101. Ms. W. also used other reading passages in literature when working with Student. Tr.VIII:1232:5-12, 1237:17-21 (W.); Tr.XXII:3752:20-3754:2 (W.).

102. Student made progress using the REWARDS program, from a second grade level to fourth grade level. Tr.VII:1141:19-1142:8 (W.); R-90 at 1402-03. Ms. W. also observed improvement in Student's reading in small group settings, and Student liked to read in those settings. Tr.XXII:3754:3-11, 3800:10-12 (W.).

103. Parent was provided data regarding Student's progress. Tr.V:707:7-23 (H.).

104. Ms. W. kept data on progress on goals. Tr.XXII:3749:1-22; 3853:11-20 (W.). Progress was reported to Parent. *See* for example R-77; R-82; R-83; R-89; R-90. After progress was recorded, it was not Ms. W.'s practice to maintain the individual papers and data. Tr.XXII:3749:1-22 (W.).

105. Ms. W. used manipulatives, visuals, and other strategies when working with Student on math goals. Tr.VIII:1216:22-1217:3, 1226:23-1227:3 (W.); Tr.XXII:3754:12-3756:9, 3780:3-18 (W.); R-90 at 1404-1405.

106. Student made progress on her IEP goals. Tr.XXII:3775:16-3784:23; R-90 at 1402-1411; R-101. In sixth grade the goals allowed Student to work on more difficult skills. Tr.XXII:3784:2-23 (W.).

107. The February 2007 IEP and the Stay Put IEP stated that the accommodations/modifications for the student were "to be used in general and/or special education." R-43 at 1024. The only accommodation/modification to be provided for the home setting was the one stating that notes from science and math were to be sent home at the end of the week. Tr.XXII:3757:25-3758:22 (W.); R-43 at 1024-25.

108. Student's class work was modified as provided for in the February 2007 IEP and the Stay Put IEP. Tr.XXII:3825:22-3826:21 (W.); R-43 at 1024-25. Student's grades were based on grade level expectations. Tr.XXII:3825:22-3826:21 (W.).

109. Ms. W. worked with Student's general education teachers to see that the accommodations/modifications in the IEP were provided. Tr.XXII:3759:4-14 (W.). Ms. W. observed that the accommodations/modifications were provided appropriately in the general education classroom. Tr.XXII:3761:7-24 (W.).

110. The services of a paraprofessional were not included as part of Student's IEP. Tr.V:749:24-750:11 (H.); R-43. A.N. is employed by SSD as a paraprofessional. Tr.VI:951:4-8 (N.). In fourth grade, Ms. N. was assigned to assist a student in Mr. F.'s room. Tr.VI:954:17-21, 963:2-7 (N.). Although assigned to a particular student, Ms. N. would sometimes assist other students. Tr.V:749:24-750:11 (H.); Tr.VI:954:17-21 (N.). Ms. N. did not notice that Student had

memory issues and did not observe that Student had any problems with Mr. F.. Tr.VI:959:17-19, 963:8-20 (N.).

111. When Student was in Ms. L.S.'s fifth grade classroom, Ms. N. was assigned to a student in Ms. P.'s room. Tr.VI:957:2-7 (N.).

112. The February 2007 IEP and the Stay Put IEP provided that directions for Student "may need" to be broken into small steps; Student did not require that every assignment be broken into small steps. Tr.XXII:3759:25-3761:6 (W.); R-43 at 1025. Student was given step-by-step directions when needed. Tr.XXII:3759:25-3761:6 (W.). The IEPs did not require that the directions be written down so that Student could take them home. R-43.

113. Student was checked for understanding. Tr.VII:1149:7-11 (W.); Tr.XII:2087:22-2089:13 (S.) ("I would check in with her constantly throughout the entire day"). Student received positive behavior support. Tr.VII:1151:24-1152:21 (W.); Tr.VIII:1275:2-10 (W.); Tr.XI:1916:10-22 (B.); Tr.XXII:3817:23-3818:13 (W.).

114. Notes from social studies were provided to Student in fifth grade. Tr.VIII:1261:18-22, 1264:8-1265:25 (W.). There were not class notes for science and math in fifth grade. Tr.VIII:1262:1-1263:2 (W.). Notes were provided to Student in sixth grade. Tr.VIII:1264:8-1265:25 (W.). Student was given preferential seating. Tr.VIII:1280:17-1281:14 (W.); Tr.XII:2145:9-2146:8 (G.B.). Ms. W. acted as a scribe for Student. Tr.VIII:1282:12-13 (W.). Ms. W. read tests to Student. Tr.XXII:3831:6-3832:5, 3863:13-19 (W.). Study guides were provided to Student. Tr.XII:2086:16-2087:14 (S.); Tr.XXII:3878:1-12, 3881:9-10 (W.). Directions were given to Student in a variety of ways and broken into small steps when needed. Tr.XII:2085:23-2088:4, 2095:1-19; 2099:20-2101:12, 2111:8-25 (S.). Hands on materials were used in math class. Tr.XII:2112:11-23 (S.).

115. Ms. W. assisted Student in science. Tr.VIII:1280:1-16 (W.).

116. Ms. W. liked Student and enjoyed working with her. Tr.XXII:3795:12-16 (W.).

117. Student did not exhibit behaviors at school during the relevant time period that required implementation of the behavior plan steps. Tr.III:358:10-359:22 (K.); Tr.V:741:8-743:10; 745:1-746:18; 808:24-809:7 (H.); Tr.VII:1149:12-17, 1150:19-1151:3, 1187:1-15 (W.); Tr.VIII:1257:25-1259:14 (W.); Tr.XI:1955:3-15, 2007:23-2010:8, 2014:10-12 (D.B.); Tr.XII:2035:5-19 (L.`S.); Tr.XV:2583:2-20 (S.).

118. D.B. has been the principal at Flynn Park since July 1, 2007. Tr.XI:1890:18-24 (D.B.). She had experience with special education in prior positions in schools. Tr.XI:1890:25-1891:20 (D.B.). Ms. D.B. previously had been a middle school language arts, social studies, and reading teacher. *Id.* Ms. D.B. tries to be in every classroom, including the special education resource room, at least one time each week. Tr.XI:1903:7-1904:6 (D.B.).

119. Student was the first student Ms. D.B. met at Flynn Park. They met at a parent coffee. Student came up to Ms. D.B., they talked, and they talked often after that. Tr.XI:200911-2010:8 (D.B.).

120. Ms. D.B. observed Student multiple times in the classroom and on other occasions. Tr.XI:2009:7-2012:11 (D.B.). "[Student] always seemed to be trying hard, she always seemed to be engaged in what she was doing. She had friends. She seemed to really enjoy attention from adults." Tr.XI:2009:22-25 (D.B.).

121. Student asked Ms. D.B. on a variety of times if Student could eat lunch with Ms. D.B., Ms. M. or Ms. W.. Tr.XI:2009:11-2010:8 (D.B.). Ms. D.B. believed that Student liked Ms. W.. Tr.XI:2012:12-13 (D.B.).

122. L.A.. is the compliance liaison for SSD. Tr.XIV:2418:3-11 (A.). Her duties include speaking and working with parents and staff members regarding compliance and implementation requirements for the IDEA. Tr.XIV:2418:14-2419:3 (A.). Prior to her employment with SSD, Ms. A. worked for the Missouri Department of Elementary and Secondary Education as a compliance supervisor. Tr.XIV:2419:7-10 (A.).

123. When a due process complaint is filed against SSD, Ms. A. advises staff members that parents still have rights and that they should be communicated with as they would with any other parent regardless of the fact that they filed a due process complaint. Tr.XIV:2427:4-2428:22; 2443:18-2444:1 (A.). She has trained University City staff with respect to that. Tr.XIV:2428:20-22 (A.).

124. Parent is a . Tr.XVI:2746:22-25 (Parent). Parent sent many communications to Ms. W., such as, P-96 at 476 ("I already have a basis to distrust you"); P-96 at 477 ("you care so little about children"); P-119A at 517D ("an added basis for individual liability"); R-112 at 1767 ("another of your unreliable statements," "it would seem if you cared for the students," "there's so little that it seems you are contributing to [Student]").

125. Ms. W. did the best she could to respond to the e-mail messages from Parent that "kept coming and coming." Tr.VIII:1224:24-1225:15 (W.); Tr.XXII:3775:12-15, 3819:5-17 (W.) ("Every time I communicated, I would get four more e-mails").

126. Ms. H. contacted Ms. A. because Ms. H. "felt that the teacher was receiving so many communications and that the teacher could only answer some of the questions." Tr.XV:2616:24-2618:4 (A.). Ms. H. thought "the communications were escalating." *Id.* at 2616:24-2617:17.

127. Ms. A. helped in responding to Parent, "almost everything we sent, [Parent] would question" and Ms. A. would attempt to address the questions. Tr.XV:2618:5-16 (A.).

128. Ms. W. considers communication with parents of students in her class to be an important part of what she does as a teacher. Tr.XXII:3765:21-24 (W.). Ms. W. continued to communicate with Parent. *See* for example R-89 at 1367-1400. In Ms. W.'s experience, the volume of communications that she received from Parent was "way above" what she received from other parents. Tr.XXII:3765:25-3766:3.

129. Student was generally happy at school and tried to complete her work. Tr.XI:2009:11-2010:8 (D.B.); Tr.XXII:3765:8-15; 3815:25-3816:7 (W.) ("when she would come to my classroom, she would always be happy, running in there, excited"). Student generally tried hard, was engaged in what she was doing and had friends. Tr.XI:2009:11-2012:11 (D.B.). In the spring of 2008, as part of the independent educational evaluation by UMSL, Student reported that she liked school, she liked her teachers, and the resource support she received was beneficial. R-84. In March 2008 Parent reported to Ms. W. that Student said that school was a strength for her and something that she liked or that interested her the most. R-115.

Student has average cognitive abilities. R-84 at 1335.

130. Parent has no training in the field of education, or certifications in education, special education, evaluation of students to determine needs for special education, interpreting results of assessments to determine needs for special education, or psychology. Tr.XVI:2748:15-2753:2 (Parent); Tr.XVII:2964:12-2966:2 (Parent). She has never been a teacher in a school. Tr.XVI:2749:25-2750:13 (Parent).

131. Parent never observed Ms. W.'s classroom during instructional time. Tr.XXII:3735:24-3736:8, 3821:11-14 (W.). Ms. W. never saw Parent in Student's general

education classroom during instructional time. Tr.XXII:3736:19-3737:1, 3821:15-3822:3 (W.). There is no evidence that Parent ever observed Student in any classroom during instructional time.

132. By September 11, 2008, Parent had made an offer to purchase a house in the Webster Groves School District. Tr.XXI:3663:23-3665:5 (Parent); R-120 at 1878. Around that time, Student told Ms. W. that Student would be moving. R-120 at 1878.

133. Student received passing grades and was advancing from grade to grade during the time she attended Flynn Park in the University City School District. R-145 at 1042, 1342, 1489.

134. Student's last day attending Flynn Park was November 20, 2008. P-8 at 123. After that, she attended public school in the Webster Groves School District, which is also served by SSD. Tr.II:271:20-24 (Parent).

II. CONCLUSIONS OF LAW

A. Determination of Whether Student Received Free Appropriate Public Education ("FAPE")

135. The Individuals with Disabilities Education Act ("IDEA"), its regulations, and the *Missouri State Plan for Special Education* (2007) ("State Plan") establish the rights of Students with disabilities and their parents and regulate the responsibilities of educational agencies, such as SSD in providing special education and related services to Students with disabilities. *See* 20 U.S.C. § 1400(d); 34 C.F.R. § 300.1; *State Plan,* p.1.

136. The State Plan was in effect at all material times during this proceeding. The State Plan constitutes regulations of the State of Missouri, which further define the rights of Students with disabilities and their parents and regulate the responsibilities of educational

agencies, such as SSD, in providing special education and related services to students with disabilities.

137. The purpose of the IDEA and its regulations is to: "(1) ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs"; (2) "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 children with disabilities." 20 U.S.C. § 1400(d); 34 C.F.R. § 300.1; *see J.L. v. Francis Howell R-3 Sch. Dist.*, 693 F.Supp.2d 1009, 1012 (E.D. Mo. 2010) ("The IDEA is designed 'to insure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs.'").

138. The IDEA generally requires that a child with a disability be provided with access to a FAPE. *See Bd. of Educ. Of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200-01 (1982). A FAPE is defined as 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 State Educational Agency ("SEA");

c. include the appropriate preschool, elementary school, or secondary school education in the State involved; and

d. are provided in conformity with the individualized education program ("IEP") required under 20 U.S.C. § 1414(d) of the IDEA and its regulations.

20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; *see Rowley*, 458 U.S. at 189.

139. An IEP is a comprehensive written statement for each child with a disability that includes the child's present level of academic achievement and functional performance, the child's special education needs, measurable annual goals, a procedure for progress reports, and

any supplemental aids and services needed. 20 U.S.C. § 1414(d)(1)(A) and 34 C.F.R. §§ 300.320-.324; *see M.P. v. Indep. Sch. Dist. No. 721*, 326 F.3d 975, 977, n.1 (8th Cir. 2003). It is developed by the student's IEP team. A SEA must ensure that the IEP team for each child with a disability includes the parent of the child; a regular education teacher of the child, a special education teacher of the child; a representative of the SEA who is qualified to provide or supervise the provision of specially designed instruction to meet unique needs of the child; an individual who can interpret instructional implications of evaluation results; and at the discretion of the parent or agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate. 34 C.F.R. § 300.321(a). An IEP team reviews child's IEP periodically, but not less than annually, to determine whether the annual goals for child are being achieved; and to revise the IEP as appropriate to address any lack of progress by child toward annual goals, the results of any reevaluation, information provided about child to or by the parents, the child's anticipated needs, or other matters. 34 C.F.R. § 300.324(b)(1).

140. The IDEA requires that students with disabilities are educated in the "least restrictive environment" ("LRE"), reflecting a strong preference that disabled students attend regular classes with non-disabled students and a presumption in favor of placement in public schools. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(1); *see T.F. v. Special Sch. Dist. of St. Louis County*, 449 F.3d 816, 820 (8th Cir. 2006). A LRE is defined in 34 C.F.R. § 300.114(a)(2) as the following:

> a. Each public agency must ensure that –
>
> i. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

ii. Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

141. The IDEA's requirement of a FAPE is met when a student with a disability is provided personalized instruction with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied. *See Bd. of Educ. Of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 189 (1982).

142. The IDEA requires each SEA to establish and maintain procedures in accordance with 20 U.S.C. § 1415 and 34 C.F.R. § 300.500 to ensure that students with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of FAPE by each SEA. A parent who believes his or her child has been denied a FAPE may file a due process compliant and obtain a state administrative due process hearing. *See* 20 U.S.C. § 1415(f); 34 C.F.R. § 300.507(a)(1); *see Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997), *cert. denied* 523 U.S. 1137 (1998); *see Thompson v. Bd. of the Special Sch. Dist.*, 144 F.3d 574, 578 (8th Cir. 1998). Such complaint must allege a violation occurred not more than two years before the parent knew or should have known about the alleged action forming the basis of the complaint. 34 C.F.R. § 300.507(a)(2).

143. A hearing panel's determination of whether a child received FAPE must be based on substantive grounds. 34 C.F.R. § 300.513(a)(1). Inquiry of whether a FAPE was provided relies on a determination of whether an IEP was adequate and appropriate at a given point in time. *See Burlington v. Dep't of Educ.*, 736 F.2d 773, 788 (1st Cir. 1984). The "measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not some later date." *Fuhrmann v. East. Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3rd Cir. 1993).

144. A reviewing authority (either a panel or a court) should not exalt "form over substance" when making its determinations that a school district violated any procedural duties in developing an IEP. *See Logue v. Shawnee Mission Pub. Sch. Dist. No. 512*, 959 F.Supp. 1338, 1349-50 (D. Kan. 1997) (finding no evidence in the record that the District violated any procedural duties in developing the IEP at issue, and stating if a procedural violation does not cause prejudice, the tribunal should deny relief (under the KS statute at issue) because a procedural flaw does not automatically render an IEP legally defective).

B. *Procedural Violations That Result in the Denial of FAPE*

(1) Implementation of the IEP

145. Interpretation of the IDEA should focus strictly on the explicit requirements of the statute. *See Lathrop R-II School Dist. v. Gray*, 2010 WL 2630337 *1, *3-4 (8th Cir. 2010); *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *see also Huffman v. North Lyon County Sch. Dist.*, 2009 WL 3185239 *1, *9 (D. Kan. 2009) (rejecting the plaintiff's suggested interpretation of the IDEA and noting that the Tenth Circuit "emphasized that the IDEA is a spending statute imposing certain obligations on the states in exchange for certain funds").

146. In matters alleging a procedural violation, a hearing panel may find that a child did not receive a FAPE only if the procedural inadequacies: 1) impeded the child's right to a FAPE; 2) significantly impeded the parents opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or 3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2)(i)-(iii).

147. When analyzing a failure to implement claim, courts generally must restrict themselves to the express terms of the IEP. *See County Sch. Bd. of Henrico County, Virginia v. Z.P. ex rel. R.P.*, 399 F.3d 298, 306 n.5 (4th Cir. 2005); *see Knable ex. rel. Knable v. Bexley City*

Sch. Dist., 238 F.3d 755, 768 (6th Cir. 2001); *see Millay v. Surry Sch. Dept.*, 2010 WL 1634311 *1, *4 (D. Me. 2010); *see generally C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008). Expanding the inquiry outside the four-corners of the IEP undermines the important policies served by the requirement of a formal written offer before either initiating placement for a disabled child or otherwise providing a FAPE to the child. *See Knable ex. rel. Knable*, 238 F.3d at 768.

148. "To prevail on a claim challenging the implementation of an IEP, the aggrieved party "must show more than a de minimis failure to implement all elements of that IEP, and instead, must demonstrate that the school board or other authorities failed to implement *substantial* or *significant* provisions of the IEP." *J.L. v. Francis Howell R-3 Sch. Dist.*, 693 F.Supp.2d 1009, 1033-34 (E.D. Mo. 2010) (emphasis added); *see M. S. v. Sch. Dist. of Pittsburgh*, 2006 WL 15589900, 183 Fed. Appx. 184, 187 (3rd Cir. 2006) (not published in Federal Reporter).

149. A school district, board, or other authority's implementation of an IEP does not have to be perfect, and does not have to maximize a student's potential or provide the very best possible education at a public expense. *See Bradley v. Arkansas Dept. of Educ.*, 443 F.3d 965, 975 (8th Cir. 2006). The IDEA does not require a school district to furnish every special service in a student's IEP. *Id.* at 975. A properly implemented IEP will provide at least "some" educational benefit to the student for whom it is designed, as contemplated by *Rowley* and the IDEA. *See Id.* at 975-76.

150. A school district's failure to provide a disabled student with an accommodation listed in the IEP *every day* is not the kind of substantial or significant failure to implement an IEP that constitutes a violation of the IDEA. *See M. S. v. Sch. Dist. of Pittsburgh*, 2006 WL

15589900, 183 Fed. Appx. 184, 187-88 (3rd Cir. 2006) "[E]xistence of a procedural flaw does not ipso facto mean that a FAPE was denied to the student." *Edwin K. v. Jackson*, 2002 WL 1433722 *1, *14 (N.D. Ill. 2002). Procedural inadequacies, however, that result in the *loss* of educational opportunity result in the denial of FAPE. *Id.*

151. When reviewing an IEP, the views of professional educators responsible for the child's education must be afforded deference. *See Neosho R-v Sch. Dist. v. Clark*, 315 F.3d 1022, 1027-28 (8th Cir. 2003) (recognizing "courts are admonished to be mindful that they lack the specialized knowledge and experience necessary to resolve difficult questions of educational policy.") ; *see Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 561 (8th Cir. 1996); *see Bd. of Educ. Of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982). ("[T]he provision that a reviewing court base its decision on the preponderance of the evidence is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review") (internal quotations omitted); *Schaffer v. Weast*, 546 U.S. 49, 62-63 (2005) (Stevens, J., concurring) (" . . . I believe that we should presume that public school officials are properly performing their difficult responsibilities under this important statute."); *see Burilovich v. Board of Educ. Of the Lincoln Consol. Schs.*, 208 F.3d 560, 567 (6th Cir. 2000); *see Indep. Sch. Dist. No. 284 v. A.C.*, No. 0:99-cv-01331-JRT-FLN, document # 41, p. 8 (D. Minn. April 18, 2000); *see also JH v. Henrico County Sch. Bd.*, 395 F.3d 185, 197-98 (4th Cir. 2005).

(a) Special Education

152. "Special education" is defined, in part, as "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability . . ." 34 C.F.R. § 300.39(a)(1); State Plan, p. 10.

153. "Specially designed instruction" is defined as "adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children." 34 C.F.R. § 300.39(b)(3)(i)-(ii); State Plan at 10-11.

154. Deference is given to trained educators with regard to issues involving the crafting and implementation of the IEP, and the methodology used to implement the IEP. *See Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1037-38 (8th Cir. 2000); *see Lessard v. Wilton Lyndeborough Corp. Sch. Dist.*, 518 F.3d 18, 28-29 (1st Cir. 2008); *see K.C. v. Fulton County Sch. Dist.*, 2006 WL 1868348 *1, *13 (N.D. Ga. 2006) ("[t]he use of a particular methodology to address a disabled student's educational needs is within the discretion of the educators who developed the IEP."); *see Edwin K. v. Jackson*, 2002 WL 1433722 *1, *17 (N.D. Ill. 2002). Courts may not engage in ascertaining the adequacy of an IEP by weighing it against alternative methods because courts "lack the specialized knowledge and experience needed to resolve persistent and difficult questions of educational policy." *Lessard*, 518 F.3d at 29 (citing *Bd. of Educ. Of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 208(1982)) (internal quotations omitted); *Gill*, 217 F.3d at 1036 ("Courts lack the specialized knowledge and expertise necessary to resolve persistent and difficult questions of educational policy.").

155. Although actual progress can at times demonstrate that an IEP provides FAPE, imposing the inverse of this rule contradicts the fundamental concept that "[a]n IEP is a snapshot, not a retrospective." *Lessard.*, 518 F.3d at 29. "Where . . . a school system develops an IEP component in reliance upon a widely-accepted methodology, an inquiring court ought not

to condemn that methodology as ex post merely because the disabled child's progress does not meet the parents' or the educators' expectations." *Id.* (citing *Lachman v. Ill. St. Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988)). A disabled student's reasonable progress in context of his or her disabilities demonstrates that an IEP provides a student with FAPE. *Id.* Deference is especially given to "trained educators" who have in-school contact with the student, over other officials who only have "out of school" contact with the student. *See Edwin K.*, 2002 WL 1433722 at *17.

156. Whether a student could have made more progress when provided with different services is not the standard a court applies when addressing alleged violations of the IDEA. *See Huffman v. North Lyon County Sch. Dist.*, 2009 WL 3185239 *1, *12 (D. Kan. 2009). The fact that a disabled student's parent is not allowed to choose every facet of her child's education is not a denial of FAPE. *See Slama v. Indep. Sch. Dist. No. 2580I*, 259 F.Supp.2d 880, 885 (D. Minn. 2003); *see also Gill*, 217 F.3d at 1038 ("The statute sets up this interactive process for the child's benefit, but does not empower parents to make unilateral decisions about the programs the public funds."); *see also K.C.*, 2006 WL 1868348 at *13 ("The Plaintiffs do not have the right to dictate educational methodology or particular programming options . . .").

(b) Related Services

157. "Related Services" are defined as "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services," as well as other services. 34 C.F.R. § 300.34(a).

158. The mere fact that a student may not have received all the related services provided for in his or her IEP does not require a finding that the student was denied FAPE. *See*

J.L. v. Francis Howell R-3 Sch. Dist., 693 F.Supp.2d 1009, 1033-34 (E.D. Mo. 2010); *see M. S. v. Sch. Dist. of Pittsburgh*, 2006 WL 15589900, 183 Fed. Appx. 184, 187 (3rd Cir. 2006).

159. According to the IDEA's definition of FAPE, which is limited to "special education and related services," accommodations/modifications are not a part of FAPE. *See* 34 C.F.R. § 300.17.

160. "The IDEA does not mandate the inclusion in an IEP of a behavior plan, let alone behavioral improvements." *See Lathrop R-11 Sch. Dist. v. Gray*, 2010 WL 2630337 *1, * 6 (8th Cir. 2010); *see also Edwin K. v. Jackson*, 2002 WL 1433722 *1, *14 (N.D. Ill. 2002). Thus, a behavior plan is not statutorily necessary. However, an IEP may include a behavioral plan unique to the needs of the disabled student where the student's behavior impedes his or her learning, or the learning of others. *See* 20 U.S.C. § 1414(d)(3)(B)(i).

(2) Parent Participation on the IEP team

161. Parental rights for participating in meetings related to the child's education program are explicitly stated in the IDEA. Specifically, "[t]he parent of a child with a disability must be afforded an opportunity to participate in meetings with respect to – (i) the identification, evaluation, and educational placement of the child; and (ii) the provision of FAPE to the child." 34 C.F.R. § 300.501(b)(1).

162. Another provision of the IDEA explicitly limits parental participation in meetings by stating,

> A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or co-ordination of service provision. A meeting also does not include prepatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

34 C.F.R. § 300.501(b)(3).

163. A public agency ensures that the parent of a disabled child is afforded the opportunity to participate at each IEP Team meeting by (1) notifying the parent of the meeting early enough to ensure they have an opportunity to attend; and (2) scheduling the meeting at a mutually agreed time and place. *See* 34 C.F.R. § 300.322(a)(1)-(2). Notice of an IEP meeting must (1) indicate the purpose, time, and location of the meeting and who will be in attendance; and (2) inform the parent of the participation of other individuals on the IEP team with expertise or knowledge about the child. 34 C.F.R. § 300.322(b)(1)(i)-(ii). In the event that a parent cannot attend an IEP team meeting, she is entitled to alternative means of participation through individual or conference telephone calls consistent with § 300.328. 34 C.F.R. § 300.322.

164. A parent's participation must be more than mere form; it must be meaningful. *See N. v. Orange City Sch. Dist.*, 454 F.3d 604, 610 (6th Cir. 2006). For example, a parent who is allowed to be a significant part of IEP meetings by voicing her opinion, desires, comments, and suggestions regarding decisions involving her disabled child's education and evidence that this input was considered is an active participant in the IEP meetings. *See Id.*

165. It is improper for IEP team members to predetermine a child's placement, and then develop an IEP to justify that decision. *See T.W. v. Unified Sch. Dist. No. 259*, 2005 WL 1324969 *1, *11, 136 Fed. Appx. 122, 134 (10th Cir. 2005) (not published in Federal Reporter); *see N.*, 454 F.3d at 610. Predetermination of a student's placement amounts to a procedural violation of the IDEA because "it can cause substantive harm and therefore deprive a child of a FAPE where the parents are effectively deprived of a meaningful participation in the IEP process. *See N.*, 454 F.3d at 610. Federal law "prohibits a completed IEP from being presented at the IEP Team meeting or being otherwise forced on the parents, but states that school evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the

child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions." *N. v. Orange City Sch. Dist.*, 454 F.3d 604, 610 (6th Cir. 2006); *see T.W.*, 2005 WL 1324969 at *11, 126 Fed. Appx. 134.

166. Predetermination is not synonymous with preparation. *Id.* "School officials must come to the IEP table with an open mind. But this does not mean they should come to the IEP table with a blank mind." *See T.W. v. Unified Sch. Dist. No. 259*, 2005 WL1324969 *1, *11, 136 Fed. Appx. 122, 134 (10th Cir. 2005) (not published in Federal Reporter). A parent is not denied active participation on an IEP team if parent voiced his or her opinion during IEP team meeting, made comments on the IEP, and the IEP team takes the parent's suggestions seriously. *See N. v. Orange City Sch. Dist.*, 454 F.3d 604, 610 (6th Cir. 2006). ("Here, Mrs. N. was given many opportunities to comment on the IEP and, by every indication, Orange took her suggestions seriously. In the end, there is insufficient evidence in the record to prove a procedural violation of the IDEA through predetermination.").

167. Although a parent may disagree with a school board or authority's decisions, failure of the school board or authority to adopt the parent's suggestion or desire is not a failure to consider parental input in the IEP process. *See B.V. v. Dept. of Educ., State of Hawaii*, 451 F.Supp.2d 1113, 1132 (D. Hawaii 2005). From a procedural standpoint, the IDEA requires nothing more than that a school authority or board discuss a parent's concerns at IEP meetings and consider her views. *See Id.* ("although B.V. may disagree with the DOE's decisions, the DOE officials at the November 6, 2003 and January 8, 2004 IEP meetings discussed B.V.'s concerns and considered her views . . . from a procedural standpoint, the IDEA requires nothing more").

168. The IDEA does not require a school board or other authority to agree to a parent's request to amend a disabled student's IEP. *See* 34 C.F.R. §§ 300.324(a)(4), (6). Under 34 C.F.R. § 300.324(a)(4), in making changes to a student's IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may *agree* not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP. Under 34 C.F.R. § 300.324(a)(6), changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or as provided in § 300.324(a)(4), by amending the IEP rather than redrafting the entire IEP.

(3) Determining Whether Parent Was Denied Information That Significantly Impeded Parent's Participation on the IEP Team

169. The definition of "education records" under the IDEA is identical to the meaning of "education records" under the Family Educational Rights and Privacy Act ("FERPA"). 34 C.F.R. § 99.3. These are records that: (1) are directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution. 34 C.F.R. § 300.611(b). The term "educational records" does not include:

> records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute.

20 U.S.C. § 1232g(a)(4)(B)(i). This exception also applies to educational records under the IDEA. 34 C.F.R. § 99.3.

170. The Supreme Court has stated that the word "maintain" must be read in context with a view towards its place in the overall statutory scheme. *See Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 434 (2002). In *Ossawo*, the Supreme Court noted that FERPA requires educational institutions to "maintain a record, kept with the education records of each

student." *Owasso Indep. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 434 (2002). Similarly, the IDEA requires educational institutions to "maintain a record, kept with the education records of each student." 34 C.F.R. § 300.611(b). The Supreme Court stated in *Owasso* that the word "maintain" suggests an educational record will be kept in one location on a permanent basis by a single custodian, such as a registrar. *Owasso*, 534 U.S. at 433, 435.

171. The IDEA contains no general requirement that school personnel communicate with parents on an ongoing basis about their children. *See generally* 34 C.F.R § 300.613(a). Each SEA must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. 34 C.F.R. § 300.613(a). The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to §300.507 or §§300.530 through 300.532, or resolution session pursuant to §300.510, and in no case more than 45 days after the request has been made. 34 C.F.R. § 300.613(a).

172. The right to inspect and review education records includes: (1) the right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; (2) the right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and (3) the right to have a representative of the parent inspect and review the records. 34 C.F.R. § 300.613(b)(1)-(3).

173. "The IDEA regulations require schools to inform parents of a child's progress at least as often as parents of nondisabled children are informed of their children's progress." *See T.W. v. Unified Sch. Dist. No. 259*, 2005 WL 1324969 *1, *10, 136 Fed. Appx. 122, 133 (10th Cir.

2005) (not published in Federal Reporter) (citing 34 C.F.R. § 300.347(a)(7)(ii) (2005), now in 34 C.F.R. § 300.320(a)(3)(i)-(ii)).

174. "The IDEA does not require schools to communicate with the parents of disabled children as frequently as the parents may wish." *See T.W*, 2005 WL 1324969, at * 10. A parent alleging denial of access to information must provide evidence of the denial. *See generally K.C. v. Fulton County Sch. Dist.*, 2006 WL 1868348 *1, *13 (N.D. Ga. 2006).

(4) Determining Whether Student Was Deprived of Educational Benefits

175. Courts have limited their review to what is expressly provided in the IEP when determining whether an IEP provides the requisite educational benefit in a given case for two reasons. *See A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007) ("In evaluating whether a school district offered a FAPE, a court generally must limit its consideration to the terms of the IEP itself . . . [e]xpanding the scope of a district's offer to include a comment made during the IEP development process would undermine the important policies served by the requirement of a formal, written offer."); *see Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001); *see Systema v. Acad. Sch. Dist.*, 538 F.3d 1306, 1316 (10th Cir. 2008) ("we conclude that when analyzing the substantive compliance of an IEP, the court should restrict our examination to the written document."); *see Millay v. Surry Sch. Dept.*, 2010 WL 1634311 *1, *4 (D. Me. 2010). First, because the "IDEA defines an IEP as a written statement for each child with a disability that is developed, reviewed and revised." *Millay v. Surry Sch. Dept.*, 2010 WL 1634311 *1, *4 (D. Me. 2010) (citing 20 U.S.C. § 1414(d)(1)(A)(i)) (internal quotations omitted). Second, because the Supreme Court requires courts to focus on whether an IEP developed through the IDEA's procedures is reasonably calculated to enable the child to received educational benefits. *Id.*; *see Bd. of Educ. Of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982). "Thus, taken together, the statutory definition of an IEP and

the Court's command that the courts must focus the inquiry on the draft IEP as written." *Millay*, 2010 WL 1634311 at *4.

176. Although there may be evidence on the record of what a school district or board "could have provided" a student, "only those services identified or described in the IEP should be considered when evaluating the appropriateness of the program offered. *See Millay,* 2010 WL 1634311 at *4 (citing *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001)).

177. The "basic floor of opportunity" provided by the IDEA consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the disabled student. *See Bd. of Educ. Of the Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 202 (1982). If state legislation creates a higher standard for educational benefits than the federal "basic floor" minimum then an individual may bring a lawsuit to enforce the state standard through the IDEA. *See Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1035 (8th Cir. 2000); *see CJN v. Minneapolis Pub. Schs.*, 323 F.3d 630, 639 (8th Cir. 2003). Several courts have concluded that the IDEA incorporates by reference state standards that exceed the minimum standard set by the IDEA and *Rowley*. *See Lagares v. Camdenton R-III Sch. Dist.*, 68 S.W.3d 518, 525 (Mo. W.D. 2001); *see Johnson v. Indep. Sch. Dist. No. 4 of Bixby*, 921 F.2d 1022, 1029 (10th Cir. 1990); *see Nelson v. Southfield Pub. Schs.*, 384 N.W.2d 423, 425 (Mich. App. 1986).

178. The statutes setting forth Missouri's special education policy and program are found in R.S.Mo. §§ 162.670 to 162.995 (1973). Prior to amendment, Missouri's maximizing standard for determining the sufficiency of special educational services for disabled or handicapped children was higher than the federal "basic floor" standard set by the IDEA. *See*

Lagares v. Camdenton R-III Sch. Dist., 68 S.W.3d 518, 525, 528 (Mo. W.D. 2001) (discussing statutes prior to amendment). § 162.670 previously declared that Missouri's policy regarding the education of handicapped children was to:

> provide or to require public schools to provide all handicapped children and severely handicapped children within the ages prescribed herein, as an integral part of Missouri's system of gratuitous education, special educational services sufficient to meet the needs and *maximize the capabilities* of handicapped and severely handicapped children.

Id. (citing to § 162.670 (1973) (emphasis added). The maximizing standard was also in provisions other than § 167.670. § 162.675(2) defined "handicapped children," in part, as those "*. . . requiring special educational services in order to develop to their maximum capacity*." *Lagares v. Camdenton R-III Sch. Dist.*, 68 S.W.3d 518, 525, 528 (Mo. W.D. 2001) (emphasis added). § 162.675(4) previously defined "special educational services," in part, as "programs designed to meet the needs and *maximize the capabilities of* handicapped or severely handicapped children . . ." *Id.* (emphasis added). Based on this statutory language, the *Lagares* court found that the Missouri "legislature's intent to hold Missouri special educational services to a higher standard than the IDEA's minimum educationally benefit standard was apparent from the plain language of the maximize capabilities language used in §§ 162.670 and 162.675." *Id.* at 528 (internal quotations omitted).

179. However, amendments to the Missouri statutes in 2002 removed the "maximizing" language to provide FAPE consistent with the IDEA. *See, e.g.*, §§ 162.670, 162.675 (2002). Thus, the holding of *Lagares* is no longer good law, and the IDEA's "basic floor," minimum standard controls. *See Reese ex. rel. Reese v. Bd. of Educ. of Bismarck R-V Sch. Dist.*, 225 F.Supp.2d 1149, 1155 n. 12 (E.D. Mo. 2002) (stating that the holding in *Lagares* was superseded by the amended statutes). Furthermore, the holdings of *Johnson v. Indep. Sch. Dist.*

No. 4 of Bixby, 921 F.2d 1022, 1029 (10th Cir. 1990) and *Nelson v. Southfield Pub. Schs.*, 384 N.W.2d 423, 425 (Mich. App. 1986) do not control in Missouri because they apply the state educational policies of Oklahoma and Michigan, respectively.

180. "Actual education progress can (and sometimes will) demonstrate that an IEP provides a FAPE. But to impose the inverse of this rule-that a lack of progress necessarily betokens an IEP's inadequacy- would contradict the fundamental concept that '[a]n IEP is a snapshot, not a retrospective.'" *See Lessard v. Wilton Lyndeborough Corp. Sch. Dist.*, 518 F.3d 18, 29 (1st Cir. 2008) (citing *Rowley*, 458 U.S. at 209-10).

181. Receipt of passing grades and progress from grade to grade are "important factor[s] in determining educational benefit." *Bd. of Educ. Of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 n.28 (1982); *see Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 613 (8th Cir. 1997) (finding that student had received three Ds, an F in reading, and mostly Cs in all other subjects, and whose standardized test placed his reading skills in the second to ninth grade percentile received a FAPE); *see Carl D. v. Special Sch. Dist. of St. Louis County*, 21 F.Supp.2d 1042, 1055 (E.D. Mo. 1998) (deferring to the findings of the panel, which relied on evidence that Danny received passing grades in his first quarter in middle school as well as testimony by his teachers that he was progressing, the court stated "Danny's passing grades are an important indicator of the appropriateness of his education [in middle school]."); *see Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 196 (2nd Cir. 2005) ("Although the district court minimized the significance of Kathryn's passing grades, we have expressly held that when a learning-disabled child is in a mainstream class, 'the attainment of passing grades and regular advancement from grade to grade' will generally constitute evidence of satisfactory progress").

182. Testimony by school personnel that a student has made progress during the relevant time period is entitled to great weight. *See Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1010-11 (8th Cir. 2006) (stating the district court must give due weight to the administrative panel because the court "should not substitute its own educational policies for those of the school authorities that they review," and affirming the district court's crediting the findings of the independent hearing officer ("IHO") that student received a FAPE although the IHO found that testimony from the student's educators was "strong on opinion, weak on substance"); *see also Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1292-93 (11th Cir. 2001); (relying on teacher testimony of autistic student, who had observed his progress in the IEP education goals, and rejecting the expert testimony of the plaintiffs' witnesses, who had limited observations of the student); *see also JH v. Henrico County Sch. Bd.*, 395 F.3d 185, 197-98 (4th Cir. 2005) (stating that hearing officer did not adequately consider the testimony of professional educators who had extensively worked with and observed the student during the school year).

183. Evidence that a student was making progress in some areas and not others does not prevent a conclusion that the student did make progress overall. *See B.V. v. Dept. of Educ., State of Hawaii*, 451 F.Supp.2d 1113, 1125-26 (D. Hawaii 2005) ("Although the evidence in this case does not clearly favor either side, the court concludes that J-C was making educational progress . . . Ms. F. testified that J-C was making progress in some areas, although she recognized that he was not making progress in other areas.").

184. The IDEA does not require the best possible education or superior results. *See Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 613 (8th Cir. 1997) ("Although [the student] may well have benefitted more from his education at Churchill than at Hawthorne, and he did not

read as well as his non-disabled peers or as his parents had hoped, IDEA does not require the best possible education or superior results"); *see also Carl D. v. Special Sch. Dist. of St. Louis County*, 21 F.Supp.2d 1042, 1055 (E.D. Mo. 1998) (the "IDEA does *not* require the Special School District to provide Danny with the best possible education." *citing Bd. of Educ. Of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 195 (1982)).

185. A SEA cannot be liable for a student's lack of academic and or behavioral lack of progress or regression as long both the IEP and the implementation of the IEP complied with the IDEA. *See P.K.W.G. v. Indep. Sch. Dist. No. 11*, 2008 WL 2405818 *1, *13 (D. Minn. 2008).

C. *Proper Evaluation of Student*

186. Specific requirements for evaluation/reevaluation procedures are contained in 34 C.F.R. §§ 300.303-311. 34 C.F.R. § 300.303(a). A reevaluation must be conducted in accordance with these regulations if a student's parent requests it. 34 C.F.R. § 300.303(a)(2). The SEA must provide notice to a parent describing evaluation procedures, use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, and use "technically sound instruments" that assess cognitive, behavioral, and physical or developmental factors. 34 C.F.R. § 300.304(a), (b)(1)-(3). The SEA must ensure that assessments and evaluations are administered by trained and knowledgeable personnel. 34 C.F.R. § 300.304(c)(iv).

187. As part of a reevaluation the IEP team, and other qualified professionals, must review existing evaluation data on the Student, including evaluations and information provided by the parent of the student, current classroom-based, local, or State assessments, and classroom-based observations, and observations by teachers and related services providers. 34 C.F.R § 300.305(a)(1). On the basis of that review, the IEP team and other qualified professionals, as appropriate, must identify what additional data, if any, is needed to carry out the reevaluation. 34

C.F.R. § 300.305(a)(2)(i)-(iv). Determination of eligibility for a new disability must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, and adaptive behavior, among other considerations. 34 C.F.R. § 300.306(c)(i)-ii).

188. The IDEA's regulations have specific requirements for the reevaluation document itself. *See* 34 C.F.R. § 300.311(a)(1)-(3), (5)(i)-(ii)(A)-(B), (6); *see* 34 C.F.R. § 300.311(b). Upon the completion of reevaluation and assessments the SEA shall provide a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent. 34 C.F.R. § 300.306(a)(1)-(2).

189. A parent is entitled to an independent educational evaluation ("IEE") subject to 34 C.F.R. § 300.502 (b) through (e) at public expense if the parent disagrees with an evaluation obtained by the public agency. 34 C.F.R. § 300.502(a), (b)(1), (5). The SEA must provide parents with information about where an IEE may be obtained. 34 C.F.R. § 300.502(a)(2). The IEE must be conducted by a qualified examiner who is not employed by the SEA responsible for educating the child. 34 C.F.R. § 300.502(a)(3)(i).

D. *Student's Placement*

190. Under the IDEA's "stay-put" provision, unless the parent and school district agree otherwise, a disabled student is to remain in his or her current educational placement during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing. 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a).

191. The Department of Education has stated that current educational placement "refers to the setting in which the IEP is currently being implemented" and "is generally not considered to be location-specific." 71 Fed. Reg. 46709. The Department of education has also

stated that "placement refers to the provision of special education and related services rather than a specific place." 71 Fed. Reg. 46687.

192. Each public agency must ensure that the parents of each student with a disability are members of any group that makes decision on the educational placement of their child. 34 C.F.R. § 300.327.

E. Equitable Relief

193. The theory of "compensatory education" is that courts and hearing panels may award "educational services . . . to be provided prospectively to compensate for a past deficient program." *Reid v. Dist. of Columbia*, 401 F.3d 516, 522 (D.D.C. 2005). Specifically, compensatory education involves the discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide FAPE to a student. *See Reid v. Dist. of Columbia*, 401 F.3d 516, 523 (D.D.C. 2005); *see also Meiner v. State of Missouri*, 800 F.2d 749, 753-54 (8th Cir. 1986).

194. Award of compensatory education depends on the finding of an educational deficit. *See generally Deptford Tp. Sch. Dist. v. H.B.*, 2008 WL 2127458 *1, *1, 279 Fed.Appx. 122, 124 (3rd Cir. 2098). An award of compensatory education does not automatically follow a finding that a student has been denied a FAPE where no harm resulted to the student. *See Id.* (noting that the district court did not grant relief to a student that was denied a FAPE in the least restrictive environment, according to the finding of an administrative law judge, because no harm resulted from the lack of LRE).

195. Compensatory education is not an appropriate remedy when a school district has provided the student with a FAPE. *See Erickson v. Albuquerque Pub. Schs.*, 199 F.3d 1116, 1123 (10th Cir. 1999) ("The award of compensatory education is not an appropriate remedy for a

failure to provide an individualized determination when the school district provided the student with a FAPE."); *see Urban v. Jefferson Cnty Sch. Dist. R*-1, 89 F.3d 270, (10th Cir. 1996) ("In the absence of a violation of his right to an appropriate education, Gregory is not entitled to compensatory education."); *see also Meiner*, 800 F.2d at 753-74 ("Accordingly, we hold that the plaintiff is entitled to recover compensatory education services if she prevails on her claim that the defendants denied her a free appropriate education in violation of the [IDEA].").

III. DECISION

A. Student Was Not Denied FAPE Between March 26, 2007 and November 20, 2008

Parent claims that Student was denied FAPE by SSD between March 26, 2007 and November 20, 2008.

The relevant time period is governed by the February 2007 IEP, and the changes made to it, and agreed to by Student's IEP team, including Parent, on September 17, 2007, also known as the Stay Put IEP.

The February 2007 IEP was jointly formed by the IEP team made up of the appropriate people. *See* 34 C.F.R. § 300.321(a). Specifically, the team included Student's Parent, SSD's Representative, Student's Special Education Teacher, Student's General Education Teacher, an individual who could interpret instructional implications of evaluation results, the Component District Representative, and a School Examiner. FF 53. In forming the IEP, the IEP team took notice of and considered Student's strengths, Student's present level of academic achievement and functional performance in being more responsible for taking class notes, and working independently, the results of Student's performance on state and district-wide assessments, and Parent's concerns for enhancing the education of her child, as required to by the IDEA and its

regulations. FF 53; *See* 20 U.S.C. § 1414(d)(1)(H); 34 C.F.R. § 320.324(b)(1); *see M.P. v. Indep. Sch. Dist. No. 721*, 326 F.3d 975, 977 n.1 (8th Cir. 2003).

To ensure the IEP addressed Student's special education needs, the IEP team considered Student's special education needs caused by Student's disability in basic reading and math calculations, and language impairment in the areas of Semantics and Morphology. FF 40-41, 54. Accordingly the IEP team addressed Student's special education needs by designing the IEP to provide for Student to receive 150 minutes per week of special education instruction in a general education setting in reading and math each, and 150 minutes per week of special education in a special education setting in reading and math. FF 54. The IEP also addressed student's language impairment in morphology and semantics by providing for Student to receive 90 minutes per week of language therapy as a related service. FF 54. Student's progress was recorded and reported to parent. FF 103-04.

The IEP team also formed the followed measurable annual goals for Student,

1. Student will increase applying decoding strategies to "problem-solve" unknown words when reading with 70% accuracy;

2. Student will increase reading vocabulary by identifying root words and use of context clues to help decode unknown words with 70% accuracy;

3. Student will increase ability to solve multi digit by multi digit multiplication with regrouping skills with 80% accuracy;

4. Student will increase ability to solve division problems up to a 3 digit by 1 digit with and without regrouping with 90% accuracy;

5. Student will maintain ability to solve multi digit addition and subtraction (fewer cues) when regrouping is required with 80% accuracy;

6. Student will increase ability to read and write decimals to the hundredths place and whole numbers up to 6 digits with 80% accuracy;

7. Student will increase vocabulary skill by using context clues, word structure, synonyms and antonyms to determine and verbally express word meanings with 80% accuracy;

8. Student will increase ability to use details from grade-appropriate fiction/nonfiction texts to make inferences and predictions with 70% accuracy;

9. Student will increase ability to use details from fiction/nonfiction texts to determine and express main ideas with 70% accuracy;

10. Student will maintain the use of age-appropriate word and sentence structure in spontaneous oral conversation with 80% accuracy.

See FF 51.

The IEP complied with the IDEA's LRE requirement, and preference for Student to attend regular classes with non-disabled students because it provided that Student was only outside the general education class setting for 21-60% of the time, and was to spend at least 300 minutes in a general education setting. FF 54; *see* 20 U.S.C. § 1412(a)(5)(A); *see* 34 C.F.R § 300.114(a)(1).

At parent's request, the behavioral plans developed when Student was in first and third grades were made part of and attached to the IEP. FF 53. Because the February 2007 IEP as designed complies with the IDEA's requirements and regulations it provided Student with FAPE. *See Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 189 (1982).

Student was also provided FAPE by the Stay Put IEP. FF 63. On September 17, 2007 Student's IEP team met again. FF 63. Student's IEP team was made up of the appropriate people including Student's Parent. *See* 34 C.F.R. § 300.321(a). Specifically, the team included Student's Parent, Student's Special Education Teacher, Student's General Education Teacher, an individual who could interpret instructional implications of evaluation results, the Component District Representative, and a School Examiner. FF 63. In light of Student's participation in a small group in math in the general education setting and her progress in language the IEP team suggested a decrease in special education in math from 150 minutes per week in a special

education setting to 75 minutes, and language services from 90 minutes per week to 60 minutes. FF 63. The IEP team members also suggested elimination of some accommodations and modifications and the behavior plan in the February 2007 IEP, because they were not necessary, given Student's progress. FF 63. Parent agreed with the suggested changes in the special education in math and language services, but disagreed with changes to accommodations/modifications and to elimination of the behavior plan. FF 63.

Parent's due process complaint, received by DESE on October 4, 2007, alleging violations of the IDEA with respect to the September 17, 2007 IEP meeting was resolved by a Resolution Session Agreement. FF 67. In the Resolution Session Agreement, Parent confirmed Parent's agreement, on September 17, 2007, to the changes in special education math and language services that Student was to receive. FF 67. Parent and SSD agreed that the February 2007 IEP would continue to be implemented, as amended by the changes Parent agreed to on September 17, 2007. FF 67.

Student was not denied FAPE between March 26, 2007 and November 20, 2008 because the February 2007 IEP and the Stay Put IEP as designed comply with the IDEA's requirements and regulations and provided Student with FAPE. *See J.L. v. Francis Howell R-3 Sch. Dist.*, 693 F.Supp. 2d 1009, 1035 (E.D. Mo. 2010).

B. SSD Did Not Engage in Procedural Violations that Resulted in the Denial of FAPE To Student

Parent alleges SSD engaged in procedural violations of the IDEA that resulted in the denial of a FAPE. Each alleged procedural violation is discussed separately.

(1) Student's IEP was implemented.

Parent alleges that Student's IEP was not implemented. The panel's interpretation of the IDEA must focus strictly on the explicit requirements of the statute, and not Parent's

interpretation of it. *See Lathrop R-II School Dist. v. Gray*, 2010 WL 2630337 *1, *3 (8th Cir. 2010); *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *see also Huffman v. North Lyon County Sch. Dist.*, 2009 WL 3185239 *1, *9 (D. Kan. 2009).

In analyzing Parent's failure to implement claim, the panel restricts itself to whether SSD complied with the explicit terms of the IEP. *See C.G. ex rel. A.S. v. Fire Town Cnty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2008); *see County Sch. Bd. Of Henrico County, Virginia v. Z.P. ex. rel. R.P.*, 339 F.3d 298, 306 n.5 (4th Cir. 2005); *see Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001).

Student's educators complied with the express terms of the IEPs providing for special education and related services. This is demonstrated in many ways.

Prior to the start of each school year, Student's teachers met to discuss the IEP, accommodations/modifications that were to be provided to Student, and strategies that had worked well with Student. Before the start of Student's fifth-grade year, the 2007-2008 school year, Student's new special education teacher, Ms. W., met with Ms. R., Student's special education teacher from first grade until the end of Student's fourth-grade year, to discuss Student's IEP, accommodations in the IEP, and effective strategies used by Ms. R. that had worked well with Student. FF 58-61. Ms. W. also spoke with Ms. K., Student's speech pathologist, about Student's related language service. FF 60, 77. Additionally, prior to the start of the 2007-2008 and 2008-2009 school years Ms. W. met with each of Student's teachers to talk about Student and to discuss Student's IEP, including the goals and accommodations and modifications. FF 61.

At those meetings, Student's IEP and the strategies used that worked well with Student were discussed. FF 61. Each of Student's teachers signed a form acknowledging that they had

met, and reviewed and discussed Student's educational diagnosis, individual needs, special services, and adaptations and modifications. FF 61. Student's teachers were also required to review Student's permanent file before the start of the school year. FF 61.

During the school year, Student's teachers worked together to monitor Student's performance to ensure that her IEP was being implemented. FF 76. Ms. S., Student's fifth grade teacher, met weekly with Ms. W. to discuss Student's performance. FF 69. Also, Ms. S. kept a copy of Student's accommodations in her lesson plan book. FF 69.

Student's special education teacher, charged with implementing parts of the IEP, ensured that the accommodations/modification in the IEP were being provided appropriately. Ms. W. provided the special education instruction in reading and math in the general education and special education settings included in the IEP. FF 99. Accordingly, Ms. W. worked with Student's general education teachers to see that accommodations/modifications in the IEP were provided and observed that the accommodations/modifications were provided appropriately in the general education classroom. FF 109.

Student's class work was modified, as provided for in the IEP, but Student's grades were based on grade level expectations. FF 108. Ms. W. acted as a scribe for Student, Ms. W. assisted Student in science, study guides were provided to Student, and Student was given preferential seating. FF 114. While the IEP provided that Student "may need" directions to be broken into small steps, Student did not require that every assignment be broken into small steps, but she was given step-by-step directions when needed. FF 112. The IEP did not require that directions be written down so that Student could take them home. FF 112.

Parent claims that Student's behavioral plan was not implemented. The evidence does not support Parent's claim. The professional educators testified that the plan was there to

address problem behaviors if they were observed. But in the fifth and sixth grade years, the problem behaviors were not observed. FF 98, 117.

Student's behavior plans from first and third grades were attached to and included in the February 2007 IEP in response to Parent's request. FF 53. The behavior plans were there to prevent Student's behavior from impeding Student's learning, or the learning of others. *See* 20 U.S.C. § 1414(d)(3)(B)(i). Student did not exhibit anxiety or other behaviors at school during the relevant time period that required implementation of the behavior plan steps. FF 98, 117. Because Student's behavior did not impede her learning or the learning of others, SSD's use of the behavior plan was not triggered or necessary. Therefore, SSD properly implemented Student's behavior plan.

Ms. S. took over for Ms. S. as the classroom teacher after Ms. S.'s maternity leave. FF 71. Ms. S. worked closely with Ms. W. to ensure that Student's IEP accommodation and modifications were provided. FF 76.

Student's educators worked together to make certain Student was receiving the special and general education services provided for in the IEP, and the benefit of those services, even when Parent made decisions that made it more difficult for Student to receive that educational benefit. FF 74-75.

As noted above, the reduction in special education in math in a special education setting was made in the Stay Put IEP because Student was receiving instruction in math in a small math group in the general education setting. FF 63, 73-75. When Ms. S. went on maternity leave, Ms. P., another fifth grade teacher at Flynn Park, was scheduled to take over Mrs. S.'s small math group in Mrs. P.' fifth grade general education classroom. FF 74. This plan was consistent with the Stay Put IEP and it was discussed with Parent at a conference. FF 74. The plan to have

Student in a different general education classroom for a small math group would not be change in placement. Placement is not location specific. *See* 71 Fed. Reg. 46709. Placement relates to the services to be provided. *See* 71 Fed. Reg. 46687. Student would still be receiving the minutes in a general education classroom. But, Parent discussed the plan with Student and then asked the school not to send Student to Ms. P.'s room for the small group in math. FF 74. Parent's request was honored. FF 75.

To provide the math minutes in the general education classroom, Ms. W. provided those additional math minutes in the general education classroom by increasing the amount of time she spent with Student in the general education setting. *See* FF 75.

The IEP requirement of provision of language therapy as a related service, FF 54, was also implemented. Ms. K. worked with Student on semantics and morphology. FF 78. Student's IEP goals were also implemented because Ms. K. worked with Student on goals 7-10 of the February 2007 IEP, which addressed language issues. FF 80.

Student's ability to benefit from her education program and to receive an educational benefit was not harmed by Student occasionally missing scheduled language services. SSD's implementation of Student's IEP does not hinge on its provision of every minute of special education and related service every day. *See Bradley v. Arkansas Dept. of Educ.*, 443 F.3d 965, 975 (8th Cir. 2006). SSD's implementation of Student's IEP may not have been perfect, but it was not required to be. *See Bradley v. Arkansas Dept. of Educ.*, 443 F.3d 965, 975 (8th Cir. 2006). A school's failure to provide a disabled student with an accommodation listed in the IEP *every day* is not the kind of substantial or significant failure to implement an IEP that constitutes a violation of the IDEA. *See Id.*; *see M. S. v. Sch. Dist. of Pittsburgh,* 2006 WL 15589900, 183 Fed. Appx. 184, 187-88 (3rd Cir. 2006).

The record reveals that SSD made every effort to provide the services in Student's IEP. Ms. K. kept a log of all language services provided, the times that were missed, and the reasons therefore. FF 83. Although Student missed language services on some days, Student was not deprived of the educational benefit. FF 83.

Student's occasional missing of scheduled language services is also not the kind of substantial or significant failure to implement an IEP that constitutes a violation of the IDEA. In *Bradley v. Arkansas Dept. of Educ.*, 443 F.3d 965, 975 (8th Cir. 2006), the Eighth Circuit held that a school district properly implemented a student's IEP even if the implementation was not perfect. The same is true here. While not perfect, SSD properly implemented Student's IEP.

Likewise, in *M. S.*, the Third Circuit held that a school's failure to provide a disabled student, M., with an aide every day, pursuant to her IEP calling for "a full time aide to assist M. during the school day," was not the kind of substantial or significant failure to implement an IEP that constituted a violation of the IDEA. *M. S. v. Sch. Dist. of Pittsburgh*, 2006 WL 15589900, 183 Fed. Appx. 184, 187 (3rd Cir. 2006). The school's issuance of math instruction above M.'s skill level, and failure to give her homework were also de minimis failures, and did not constitute violations of the IDEA. *Id.* at 188. Similarly, here, SSD's not providing language services in Student's IEP every day is de minimis, and not a procedural violation of the IDEA.

Parent claims a procedural violation because one of the accommodations was providing class notes for science and math. One of the accommodations was that notes from science and math were to be sent home at the end of the week. FF 107. There were no class notes for science and math in fifth grade. FF 114. Notes were provided to Student in sixth grade. FF 114. The mere fact Student may not have received all the accommodations provided in Student's IEP does not require a finding that Student was denied FAPE. *See J.L. v. Francis Howell R-3 Sch.*

Dist., 693 F.Supp.2d 1009, 1033-34 (E.D. Mo. 2010); *see M. S. v. Sch. Dist. of Pittsburgh*, 2006 WL 155899.00, 183 Fed. Appx. 184, 187-88 (3rd Cir. 2006). Thus, SSD did not procedurally violate the IDEA by not sending science and math notes home with Student in fifth grade, because such notes were unavailable. FF 114.

Furthermore, by definition, accommodations/modifications are not part of a FAPE. *See* 34 C.F.R. § 300.17. Thus, SSD could not have violated the IDEA by failing to send home science and math notes with Student in fifth grade. Even if this were a procedural violation – which it is not – it is a de minimis one, and not substantial or significant enough to warrant the panel finding it constituted a violation of the IDEA. *See J.L. v. Francis Howell R-3 Sch. Dist.*, 693 F.Supp.2d 1009, 1033-34 (E.D. Mo. 2010).

Student received passing grades and was advanced from grade to grade. FF 133. Student's grades were based on grade level expectations. FF 108. Student's progress also shows that Student received some educational benefit from the implementation of the IEP, as contemplated by *Rowley* and the IDEA. *See Bradley v. Arkansas Dept. of Educ.*, 443 F.3d 965, 975-76 (8th Cir. 2006). Student was checked for understanding and received positive behavior support. FF 113. Ms. K. observed Student in Student's classroom on several occasions during fifth grade. FF 79.

Ms. K. observed that Student had made "tremendous" improvement in Student's language abilities over the years and improved "a lot" with respect to communication issues exhibited by Student in earlier years. FF 79. Ms. K. also observed improvement in Student's reading during the time they worked together. FF 79. The January 31, 2008 reevaluation report showed that Student would not have qualified for language services at the time, if the

reevaluation had been an initial one. FF 81. Based on her observations and working with Student, Ms. W. agreed that Student made progress on her goals. FF 80.

The record demonstrates that Student's educators' methodology in implementing the IEP resulted in educational benefit to Student. The panel gives deference to Student's educators' expertise with regard to issues involving the implementation of an IEP, and assessment and observance of Student's progress because they are responsible for Student's education. *See Gill v. Columbia Sch. Dist.,* 217 F.3d 1027, 1037-38 (8th Cir. 2000); s*ee also Lessard v. Wilton Lyndeborough Corp. Sch. Dist.,* 518 F.3d 18, 28-29 (1st Cir. 2008); s*ee also Edwin K. v. Jackson,* 2002 WL 1433722 *1, *17 (N.D. Ill. 2002). All of Student's teachers are trained educators, and their decisions and implementation of the IEP are entitled to deference. *See* FF 59, 68, 71, 77, 84, 118. Student's teachers saw Student progress. FF 79, 80, 102, 106. The use of a particular methodology to address Student's educational needs is within the discretion of Student's educators because they helped develop the IEP and have special awareness of Student's special education needs. *See Gill v. Columbia Sch. Dist.*, 1027, 217 F.3d 1037-38 (8th Cir. 2000).

Various teaching methods used by Ms. W. resulted in Student's progress. Ms. W. worked on goals 1-6 of the February 2007 IEP with Student. FF 99. Ms. W. used the REWARDS program as part of the reading services she provided to Student. FF 100. This program was used in a small group setting with two or three other students. FF 100. Ms. W.'s decision to use the REWARDS program is entitled to deference. *See Gill*, 217 F.3d at 1037-38; s*ee also Lessard v. Wilton Lyndeborough Corp. Sch. Dist.,* 518 F.3d 18, 28-29 (1st Cir. 2008); s*ee also Edwin K. v. Jackson,* 2002 WL 1433722 *1, *17 (N.D. Ill. 2002). Student made progress using REWARDS. FF 102. Ms. W. also used other reading passages in literature when

working with Student on reading. FF 101. She used manipulatives, visuals, and other strategies when working with Student on math goals. FF 105. Student made progress on the related IEP goals. FF 106. Ms. W.'s methodology in implementing the IEP resulted in educational benefit to Student. Student's considerable progress shows that she received benefit from SSD's implementation of the IEPs.

The panel notes that in contrast to Student's educators' training and expertise, Parent has no training in the field of education, or certifications in education, special education, evaluation of students to determine needs for special education, interpreting results of assessment to determine needs for special education, or psychology. FF 130. Parent has never observed Ms. W.'s classroom during instructional time, nor has Parent observed Student in the general education classroom during instructional time. FF 131. Parent's allegations of what SSD "could have provided" Student outside of the services in the IEPs or by using different methods is not relevant. Whether Student could have made more progress when provided with services or methods is not the standard to resolve alleged violations of the IDEA. *See Bradley v. Arkansas Dept. of Ed.*, 442 F.3d 965, 975 (8th Cir. 2005). The mere fact that Parent was not able to choose every facet of Student's education does not mean Student was denied FAPE. *See Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1038 (8th Cir. 2000).

The panel finds that SSD properly implemented the IEPs according to their express terms and in compliance with the IDEA and its regulations. SSD is not required to provide every service in the IEP every minute of every day. Student's progress demonstrates that SSD's implementation of the IEP provided Student with educational benefit. Thus, the panel finds that SSD did not engage in procedural violations with respect to the implementation of Student's IEPs and Student's right to FAPE was not impeded.

(2) Parent was not prevented from being an active participant on the IEP team from March 26, 2007 to November 20, 2008.

Parent was not denied meaningful participation on Student's IEP team meetings, because she actively participated in the February 14, 2007 and September 17, 2007 IEP meetings designing Student's IEPs. FF 53, 63. *See N. v. Orange City Sch. Dist.* 454 F.3d 604, 610 (6th Cir. 2006). As discussed above, Parent was a significant part of the February 2007 IEP meeting. She voiced her opinion, desires, comments, and suggestions regarding Student's strengths; Student's present levels of academic achievement, Student's functional performance; special education to be provided to Student in reading and math to address Student's disability in basic reading and math calculations; creation of Student's measurable annual goals; accommodations and modifications provided to Student; and provision of language therapy to Student to address Student's language impairment in morphology and semantics. FF 40-41, 53-55. Parent voiced her desire to have Student's first and third grade behavioral plans attached to the February 2007 IEP. FF 53. Parent's input was considered by the IEP team, as exhibited by the IEP team decision to attach Student's behavioral plans and make them part of the February 2007 IEP. FF 53.

In May 2007, when Parent requested that Student's February 2007 IEP be amended, Parent was provided a copy of the portion of the State Plan discussing the process to amend an IEP, which is different from the IEP meeting process. FF 57. Ms. A. explained to Parent why SSD believed that Parent's requests to amend the IEP required an IEP meeting. FF 57. Parent was advised that an IEP meeting would be scheduled in the fall when staff was available. FF 57. This was a reasonable response that was consistent with the State Plan.

Parent was also an active participant in the September 17, 2007 IEP meeting. FF 63. As part of the IEP team, Parent made the decision to 1) reduce the special education in math in a

special education setting from 150 minutes per week to 75 minutes, and 2) to reduce language services from 90 minutes per week to 60 minutes. FF 63. Parent voiced her disagreement with the IEP team's suggestion eliminate some of the accommodations/modifications and behavioral plan in the February 2007 IEP. FF 63. In addition, the IEP team discussed items Parent raised in her request to amend the IEP. FF 64.

SSD's denial of Parent's request that the IEP team reconvene, the very next day after the team met, did not deny Parent meaningful participation in IEP team meetings. *See* FF 66. *See* 34 C.F.R. § 300.324(a)(4)-(5). SSD is not required to reconvene for another IEP meeting at Parent's request. SSD denied Parent's request for another IEP meeting because it believed there was no new information for the IEP team to consider. FF 66. The IEP team had finished their meeting less than 24 hours when Parent demanded another meeting. IDEA does not require the IEP team to reconvene on demand. *See* 34 C.F.R § 300.324(a)(4)-(6).

Parent claims SSD had "canned" "pre-done" IEPs. The record does not support this claim. SSD never presented a completed IEP at IEP meetings, or otherwise forced an IEP on Parent. FF 53-54, 63, 65. SSD prepared reports and came into meetings with clearly marked *drafts* of an IEP. FF 65. The law does not require SSD to come into an IEP meeting with a blank slate. *See T.W. v. Unified Sch. Dist. No. 259*, 2005 WL 1324969 *1, *11, 136 Fed. Appx. 122, 134 (10th Cir. 2005) (not published in Federal Reporter); *see N. v. Orange City Sch. Dist.*, 454 F.3d 604, 610-11 (6th Cir. 2006). SSD may come into Student's IEP meetings with pre-formed opinions regarding the best course of action for Student, as long as SSD was willing to listen and Parent had the opportunity to make objections. *See T.W.*, 2005 WL 1324969 at *11, 136 Fed. Appx. at134; *see N.*, 454 F.3d at 610-11.

The above examples show SSD did listen to Parents concerns in the formation of the IEP. FF 53, 63-64. For example, SSD included in the February 2007 IEP Student's behavior plans, at Parent's request and discussed items Parent wanted to have addressed by amendment to the IEP at the September 17, 2007 IEP meeting. FF 53, 64.

Parent was not denied active participation on Student's IEP team. The record proves she voiced her opinion during IEP team meetings and the IEP team took Parent's suggestions seriously. Procedurally, the IDEA requires nothing more than that SSD consider Parent's concerns and views. *See N.,* 454 F.3d at 610; *see B.V. v. Dept. of Educ., State of Hawaii,* 451 F.Supp.2d 1113, 1132 (D. Hawaii 2005). SSD has met this requirement. FF 53, 63-64. The Panel finds that SSD did not procedurally violate the IDEA and did not deny Parent active participation on the IEP team.

(3) Parent was not denied information from March 26, 2007 through November 20, 2008 which significantly impeded Parent's participation on the IEP team.

There is no evidence in the record showing that Parent was denied access to any of Student's educational records, or how the alleged denial affected Parent's participation on the IEP team meetings. The IDEA regulations only require SSD to inform Parent of Student's progress at least as often as parents of nondisabled children are informed of their children's progress. *See* 34 C.F.R. § 300.320(a)(3)(i)-(ii); *see T.W. v. Unified Sch. Dist. No. 259*, 2005 WL1324969 *1, *10, 136 Fed. Appx. 122, 133 (10th Cir. 2005) (not published in Federal Reporter) (citing 34 C.F.R. § 300.347(a)(7)(ii) (2005), now in 34 C.F.R. § 300.320(a)(3)(i)-(ii)). The record shows that SSD provided reports to Parent as often as Student's nondisabled peers. FF 103, 104. In addition, Ms. H. provided Parent with data regarding Student's progress. FF 103. Similarly, Ms. W. kept data on Student's progress on IEP goals and reported the progress to Parent. FF 104. Ms. W.'s recording of data on Student's progress on IEP goals is not an

"educational record" within meaning of the IDEA. *See* 20 U.S.C. § 1232g(a)(4)(B)(i). Thus, Miss W. was not obligated to keep every assignment and paper directly related to Student. *See* 20 U.S.C. § 1232g(a)(4)(B)(i).

The "records" that Parent complains about are those in addition to Student's progress reports. The exhibits in evidence contain numerous examples of e-mails sent by Parent to Ms. W., Ms. H., and Ms. A. making frequent requests for information about Student. FF 124-28. Parent sent many emails to Ms. W.. Ms. W. did her best to respond to the influx of continuous email messages from Parent. FF 124-25.

Ms. H., SSD's representative contacted Ms. A., SSD's compliance liaison, for assistance in answering Parent's emails because Ms. H. "felt that the teacher was receiving so many communications and that the teacher could only answer some of the questions." FF 126. Ms. H. thought the "communications were escalating." FF 126. While helping respond to the barrage of Parent's emails, Ms. A. noted that "almost everything we sent, [Parent] would question" and Ms. A. would attempt to address the questions. FF 127.

Ms. W. considered communication with Parent regarding Student to be an important part of her job as a teacher. *See* FF 128. In Ms. W.'s experience, the volume of communications that she received from Parent was "way above" what she received from other parents. FF 128. Despite this fact, Ms. W. continued to communicate with Parent. FF 128.

The IDEA contains no general requirement that teachers must communicate with Parent on an ongoing basis. *See* 34 C.F.R. § 300.613(a). Furthermore, the IDEA does not require teachers to communicate with Parent as frequently as Parent may wish. *See T.W. v. Unified Sch. Dist. No. 259*, 2005 WL1324969 *1, *10, 136 Fed. Appx. 122, 133 (10th Cir. 2005). The communications with Parent regarding Student equaled or exceed the amount of communication

teachers have with the parents of nondisabled children. *See T.W. v. Unified Sch. Dist. No. 259*, 2005 WL1324969 *1, *10, 136 Fed. Appx. 122, 133 (10th Cir. 2005).

The record shows that Parent excessively sent communications to Student's teachers and school administrators. The personnel replied in a routine and timely fashion, and provided much more information than required by the IDEA or Student's IEP. FF 124-28. SSD's actions satisfy IDEA's requirement. *See T.W.*, 2005 WL 1324969 at *10, 136 Fed. Appx. at 133.

Parent has failed to meet her burden of showing that she was denied access to educational records. She also failed to show how the claimed lack of access impeded her ability to actively participate on Student's IEP team from March 26, 2007 through November 20, 2008. In contrast, the record shows that Parent was very active in Student's IEP team meetings and that her concerns, views, and objections were taken seriously by SSD and incorporated into the IEPs when appropriate. The panel finds that SSD did not procedurally violate the IDEA; SSD did not deny Parent information; and SSD did not impede Parent's participation on Student's IEP team. *See id.*

(4) Student was not deprived of educational benefits.

Student received educational benefit. Her IEPs were properly developed, properly implemented, and she received benefit from them. SSD has met the IDEA's requirement of a "basic floor of opportunity" by providing Student with access to specialized instruction and related services that were individually designed by Student's IEP team to provide educational benefit to Student. *See Bd. of Educ. Of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 201 (1982). Student was not denied FAPE; Student received educational benefit from the IEPs. *See Id.* at 201; *see T.F. v. Special Sch. Dist. of St. Louis County*, 449 F.3d 816, 820 (8th Cir. 2006); *see Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1035-36 (8th Cir. 2000); *see Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658-59 (8th Cir. 1999).

Student's progress, discussed in more detail above, demonstrates that Student's IEPs provided FAPE. *See Lessard v. Wilton Lyndeborough Corp. Sch. Dist.*, 518 F.3d 18, 29 (1st Cir. 2008) (citing *Rowley*, 458 U.S. at 209-10). Testimony by SSD's personnel that Student made progress during the relevant time period is entitled to great weight. FF 79, 80, 102, 106; *see Sch. Bd. of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006); *see Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1292-93 (11th Cir. 2001); *see JH v. Henrico County Sch. Bd.*, 395 F.3d 185, 197-98 (4th Cir. 2005). Ms. K. has been Student's speech pathologist since Student was in kindergarten. FF 77. Ms. K. observed Student in Student's classroom on several occasions during fifth grade and in their work together. FF 77, 79. She observed that Student had made "tremendous" improvement in Student's language abilities over the years and improved "a lot" with respect to communication issues exhibited by Student in earlier years. FF 79. Ms. K. also worked with Student on goals 7-10 of the February 2007 IEP, which addressed language issues, and Student made progress on those goals. FF 80. Parent agreed that Student made progress; she agreed that Student's language minutes should be reduced. FF 63. Ms. K. administered the language testing for Student's January 2008 reevaluation. FF 81. The reevaluation report significantly demonstrates Student's progress because it showed that Student would not have qualified for language services at the time if the evaluation had been an initial one. FF 81.

Based on her observations and working with Student, Ms. W. also saw that Student made progress on Student's IEP goals. FF 80, 102, 106. Ms. W. worked on goals 1-6 of the February 2007 IEP with Student. FF 99. Ms. W. observed that Student made progress using the REWARDS program, from a second grade level to a fourth grade level, and observed Student's improvement in reading in small group settings. FF 102. Student made progress on her related

IEP goals. FF 106. The goals used for sixth grade allowed Student to work on more difficult skills. FF 106. Student's receipt of passing grades and progress from grade to grade also show that Student's received an educational benefit from her IEPs. FF 133; *see Bd. of Educ. Of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 n.28 (1982); *see Carl D. v. Special Sch. Dist. of St. Louis County*, 21 F.Supp.2d 1042, 1055 (E.D. Mo. 1998); *see Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612-13 (8th Cir. 1997).

The IDEA does not require that SSD attempt to "maximize" Student's potential or provide the very best education possible at public expense. *See Bd. of Educ. Of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 208, 209-10 (1982); *see CJN v. Minneapolis Pub. Schs.*, 323 F.3d 630, 642 (8th Cir. 2003). The IDEA does not contain any "substantive" requirement prescribing the level of education to be accorded to Student, and does not mandate that Student acquire specific knowledge, strict equality, or opportunity of services. *Rowley*, 458 U.S. at 189-92, 202; *see Lathrop R-II School Dist. v. Gray*, 2010 WL 2630337 *1, *3 (8th Cir. 2010). Parent would have this panel adopt the standard in R.S.Mo. §§ 162.670, 162.675(2), (4) (1973), requiring public schools to provide disabled children with special education services sufficient to meet and *maximize* the capabilities of disabled children. It is not within the panel's authority. The statutes cited by Parent were amended in 2002 to remove the "maximizing" language. *See* R.S.Mo. §§ 162.670, 162.675(2), (4) (2002); *Reese ex rel. Reese v. Bd. Of Educ. Of Bismarck R-V Sch., Dist.*, 225 F.Supp.2d 1149, 1155 n.12 (E.D. Mo. 2002). This amendment made Missouri's special education policy consistent with the IDEA. As a result, case law relied upon by Parent, in support of the proposition that Missouri's legislature intends to hold Missouri special education services to a higher standard than the IDEA's standard, is no longer binding and the IDEA's "basic floor" standard controls. *See Reese*, 225 F.Supp.2d at 115 n.12.

Accordingly, the panel holds that Student was not deprived of an educational benefit. To the contrary, Student's progress, receipt of passing grades, and progress from grade to grade show that she received an educational benefit from her IEPs. *See Bd. of Educ. Of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 201, 206 n.28 (1982); *see Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1035-36 (8th Cir. 2000); *see Carl D. v. Special Sch. Dist. of St. Louis County*, 21 F.Supp.2d 1042, 1055 (E.D. Mo. 1998); *see Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612-13 (8th Cir. 1997).

C. Student Was Properly Evaluated During The 2007-2008 School Year

SSD did not procedurally violate the IDEA because a reevaluation of Student and an independent educational evaluation ("IEE") were conducted at Parent's request, at public expense, and in compliance with the IDEA and its regulations. FF 86, 87, 96, 97; *see* 34 C.F.R. § 300.303-311; 34 C.F.R. § 300.502(a), (b). SSD properly reevaluated Student at Parent's request. FF 87, 92, 94.

Ms. S., SSD's school psychologist attended Student's September 17, 2007 IEP because Parent requested that testing be done. FF 86.

At the meeting, Student's IEP team properly reviewed existing data from reevaluation of Student completed on December 7, 2005, and considered additional information provided by Parent regarding her concern that Student be tested for an Emotional Disturbance diagnosis. FF 86; *see* 34 C.F.R. § 300.305(a)(1), (2). A meeting was held on October 4, 2007 to discuss Parent's requested reevaluation of Student and testing. FF 87. Parent participated in this meeting by telephone. FF 87. Parent had the opportunity to provide input into the reevaluation and Parent did provide input. FF 87.

SSD answered Parent's questions about testing to be done at Student's reevaluation and used a test Parent selected. FF 87-89. After the meeting and at Parent's request, Parent was

provided information about what testing would be done by Ms. S.. FF 87. Dr. S., a licensed psychologist and certified school psychologist also communicated with Parent in October 2007 in response to questions she had about proposed testing and testing Parent wanted to be conducted. FF 88. As part of Student's reevaluation, Ms. S. used a test that contained both a nonverbal and verbal component and properly sought input from Student's teachers and service providers. FF 89, 90; *see* 34 C.F.R. § 300.305(a)(1)(iii); *see* 34 C.F.R. § 300.306(c)(i)-(ii).

Parent participated in a meeting on January 31, 2008 to discuss Student's reevaluation results. FF 91. The reevaluation report showed that Student's cognitive function was in the average range and that Student had an average long-term memory. FF 92. The language testing portion of the reevaluation showed that Student had made progress, and would not have qualified for language services at the time, if the evaluation had been an initial one. FF 81. Based on this testing, SSD determined that Student did not meet the eligibility criteria for any new disability under the IDEA, and Student's diagnosis remained the same. FF 93. The reevaluation document created by SSD meets all of the requirements in the IDEA's regulations. FF 92; *see* 34 C.F.R. § 300.311.

Dr. S. went to Parent's office to meet with Parent and discuss the reevaluation results with her. FF 95. Parent relied on Dr. S. to learn about assessment of students to determine needs for special education. FF 95.

On February 6, 2008, Parent requested an IEE based on her desire to get a better measure of Student's intelligence by a nonverbal test. FF 96. SSD complied with Parent's request for additional testing at public expense and arranged an IEE. FF 97; *see* 34 C.F.R. § 300.502(a), (b)(1)-(5). Dr. S. arranged with CPS at the University of Missouri-St. Louis, a qualified

examiner not employed by SSD, to have administered the nonverbal cognitive testing requested by Parent. FF 97; *see* 34 C.F.R. § 300.306(a)(1)-(2).

CPS completed an evaluation of Student on April 30, 2008. FF 97. In its May 15, 2008 Psychological Evaluation, CPS stated that the test results were believed to be valid indicators of Student's nonverbal cognitive abilities. FF 97. Student's full scale score was 101, which was reported to be in the average range. FF 97. The January 2008 reevaluation and the nonverbal testing done by CPS at Parent's request both demonstrated that Student's cognitive abilities were in the average range. FF 92, 97, 129.

The record is void of any evidence supporting Parent's claim that the 2008 reevaluation was lacking, other than Parent's own testimony, which makes no specific allegation regarding the alleged deficiency. Given Parent's lack of credentials in the area of educational assessment, Parent's testimony is of no significance. *See* FF 130.

The documentary evidence and testimony presented by SSD's personnel show that Student's reevaluation procedures complied with the IDEA and its regulations. The January 2008 reevaluation provided the information needed to evaluate Student. FF 94. The tests administered to Student were appropriate, comprehensive, tailored to Student's specific area of educational needs, and provided the information that Parent requested. FF 94. Therefore, the panel finds that Student was properly evaluated during the 2007-2008 school year.

D. Student's Placement Was Not Changed During The 2007-2008 School Year

Parent claims that Student's placement was changed during the 2007-2008 school year, however, the nature of this claim is unclear. The Department of Education has stated that "placement refers to the provision of special education and related services rather than a specific place." 71 Fed. Reg. 46687. Student's placement was not location specific. *See* 71 Fed. Reg.

46709. Student's placement was not changed during the 2007-2008 school year because the special education and related services in Student's Stay Put IEP were provided. *See id*.

On September 17, 2007 Student's IEP team members suggested a decrease from 150 per week to 75 minutes per week in the minutes of special education in math and a decrease from 90 minutes per week to 60 minutes in related language services, as well as elimination of some of the accommodations/modifications. FF 63. On September 17, Parent agreed with the suggested changes in the special education math and language services. FF 63. Parent confirmed her agreement to these changes in the Resolution Session Agreement. FF 67. The February 2007 IEP with the agreed changes was Student's placement. SSD complied with the IDEA's stay put provision because Student's placement was not changed during the pendency of any of Parent's due process complaints. Student continued to receive the special education and related services in the Stay Put IEP. *See* 34 C.F.R. § 300.518(a); *see* 71 Fed. Reg. 46687. Thus, SSD did not change Student's placement in violation of 34 C.F.R. § 300.518(a).

The increased time spent by Ms. W. to assist Student in the general education classroom, after Parent asked that Student not participate in Ms. P.'s small group for math is not a change in placement because Student continued to receive the math minutes in the general education class room as indicated in Student's IEP. FF 75; *see* 71 Fed. Reg. 46687.

SSD could have provided Student's math minutes in Ms. P. general education class room. That would not have been a change in placement. *See* 71 Fed. Reg. 46709, 46687. However, Parent asked that Student not be sent to Ms. P.'s room and SSD acquiesced. FF 74-75. This shows an effort by SSD to cooperate with Parent and to continue to provide Student with the benefit of the special education in Student's IEP, as opposed to it being a change in Student's placement.

The panel finds that there was no change in Student's placement during the 2007-2008 school year.

E. *Parent is Not Entitled To Equitable Relief*

Parent is not entitled to equitable relief because SSD has: not denied Student FAPE; not engaged in procedural violations of the IDEA; not improperly evaluated Student for the 2007-2008 school year; and not changed Student's placement.

Student's special education program fully complied with the IDEA and its regulations; therefore, SSD is not required to provide Parent with compensatory education. *See Erickson v. Albuquerque Pub. Schs.*, 199 F.3d 1116, 1123 (10th Cir. 1999); *see Urban v. Jefferson County. Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996) *also Meiner v. State of Missouri*, 800 F.2d 749, 753-54 (8th Cir. 1986); *see also Deptford Tp. Sch. Dist. v. H.B.*, 2008 WL 2127458 *1, *1 , 279 Fed. Appx. 122, 124 (3rd Cir. 2008). Equitable relief and compensatory education are not appropriate in this case because SSD has provided Student with FAPE. *See Erickson*, 199 F.3d at 1123; *Urban*, 89 F.3d at 727.

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 R.S.Mo. 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. R.S.Mo. § 162.962(3). Your right to appeal this final decision is also set forth in the Regulations to the IDEA, 34 C.F.R. §300.514 and 34 C.F.R. §300.516, and in the Procedural Safeguards which were provided to you at the beginning of this matter.

IV. CONCLUSION

The panel concludes that Parent did not carry the burden of proof on any of Parent's claims. The panel finds in favor of SSD and against Parent on all issues.

IT IS SO ORDERED

CATHY J. DEAN
Chairperson

Date: _____

FRED DAVIS
Panel Member

ROBERTA BRENNAN
Panel Member

by electronic mail only to:

Cynthia Quetsch
Fred Davis
Roberta Brennan

by electronic mail and regular U.S. mail to:

Wanda Allen
Parent
John Brink