

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

\_\_\_\_\_, STUDENT, )  
by and through \_\_\_\_\_, )  
PARENT, )  
 )  
Petitioner, )  
v. )  
 )  
SPECIAL SCHOOL DISTRICT )  
OF ST. LOUIS COUNTY, )  
 )  
Respondent. )

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

**STATEMENT OF ISSUES AND PROCEDURAL HISTORY**

**A. Procedural History**

This matter comes before the three-person due process hearing panel convened by the Missouri Department of Elementary and Secondary Education ("MDESE") pursuant to Section 162.961 R.S.Mo., on the request for due process filed by the mother of Student ("Parent" or "Mother" or "Petitioner") on behalf of her daughter (hereinafter "Student"), a student who at all times pertinent hereto has been enrolled in the Ritenour School District ("Ritenour") and received special education services through the Respondent Special School District of St. Louis County ("SSD"). The request for due process ("Complaint") was received by MDESE on July 20, 2009. (Hearing Panel Exhibit No. 1, hereinafter HP or R for Respondent or P for Petitioner followed by a dash and then exhibit number). The panel convened by MDESE consists of panel members Dr. Richard Staley and Rand Hodgson, and Chairperson Janet Davis Baker. The Student and Parent proceeded *pro se*. The Respondent School District is represented by Robert J. Thomeczek with Thomeczek & Brink, LLC. A resolution meeting was conducted on August 4, 2009 but the parties were not able to resolve the dispute. (Transcript at volume 2, p. 6, hereinafter TR followed by volume number then colon (: ) and then page number).

Five days of hearing were conducted at the offices of the Ritenour School District on September 21-23 and November 9-10, 2009. A motion for directed verdict was made at the conclusion of the Parent's case which was denied and then renewed at the close of the evidence which was taken under advisement and subsequently denied by Order of the Chairperson. (HP-2). The hearing was open at Petitioner's request. (TR 2:129). Respondent's exhibits were all admitted by agreement as were all of Petitioner's exhibits. (TR 2:189-91). Petitioner called the

following witnesses to testify: Kathleen Boone, Student's Grandmother, Robert Cornell, Cristina Pappalardo, Stephanie Moscola, Student, Mary Beth Fortney and Student's Mother. Respondent called Carrie Klein, Student's Mother and Mary Whitmore.

**B. Time-Line Information**

The initial deadline for issuance of the hearing panel's decision was October 3, 2009. At the conclusion of the first set of hearing days the SSD requested an extension of time for the hearing panel's decision through November 30, 2009, which the Chairperson granted. At the conclusion of the second set of hearing days the SSD requested an extension of time for the hearing panel's decision through March 1, 2010, which the Chairperson granted. Subsequent requests for extension of time of the hearing panel's decision were made by the SSD through March 31, 2010 and April 30, 2010, both of which were granted by the Chairperson.

**C. Statement of Issues**

The issues were set out by Petitioner in her due process request in HP-1. Petitioner challenged "the generic I.E.P. [individualized education plan] that is currently in place for [Student] as of May 29, 2009."

The issues before the panel as identified by the Complaint and the SSD's Response dated August 31, 2009 (HP-3) are as follows:

1. Present Level of Academic Achievement and Functional Performance – PLAAFP.

Parent states the PLAAFP section of the IEP reports that "math is a relative strength" for [Student] but on her report card "she received a U in math and all ones and twos which suggests beginning or little understanding of concept or skill." The section further indicates that Student has turned in homework once when her report card says otherwise.

The SSD's Response states that the May 29, 2009 IEP addresses the Parent's concerns. There are 150 minutes per week ("mpw") of instruction in math in the special education setting, an increase from 60 mpw. There are 150 mpw of instruction in task-related skills where there were none in the prior IEP in this area.

2. Behaviors.

Parent alleges that Student has had two BIP's ("Behavior Intervention Plans") and two behavior assessments and yet an increase in behavior problems during 2008-2009 school year.

The SSD responded that the May 29, 2009 IEP addresses the Parent's concerns in this area. The IEP provides that "due to ... additional social/emotional concerns, the team will meet in the Fall to complete a Review of Existing Data." The SSD contends that the Parent's request for a due process hearing as it relates to Student's proposed behavior plan was premature at the time of the filing for due process as prior to the July 20, 2009 filing of the Complaint, the SSD did not have a chance to implement the May 29, 2009 IEP or to meet to address Student's

behaviors.<sup>1</sup> During the due process proceedings, in the fall as provided for in the May 29, 2009 IEP, the IEP team met to review existing data and has conducted additional evaluations, including, but not limited to, a functional behavior assessment (FBA).

3. Communication.

Parent claims that an assessment from the Missouri Department of Mental Retardation (“DMR”) and Developmental Disabilities determined that Student is at least 2.5 below the means in social and communication skills. At the last IEP meeting both the special education teacher and her classroom teacher noted that Student had difficulty putting her thoughts on paper and this was noted in the IEP but nothing further was stated. The Parent believes these are sorts of communication needs that should have been addressed in the IEP.

The SSD contends that the issue of Student having problems putting her thoughts on paper is not a “communication need” as contemplated by the IDEA and included on the IEP page “Special Considerations: Federal and State Requirements.” The SSD responds that this issue is more appropriately described as an education need for Student’s “written expression” for which service minutes in the May 29, 2009 IEP are allocated. The SSD states that the May 29, 2009 IEP also addresses the Parent’s concern related to social skills as there is an increase from 0 mpw in social skills to 150 mpw of instruction.

4. Assistive Technology Services.

Parent alleges that the assistive technology services that the SSD and Ritenour have used have not been effective. Student has advised Parent that the picture cue card system does not work. Parent states that “[o]ne of [Student’s] big problems is starting and completing tasks” and further that Student is a “strong visual hands on learner.”

The SSD responds that the May 29, 2009 IEP addresses the parent’s concerns. In the PLAAFP, the IEP provides: “Due to Student’s strong visual learning channel, visual schedules, tasks checklists, and graphic organizers will be used.”

5. Extended School Year.

Parent states that based on Student’s “in-class work, her homework, and DRA [a standardized reading test] scores” and the DMR’s assessment which Parent claims indicates that Student is 2.5 below the means, that Student should have been eligible for extended school year (“ESY”) services.

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1. The panel’s review is limited to the fact situation and the IEP that existed at the time of the Complaint and not modifications that may be implemented in the IEP or any subsequent IEPs. However, a Student’s progress or lack thereof subsequent to the filing of a due process complaint and prior to hearing is relevant to a determination of whether the complained of IEP under which the Student was receiving services was reasonably calculated to provide Student with a free appropriate public education. See further discussion herein.

The SSD responded that based on regression/recoupment analysis, the IEP team determined that Student did not qualify for ESY services.

The Parent suggested resolution as follows:

1. Parent would like to begin "Phase 3 and 4" and place Student in an alternative school within the SSD that will address all of her educational needs regardless of her disabilities. Parent no longer believes that Ritenour is capable of dealing with children with as many needs as Student and wants Student placed in an alternative school within the SSD. During the hearing, Parent requested Litzsinger School, a public separate day school operated by the SSD. (TR 2:11).

2. Until placement at the separate school is made, Parent would like Student to be able to utilize a laptop paid for by SSD for all her educational needs.

3. Parent wants the SSD to come up with a behavior support plan that will assist Student in making the right choices and no longer punish her for her disabilities.

4. Parent would like to see Student with "more concrete services", for example "perhaps a professional who deals with children with multiple diagnoses... specifically Asperger's, to help them develop an I.E.P. that addresses [Student's] many problems."

#### **FINDINGS OF FACT**

1. During all times material to this due process proceeding, Student resided with her mother within the boundaries of the Ritenour School District, which is within the boundaries of the SSD, attending Marvin Elementary School. (HP-1; R-6).

2. Student's date of birth is January 8, 1999. At the time of the hearing during the 2009-10 school year, Student was a 5<sup>th</sup> grade student at Marvin Elementary School. (HP-1).

3. Student entered kindergarten at Marvin Elementary on August 16, 2004 and has only attended Marvin Elementary School. She lives with her mother, a younger brother and her grandmother within the boundaries of the Ritenour School District. (R-6).

4. Both the SSD and Ritenour are Missouri public school districts and both are located in St. Louis County, Missouri. Litzsinger School is a public separate (day) facility operated by the SSD for students that have significant disabilities that need a more restrictive educational environment. (TR 5:67).

5. Student was referred for an initial evaluation and Parent provided consent to evaluate on October 25, 2006. An evaluation plan was developed on October 27, 2006. (R-5).

6. The diagnostic report indicated that the school had significant concerns in the areas of task related behaviors and academics. (R-6). A diagnostic conference was held by the SSD on December 4, 2006. The diagnostic team determined that Student was eligible for special

education services with an Other Health Impaired (OHI) diagnosis due to an attention deficit hyperactive disorder (ADHD). (R-6).

7. Student's initial IEP was developed on December 20, 2006. (R-7). The IEP only had one goal which was to have Student remain on task and complete 85% of her daily assignments. Student was to receive 300 mpw in instruction in task related skills, half in the special education setting and half in the regular education setting. The IEP noted that Student's Development Reading Assessment ("DRA") score was at a level 8, while grade level for her at that time would have been at a level 16. No behavior concerns were noted to impede Student's learning or the learning of others, in the section provided for such a report in the IEP.

8. A new IEP was developed by the IEP team on February 28, 2007. (R-8). That IEP noted that Student's medical diagnoses were that of bipolar, organic affective disorder, and a mood disorder. The PLAAFP section noted that Student's task completion improved during a two-week period when she was on medication but Parent stopped the medication reportedly due to sleep problems and behaviors at home. The IEP did indicate behavior as a concern as it impeded Student's learning or the learning of others and this was to be addressed through a behavior intervention plan ("BIP") and IEP accommodations. Student's DRA reading score had increased by the time of this IEP to a level 10, with grade level expectancy being at level 16.

9. On August 31, 2007, at the beginning of Student's 3<sup>rd</sup> grade school year, Petitioner filed a request for a due process hearing. (R-10). One concern was the lack of development of a BIP as required by the February 2007 IEP.

10. The report of the resolution sessions indicates that the SSD had agreed to conduct a review of existing data to determine the need for additional information, conduct a FBA, correct inconsistencies in a report card, address goals in reading and writing, assess and reevaluate progress in math and write a new IEP to address any concerns from the assessments. (R-42, pp. 492-495). The actual agreement section states the agreement of the parties as follows: the IEP team will write a new IEP to address the areas identified in the assessments; Parent would be reimbursed for certain tutoring provided to Student; the IEP to be developed would be considered to provide a free appropriate public education in the least restrictive environment; and Parent would provide the SSD with all relevant medical information including medical releases. (R-42, p. 493). The agreement provided that Parent would dismiss the due process complaint with prejudice, which she did on December 17, 2009. (R-42, p. 491).<sup>2</sup>

11. A math assessment was subsequently conducted and scores were determined to be within average range. (R-13). The diagnostic team recommended the use of visual tools, such as a number grid and flash cards and practice with money values.

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2. As this due process complaint was dismissed with prejudice, the hearing panel has no jurisdiction to review any of the issues of that complaint and information regarding the complaint and its disposition and this information is to provide background only. If a Student does not receive all of the relief promised through a resolution session, the recourse is through the federal courts and not the original or any subsequent hearing panel. 20 U.S.C. § 1415(f)(1)(B)(iii)(II); Section 162.961.7 R.S.Mo; *State of Missouri ex rel. St. Joseph School District*, WD 70847 (Mo. Ct. App. W.D. March 30, 2010).

12. The IEP to address the additional assessments was written on January 22, 2008. (R-14). This IEP noted that Student has medical diagnoses of an organic affective disorder, bipolar, ADHD, ODD and a diagnosis from the Judevine Center for Autism of Asperger's Syndrome. There was no change to Student's educational diagnosis. The PLAAFP reported that Student was not currently taking any medications. Student's DRA reading score increased from level 12 to level 16 from the prior IEP. While the IEP did note that the student exhibited behaviors that impeded his/her learning or that of others (R-14, p. 118), no specific disruptive behaviors were noted. The behavior was to be addressed through IEP goals and IEP accommodations. There was a comment that Student had received several bus write-ups resulting in two bus suspensions. The school was to work with Student "in order to develop an incentive-based plan to improve bus behavior." (R-14, p. 125). The Student was not determined to need transportation as a related service.

13. There were 9 IEP goals regarding the following areas: (1) reading comprehension; (2) basic reading; (3) written expression, spelling; (4) written expression, paragraph writing; (5) written expression, punctuation; (6) social/emotional behavior, seek attention appropriately; (7) math calculation, regrouping 2 and 3 digits numbers; (8) math calculation, money skills; and (9) social/emotional behavior, ability to ask for help appropriately.

14. The Services Summary page for the January 22, 2008 IEP provides that Student is to receive the following services in a special education setting which would put her outside of regular education classes 21-60% of the time: (1) 200 mpw instruction in reading; (2) 150 mpw instruction in written expression; (3) 60 mpw instruction in math; and (4) 15 mpw instruction in self-advocacy. (R-14, pp. 119-20).

15. A Notice of Action ("NOA") was issued by the SSD on January 29, 2008, proposing to change the level of special education services by increasing the number of minutes of special education services from 300 minutes to 450 minutes in the special education setting. (R-14). In addition to the SSD's assessments and progress reports, this proposal also took into consideration other agency assessments including the Missouri Department of Mental Health, the Judevine Center and St. John's Mercy Hospital's occupational therapy evaluation. According to the NOA, these additional minutes were needed to address the 9 goals of the January 29, 2008 IEP in the areas of self-advocacy, written expression, reading and math, which were designed so Student could make adequate progress in the general education curriculum.

16. An occupational therapy assessment was conducted and a report issued on March 18, 2008. (R-16). The testing in the areas of visual perceptual and sensory processing resulted in scores that were all considered within average ranges and her processing did not impact her access to the school environment or curriculum. An addendum was prepared for the IEP on March 18, 2008 to include the assessment but there was no change in any services. (R-17).

17. On April 24, 2008, a new IEP was developed. (R-18). It noted the same medical diagnoses and education diagnosis but indicated that as of March 18, 2008, Mother reported that Student was then taking the medication, Tenex. The IEP noted progress with Student's DRA reading scores from 12 in fall of 2007 to 16 in December of 2007 and 18 prior to this IEP. The IEP team considered the need for extended school year ("ESY") services through the use of the

regression and recoupment analysis. Data was collected over spring break in all goal areas which indicated that there was no regression of skills over the break. (TR 5:62-63; TR 2:63-64). The minutes in special education remained unchanged from the prior IEP. The 9 IEP overall goals were continued but with a higher standard for achievement on some goals. With respect to reading comprehension, the goal was to reach a DRA reading level of 28 by the next annual IEP date, which would have been April 24, 2009. The IEP had the same behavior notation as the prior IEP but there were no comments regarding specific behaviors either in the classroom or on the bus.

18. Parent acknowledged that Student had met all the goals established by the April 24, 2008 IEP (R-18) and that she was making progress on the DRA scores. (TR 4:65-68).

19. Kathleen Boone was Student's 4<sup>th</sup> grade special education teacher for the 2008-2009 school year. Ms. Boone is in her 19<sup>th</sup> year as a special education teacher with 12 of those years teaching at Marvin Elementary School. (TR 2:79-80). According to Ms. Boone, Student met or made progress on the goals in her April 24, 2007 and specifically on the DRA scores. (TR 2:87, 92). This progress is also noted on the IEP progress report. (R-19, p. 235).

20. Stephanie Moscola was Student's 4<sup>th</sup> grade general education teacher at Marvin Elementary for the 2008-2009 school year. Ms. Moscola collaborated with Ms. Boone regarding Student's education. (TR 3:56).

21. On August 27, 2008, pursuant to the Parent's request for an independent educational evaluation (IEE), cognitive and academic testing was conducted of Student by the LDA (Learning Disabilities Association). The report prepared after testing stated that Student's "... scores in reading and math do not meet state criterion for a diagnosis of learning disabled" but she did demonstrate some "unevenness in her reading development and some processing vulnerabilities." (R-22, p. 257).

22. On September 18, 2008, SSD teacher Ms. Boone, completed a form to request social work services pursuant to a request made by the Parent. (R-28; TR 2:66; TR 4:12). Beginning in late September 2008 after the form was submitted, the SSD's social worker Carrie Klein conducted some student observation and teacher and parent consultation and had individual and group therapy sessions with Student through mid-March 2009. (R-28, p. 376-379). Ms. Klein was advised by Mother that Student was receiving services through a psychiatrist at Barnes Jewish Center Behavior Health Services and behavior therapy at home through Judevine Center. Student also had a Department of Mental Health caseworker providing various supports. (TR 4:14-15). Mother was interested in additional support in school through counseling services. (TR 4:14). Ms. Klein did not believe that individual counseling was appropriate in the school setting as she did not see any "red flag" behaviors such as school anxiety, depression or anger. (TR 4:17). Ms. Klein thought Student could benefit from a 6 week social group with other girls as Mother had indicated peer problems. (TR 4:17). Student acknowledged participation in this program and said it helped her "a little" in making friends and not fighting with others. (TR 3:141).

23. Parent filed a child complaint with MDESE dated December 18, 2008, which among other things, alleged that the School District and the SSD failed to identify Student as LD (learning disabled), failed to provide ESY, failed to provide accommodation during Iowa testing, failed to provide access to records, failed to properly respond to the request for an independent education evaluation and failed to develop a behavior intervention plan. (R- 42).

24. The IEP team reviewed the LDA IEE on January 8, 2009. Based upon the IEE's findings, the current diagnosis of OHI was maintained by the IEP team. (R-24).

25. On January 16, 2009, a Notice of Action (NOA) was issued by the SSD regarding the IEE that provided that the LDA evaluation completed by that agency's certified school psychologist determined that Student's current diagnosis of OHI remained appropriate. The team considered a learning disabled ("LD") diagnosis in the areas of reading and math but rejected same because review of the IEE data from the LDA revealed that Student did not meet State eligibility criteria for LD. (R-24, p. 263).

26. On January 21, 2009, an Individualized Education Program (IEP) was written for Student. (R-25). The IEP listed the Parent's concerns about Student's feelings toward her teachers. Parent was also concerned with the consequences Student received for not doing her work. Student's Grandmother expressed concerns with issues of getting Student to complete her homework. Staff concerns noted were in the areas of task focus and completion and organizational skills. The IEP had the same behavior notation as the prior IEPs but there were no notes about specific behaviors either in the classroom or on the bus. The notes do not reflect that Parent or Grandmother raised issues about any aggressive behavior.

27. At the time of the January 2009 IEP, Student was in the second semester of 4<sup>th</sup> grade and had a DRA level of 28, which was ending 2<sup>nd</sup> grade level. The PLAAFP section of the IEP noted that Student was making progress on her academic goals, including math. The Services Summary page provided that Student was to receive the same number of special education minutes as in the prior IEP in the same areas and settings. (R-25, p. 270). The IEP provided for the use of graphic organizers and a visual schedule and sheets to assist in organizational skills to be used in the classroom environment. (TR 2:69, TR 3:25; R-25, p. 274; R-34, pp. 410-25).

28. At that Jan. 21, 2009 IEP meeting, a Notice of Action (NOA) was written that proposed to change the level of services. The IEP team determined that special education minutes were not needed in the areas of reading, math and written expression; however increased minutes were needed in the areas of task completion strategies and organizational skills. The NOA proposed 150 mpw of special education services in the special education setting for task completion strategies, and 50 mpw of special education services in the general education setting to address organizational skills. (R-25, p. 290).

29. On January 23, 2009, Ritenour staff met to consider intervention supports for Student. (R-26). The meeting to consider intervention supports was held in anticipation of the change in the IEP service minutes from the January 21, 2009 IEP.

30. Mediation was conducted on the issues arising from the child complaint with Mr. Ken Chackes presiding on January 30, 2009. Mr. Chackes reported that the parties agreed to resolve their current dispute. The SSD and Ritenour agreed to private testing in the areas of cognition (including processing) and reading and math, continued implementation of the amount of special education services and the goals and objectives of April 24, 2008 IEP (R- 42) which would be implemented as part of the January 21, 2009 IEP, the monitoring of Student's behavior and consideration of a behavior plan with the school-wide PBS (positive behavior support) team, and consideration of ESY if Parent could prove the SSD committed to provide it previously. (R-42, p. 511). The Parent did not file a due process complaint regarding these issues.<sup>3</sup>

31. MDESE issued its decision on the child complaint on February 25, 2009, finding that the school districts were in compliance with applicable law. (R- 42). The Commissioner of MDESE specifically found that the Student did not meet the criteria for LD and did not qualify for ESY services as the time of the January 22 and April 24, 2008 IEPs. The Commissioner found no denial of parental access to test scores and found that the school districts provided a reevaluation of Student and an IEE when requested. The parental complaint regarding Iowa testing could not be addressed because the testing occurred outside the one-year statute of limitations for child complaints. The decision further stated that the IEP team had met on January 22 and April 24, 2008 and addressed behavior concerns by social/emotional goals and classroom accommodations and that there is no requirement of a BIP in the regulations. (R-42, p. 498). The Commissioner stated that Student did not qualify for ESY services in these IEPs based upon Student's progress on her IEP goals.<sup>4</sup>

32. Marvin Elementary School is a PBS school which focuses on the positive behaviors of all of the students and puts supports in place for all of the students in the school. The Student's 4<sup>th</sup> grade special education teacher Kathleen Boone and the Marvin Elementary principal, Mary Beth Fortney, testified that the positive behavior support plan (PBSP) developed for students is done outside the context of an IEP. (TR 2:72; TR 3:180).

33. On February 20, 2009, a PBSP was prepared by the School District for Student. (R-27). The PBSP notes that during the 2008-09 school year up until the date of the plan, Student had 6 office referrals, 4 for defiance of authority, one for improper language and one for pushing a student in September 2008. The PBSP targeted refusal to follow directions. Aggressive behavior was not specifically mentioned. (TR 3:169). Intervention consisted of a

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3. Generally mediation is confidential and all discussion is confidential and cannot be used as evidence in any subsequent proceeding. However this mediation provides background information as to the reason for the contents of the January 21, 2009 IEP and why the NOA of January 21, 2009 was not implemented. As with complaints about receipt of relief promised through resolution sessions, the recourse is through the federal courts and not the original or any subsequent hearing panel. 20 U.S.C. § 1415(e)(2)(F)(iii); Section 162.959.6 R.S.Mo.; *State of Missouri ex rel. St. Joseph School District*, WD 70847 (Mo. Ct. App. W.D. March 30, 2010).

4. ESY services were another issue of the child complaint. There was a finding by the Commissioner that there was no violation of the IDEA by the IEPs failure to provide for ESY services. The Commissioner found that the IEP teams for the January 22 and April 24, 2008 IEPs properly considered the results of evaluations and records in determining ineligibility. Because the Commissioner's decision was not based upon the current IEP, the panel reviews the issue relative to the May 29, 2009 IEP.

sticker chart to earn free time. A crisis plan was also outlined in the event Student failed to follow directions. (R-27, p. 328).

34. Toward the end of Student's 4<sup>th</sup> grade school year in spring of 2009, Student had an increase in aggressive behaviors in the regular education classroom. (TR 3:72-73). This was a very difficult classroom with verbally and physically aggressive peers according to Ms. Moscola. (TR 3:70-1, 95). Student's behaviors would sometimes be so distracting to others that she would be sent to the office maybe once a week according to Ms. Moscola; however, this was not as frequent as others in the class. (TR 3:71). The behavior interventions were not very effective in the regular classroom (TR 3:8-9). At this time there was no plan in place for physically aggressive behaviors.

35. The records of Student's attendance indicate that she has missed at least 95 days of school from kindergarten through fourth grade. Parent testified in the hearing that Student missed significant numbers of days of school but attributed it to doctors' appointments and testing. (TR 4:59-61).

36. According to the elementary school principal, Mary Beth Fortney, school attendance significantly impacts a student's ability to learn. (TR 3:174).

37. The progress reports for the January 21, 2009 IEP show that by May 29, 2009, Student had met all the goals in the IEP. (R-25, pp. 284-290).

38. On May 29, 2009, the Individualized Education Program (IEP) which is the focus of the request for a due process hearing was developed for Student. (R-30). Staff raised concerns in the areas of task completion, peer interactions and organizational skills. (R-30, p. 384). The IEP team noted that "more significant behaviors were noted at home than within the school environment." The IEP team determined that "[d]ue to these additional social/emotional concerns, the team will meet in the Fall to complete a Review of Existing Data."

39. At the May 29, 2009 IEP meeting, the team added a goal for social/emotional behavior and added modifications and accommodations to address Student's behaviors. (R-30, p. 395). Specifically, the goal for Student was to "increase appropriate interactions with others... and resolving conflict without abrasive language or defiance."

40. The May 29, 2009 IEP did note that the student exhibited behaviors that impeded her learning or that of others. Per the IEP form, "strategies including positive behavior interventions and supports must be considered by the IEP team, and if deemed necessary, addressed in *this* IEP." (R-30, p. 385). The IEP indicates that this issue will be addressed by IEP goals and accommodations, no behavior intervention plan is required.

41. Prior to the date of this IEP, Student received a one-day suspension from the school district for making threats to other students. (R-29). The student suspension report form indicates that it is unknown if this behavior is related to any disability.

42. The Services Summary page for the May 29, 2009 IEP provided that Student was to receive: (1) 150 mpw instruction in reading; (2) 150 mpw instruction in written expression; (3) 150 mpw instruction in math; (4) 150 mpw instruction in social skills; and (5) 150 mpw instruction in task related skills. All of these 750 minutes were to be provided in the special education setting. This would place Student in the regular classroom setting for 40-79% of the time. (R-30, p. 386).

43. There are 5 goals in the May 29, 2009 IEP: (1) written expression, proofreading and editing written work; (2) reading comprehension, use of variety of strategies; (3) math reasoning, using appropriate operations to solve problems; (4) task related and organizational skills; and (5) social/emotional behavior, increase appropriate interactions with others by identifying situations leading to conflict. (R-30).

44. On Alternate Form 1, Modification/Accommodation, it is noted that Student requires reinforcement, through frequent reminder of rules, checking often for understanding, and frequent eye contact and proximity control. (R-30, p. 396).

45. Robert Cornell is Student's 5<sup>th</sup> grade general education teacher at Marvin Elementary and Christina Pappalardo is Student's 5<sup>th</sup> grade special education teacher at Marvin Elementary. Mr. Cornell and Ms. Pappalardo communicate with each other regarding Student's academics and behaviors. (TR 3:182). Student has friends at school and in Mr. Cornell's regular education classroom. (TR 3:181).

46. Pursuant to the May 29, 2009 IEP (R-30), Mr. Cornell and Ms. Pappalardo use visual aids, a visual schedule, a behavior chart and graphic organizers and have found them helpful for Student. (TR 2:201-02, 220-21; R-38, pp. 459-60). Ms. Pappalardo found writing to be a strong area for Student and the use of "think sheets" for behavior issues especially useful. (TR 2:240). The think sheets allow Student to write out incidents of difficulties and conflict in order that she may reflect on how she may handle similar incidents in the future.

47. A reward system was created so that Student could self-monitor her behaviors. (TR 2:179, 236). She responded well to the system of earning points according to Ms. Pappalardo (TR 2:236-37) and Mr. Cornell. (TR 2:179). Student confirmed that she kept track of her progress toward the reward by volunteering same at this point in the hearing. (TR 2:237). Student is cooperative more than she is disruptive according to Ms. Pappalardo. (TR 2:230). There was only one incident of physical aggression that Ms. Pappalardo was aware of and that was pushing over a desk. (TR 2:229). Student also has a safe area where she can go in the special education classroom. (TR 2:46). Ms. Fortney, the principal, is not aware of any physically aggressive behaviors. (TR 3:167).

48. Student is making progress on the IEP goals and objectives contained in the May 29, 2009 IEP. Her DRA had increased from a level 24 in 4<sup>th</sup> grade on August 28, 2008 to a level 38 in September 2009. (TR 2:183-84). Her DRA progression line shows an upward progression. (R-43).

49. Mr. Cornell believed that what was in place for Student this school year was working for her and he wanted Student in the regular classroom environment as much as possible since she was working well there. (TR 2:184-86). Although Student was still behind grade level, he was seeing results. (TR 2:206, 210).

50. There was an incident on the bus at the beginning of the school year where Mr. Cornell had to get on the bus and talk to Student as she was upset. However Student did what she was asked to do on the bus by Mr. Cornell. (TR 2:182). Transportation is not a related special education service in Student's IEP. (TR 2:46-48; R-30, p. 386). Student indicated that she had some problems on the bus. (TR 3:124). Ms. Fortney was aware of bus issues with Student but attributed them to acclimation and building relationship issues with a new bus driver. (TR 3:153, 165-66). Student is not the only student who received bus referrals during this time period. (TR 3:166).

51. Ms. Pappalardo was seeing results in the special education classroom (TR 2:230-31). Student confirmed that she was being helped more and Ms. Pappalardo was teaching her well. (TR 3:121, 131, 139-40). Ms. Pappalardo was providing services to Student in the special education classroom and the regular classroom. (TR 3:137-38).

52. Student's mother stated on November 9, 2009 that she had seen "amazing improvements finally this year", referring to the fall semester of the 2009-10 school year. She testified that Student has made progress under the May 29, 2009 IEP with both Ms. Pappalardo and Mr. Cornell and that the May 29, 2009 IEP was being implemented. (TR 5:9-10).

53. Mary Whitmore, the SSD's area coordinator who supervises the special education services at the elementary school Student attended, testified that Student did not meet the qualifications to receive extended school year ("ESY") services. (TR 5:90). The progress reports for Student indicated that Student did not regress on the IEP goals. (TR 5:105). ESY services are provided depending on the regression of skills over breaks on the majority of the student's goals. Data is taken before and after a break to see if the student is able to recoup learned skills. (TR 5:62). Student would have been able to attend regular summer school but she did not attend. (TR 5:63).

54. According to Ms. Whitmore, assistive technology fits into "low tech" and "high tech" categories. (TR 5:108). Low tech includes graphic organizers such as schedules and charts while high tech includes computers. Student's IEP in May 2009 did not find high tech assistive technology to be necessary for her to meet the goals of her IEP (TR 5:109); however, all students at her elementary school have access to computers. (TR 5:108).

55. Ms. Whitmore testified that Student was very successful with task related skills (TR 5:102-03) and she observed very cooperative behavior in the classroom (TR 5:99-100).

56. Student's regular education teacher Mr. Cornell does not believe Student needs to be segregated from the general student population. (TR 2:215). Mr. Cornell testified that Student will be able to go into middle school for the 2010-11 school year but not on grade level.

(TR 2:209, 214). Ms. Fortney testified that transition services would be available to assist Student with acclimating to middle school. (TR 3:180-81).

57. Litzsinger School, is a public segregated day-school facility operated by the SSD for children with "significant disabilities" in the wording of Ms. Whitmore (TR 5:67). In her opinion, Student does not fit the typical student profile for Litzsinger School. Neither Ms. Pappalardo (TR 2:241) or Ms. Fortney (TR 3:181-82) think that Student's placement at Litzsinger would be appropriate at this time.

58. Student's Mother wants her to attend Litzsinger School. She thinks Student would be better able to manage her behaviors there (TR 2:211). Both Student's Mother and Grandmother are very concerned with her aggressive behaviors (TR 2:14-15, 123-24). Her Grandmother is concerned with behavior outside of school (TR 2:116) and that Student might harm someone depending on the situation. (TR 2:125). Student's grandmother believes that Student knows when she is behaving inappropriately. (TR 2:124).

59. Student was not observed to be disruptive during the due process hearing according to the testimony of Ms. Fortney when questioned about Student's behavior during the first three days of the hearing (TR 3:182).

## **DISCUSSION AND DECISION RATIONALE**

### **General Legal Principals of FAPE and LRE**

Under the IDEA, all children with disabilities as defined by the statute are entitled to a free appropriate public education in the least restrictive environment appropriate to allow that child to receive educational benefit. 20 U.S.C. §§ 1412(a)(1)(5), 1401(8). In addition to the federal statute and its implementing regulations at 34 C.F.R. Part 300, Missouri has adopted a plan for special education ("State Plan") setting forth requirements imposed upon school districts for the provision of FAPE.

Under the Supreme Court test established by *Board of Education v. Rowley*, 458 U.S. 176, 203 (1982), FAPE consists of educational instruction specifically designed to meet the unique needs of the handicapped child, and related services as are necessary to permit the child to benefit from the instruction. FAPE is not required to maximize the potential of each child; however, it must be sufficient to confer educational benefit. *Id.* at 200. The *Rowley* standard is satisfied by providing meaningful access to educational opportunities for the disabled child. *Id.* at 192. The *Rowley* court determined that the IDEA requires school districts to provide a "basic floor of opportunity" consisting of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.* at 201. The Supreme Court found Congress' intent in passing the IDEA was "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.* at 192.

A Student is substantively provided a free, appropriate public education ("FAPE") when the Student receives personalized instruction with sufficient support services to permit the child

to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.* at 203-04. This 'progress' component is also to be addressed in the IEP.

The extent of educational benefit to be provided to the handicapped child is not defined by *Rowley*; the Supreme Court required an analysis of the unique needs of the handicapped child to carry out the congressional purpose of access to a free appropriate public education. *Id.* at 188. However the Supreme Court found implicit in this purpose, the "requirement that the education to which access is provided be sufficient to confer *some* educational benefit upon the handicapped child." *Id.* at 200 (emphasis added); *T.F. v. Special School Dist. of St. Louis County*, 449 F.3d 816, 820 (8<sup>th</sup> Cir. 2006); see also *Gill v. Columbia 93 School District*, 217 F.3d 1027, 1035 (8<sup>th</sup> Cir. 2000) ("The standard to judge whether an IEP is appropriate under IDEA is whether it offers instruction and supportive services reasonably calculated to provide some educational benefit to the student for whom it is designed."). When quoting the foregoing passage from *Gill* in *Bradley v. Arkansas Dept. of Education*, 443 F. 3d 965, 974 (8<sup>th</sup> Cir. 2006), the Court supplied its own emphasis: "The standard to judge whether an IEP is appropriate under IDEA is whether it offers instruction and supportive services reasonably calculated to provide *some* educational benefit to the student for whom it is designed." *Bradley*, 443 F. 3d at 974 (emphasis by the Court).

Federal courts interpreting *Rowley* have held that *Rowley* does not require a school district "to either maximize a student's potential or provide the best possible education at public expense." *Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 612 (8<sup>th</sup> Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998). A school district is not required to provide a program that will "achieve outstanding results" (*E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8<sup>th</sup> Cir. 1998) or one that is "absolutely best" (*Tucker v. Calloway County Board of Education*, 136 F.3d 495, 505 (6<sup>th</sup> Cir. 1998) or one that will provide "superior results" (*Ft. Zumwalt*, 119 F.3d at 613), see also *Blackmon v. Springfield R-XII School Dist.*, 198 F.3d 648, 658 (8<sup>th</sup> Cir. 1999). The purpose of the IDEA is "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Rowley*, 458 U.S. at 192.

However, the *Rowley* requirement of consideration of the unique needs of the handicapped child does require consideration of the child's capacity to learn. *Nein v. Greater Clark County School Corporation*, 95 F.Supp.2d 961, 973 (S.D. Ind. 2000). The requirement of "some educational benefit" requires more than a "trivial" benefit but not a maximization of the potential of a handicapped child. *N.J. v. Northwest R-1 School District*, 2005 U.S. Dist. LEXIS 24673, 22 (E.D. Mo. 2005).

To achieve its goals, the IDEA "establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of

their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree.” *Honig v. Doe*, 484 U.S. 305, 308 (1988). The primary vehicle for carrying out the IDEA’s goals in the provision of FAPE is the IEP. 20 U.S.C. §§ 1414(d), 1401(8). An IEP must be in effect at the beginning of the school year for each child with a disability who has been deemed eligible for services. State Plan; 34 C.F.R. § 300.342. An IEP is a written document containing, among other things:

- (a) a statement of the child’s present levels of educational performance; including how the child’s disability affects the child’s involvement in the general curriculum;
- (b) a statement of measurable annual goals, including benchmarks or short-term objectives related to meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum; and
- (c) a statement of the special education, related services, supplementary aids and services, and modifications and accommodations to be provided to the child to enable the child to advance appropriately toward attaining those annual goals, to be involved and progress in the general curriculum, to be educated and to participate with other children in these activities, both disabled and nondisabled.

20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.347; Part IV Missouri State Plan.

For children who are deaf or hard of hearing, the statute and regulations and State Plan require the consideration of the communication needs of the child, including the child’s language and communication mode, “including opportunities for direct instruction in the child’s language and communication mode.” 20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.346(a)(2)(iv).

Under *Rowley*, there are two components to the FAPE analysis, one procedural and the other substantive. An educational program can be set aside for failure to provide FAPE on procedural grounds under three circumstances: (1) where the procedural inadequacies have “compromised the pupil’s right to an appropriate education”; (2) when the district’s conduct has “seriously hampered the parents’ opportunity to participate in the formulation process”; or (3) when the procedural failure has resulted in “a deprivation of educational benefits.” *Independent School District No. 283 v. S.D.*, 88 F.3d at 556. Where this type of harm is found, the substantive question of whether the IEP provided FAPE is not addressed by the hearing panel. *W.B. v. Target Range School District*, 960 F.2d 1479, 1485 (9<sup>th</sup> Cir. 1991). Assuming no denial of FAPE on procedural grounds, the analysis turns to the substance of whether the IEP provides FAPE as defined by the *Rowley* standard.

Under the *Rowley* standard, the ultimate question for a court under the IDEA is “whether a proposed IEP is adequate and appropriate for a particular child at a given point in time.” *Rowley*, 458 U.S. at 200; *Town of Burlington v. Dept. of Education*, 736 F.2d 773, 788 (1<sup>st</sup> Cir. 1984), *aff’d* 471 U.S. 359 (1985). An IEP is not required to maximize the educational benefit to a child or to provide each and every service and accommodation that could conceivably be of some educational benefit. *Rowley*, 458 U.S. at 200; *Gill v. Columbia 93 School District*, 217 F.3d 1027, 1035-36 (8<sup>th</sup> Cir. 2000). Although parental preferences must be taken into

consideration in deciding IEP goals and objectives and making placement decisions, the IDEA “does not require a school district to provide a child with the specific educational placement that her parents prefer.” *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 658 (8<sup>th</sup> Cir. 1999); *T.F. v. Special School District*, 449 F.3d 816, 821 (8<sup>th</sup> Cir. 2006). The issue is whether the school district’s placement is appropriate, “not whether another placement would also be appropriate, or even better for that matter.” *Heather S. v. Wisconsin*, 125 F.3d 1045, 1057 (7<sup>th</sup> Cir. 1997).

In addition to the FAPE requirement, there is a “strong congressional preference” under the IDEA for educating students in the least restrictive environment (“LRE”). *Rowley*, 458 U.S. at 202; *Carl D. v. Special School District of St. Louis County*, 21 F.Supp.2d 1042, 1058 (E.D. Mo. 1998). The IDEA regulations embody the LRE concept:

Each public agency must ensure that-

- (1) 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
- (2) Special classes, separate schooling, or other removal of children with disabilities from the general 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.

34 C.F.R. § 300.114.

The *Rowley* court acknowledged that regular classroom environments are not suitable for the education of many handicapped children. “Mainstreaming” in the regular classroom environment is required “to the greatest extent appropriate,” considering the needs of the child. *Beth B. v. Van Clay*, 282 F.3d 493, 498 (7<sup>th</sup> Cir.), *cert. denied*, 537 U.S. 948 (2002) (quoting 20 U.S.C. § 1412(5)). The statutory language reflecting a mainstreaming preference has also been determined to reflect a “presumption in favor of the [student’s] placement in the public schools.” *Blackmon*, 198 F.3d at 661; *Independent School District No. 283 v. S.D.*, 88 F.3d 556, 561 (8<sup>th</sup> Cir. 1996); *Mark A. v. Grant Wood Area Education Agency*, 795 F.2d 52, 54 (8<sup>th</sup> Cir. 1986), *cert. denied*, 480 U.S. 936 (1987). This “strong Congressional preference” for educating students in the least restrictive environment, *Carl D. v. Special School District of St. Louis County, Mo.*, 21 F.Supp.2d 1042, 1058 (E.D. Mo. 1998), is shown in the statutory language.

In Missouri, the preference for least restrictive environment placements has been expressed by legislation as follows:

To the maximum extent appropriate, disabled and severely disabled children shall be educated along with children who do not have disabilities and shall attend regular classes, except that in the case of a disability resulting in violent behavior which causes a substantial likelihood of injury to the student or others, the school district shall initiate procedures consistent with state and federal law to remove the child to a more appropriate placement. Special classes, separate schooling, or other removal of children with

disabilities from the regular educational environment shall occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Section 162.680.2, R.S.Mo.

Each school district must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services, including instruction in the regular classes (general education environments) with any necessary supplementary services such as resource room or itinerant instruction, special classes, special schools, home instruction, and instruction in hospitals and institutions. 34 C.F.R. § 300.115. The least restrictive environment should always be considered in determining whether a parentally preferred placement is appropriate. *Independent School District No. 83 v. S.D.*, 88 F.3d at 556, 561 (8<sup>th</sup> Cir. 1996).

The burden of proof in a due process hearing is on the party initiating the challenge to the IEP to prove a denial of FAPE. *Schaffer ex rel. Schaffer v. Weast*, 456 U.S. 49 (2005). Accordingly, the burden of proof in this case is on the Petitioner/Parent to establish that the IEP at issue did not provide FAPE to Student. Parent must sustain her burden of proof by a preponderance of the evidence, the standard appropriate to most civil proceedings and the standard utilized by reviewing courts of hearing panel decisions. *Blackmon*, 198 F.3d at 654; 20 U.S.C. § 1415(i)(2)(B); *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6<sup>th</sup> Cir. 1990) (finding Student has the burden of proving by a preponderance of the evidence that the IEP was inadequate; citing *Tatro v. State of Texas*, 703 F.2d 823, 830 (5th Cir.), *aff'd in part and rev'd in part sub nom., Irving Indep. School Dist. v. Tatro*, 468 U.S. 883 (1984)).

While not an issue in this case because of the specific allegations of the Complaint as well as the disposition of the prior due process complaint and the mediation and disposition of the child complaint, the statute of limitations for due process complaints is two years. Thus, the panel can only go back, absent certain tightly defined exceptions, two years from the date of the due process complaint to consider IDEA compliance. 34 C.F.R. § 300.507(a)(2).

#### **MAY 29, 2009 IEP**

Parent's complaints regarding the May 29, 2009 IEP (R-30) may be summarized as follows: it fails to deal with noted deficits in math and completion of homework; it fails to adequately address behaviors; it fails to address communication concerns; it fails to provide adequate assistive technology; and it fails to provide for extended school year services. While listed as possible resolutions and not as a specific grounds of complaint, Parent wanted the participation of professionals who deal with children with Asperger's Syndrome or with multiple diagnoses in the IEP process, the development of an effective behavior support plan, the use of a laptop for Student and the placement of Student in a segregated special education school.

1. Deficits in Math and Completion of Homework.

The May 29, 2009 IEP did discuss issues regarding math and homework completion. Student did meet the goals in the previous IEP of January 21, 2009 (R-25) in these areas. As a result of the Mother's concerns, special education minutes were added for math from 60 minutes per week to 150 minutes per week. The IEP included 150 minutes of instruction in task completion skills.

The PLAAFFP contained in the May 29, 2009 IEP accurately reflected information possessed by the School Districts regarding the Student's needs and levels of performance and included a description of how the Student's disability affected her involvement and progress in the general education curriculum, as required by 34 C.F.R. Section 300.320(a)(1)(i) and the State Plan. Progress was noted in the areas of math and reading from the prior January 21, 2009 IEP. Her DRA score was progressing steadily. Student's math baseline noted that she was solving grade level math problems with 62% accuracy. Both Student's Mother and teachers for the 2009-10 school year testified that progress was being made in academic goals.

Task competition is an issue that transcends subject matter for this Student. The IEP acknowledges this by adding 150 minutes per week of special education and an IEP goal in this area.

The panel finds that the IEP addressed Parent's concerns in this area and that the IEP is IDEA compliant. Student's progress toward goals from prior IEPs establishes that she is able to learn while in the regular classroom environment for at least part of the day. The May 29, 2009 IEP placement while increasing special education minutes, still has Student in the regular classroom environment for 40-79% of the time.

2. Participation of Professionals in IEP Development Process.

Parent requested as part of the resolution of her complaint that the School Districts include the involvement of professionals with experience with children with multiple diagnoses and Asperberger's Syndrome in the IEP development process. The following persons were present at the May 29, 2009 IEP meeting: Student's Mother, Student's current special education teacher, Student's current general education teacher, a representative of the Ritenour School District and the Special School District, an individual who was able to interpret the instructional implications of the evaluation results and a case manager from BJC (believed to be Barnes Jewish Center, according to the testimony of Carrie Klein, TR 4:14-15).

In accordance with 34 C.F.R. § 300.321, IEP team members must include:

1. The parents of the child;
2. Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment);

3. Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child;
4. A representative of the public agency (who has certain specific knowledge and qualifications);
5. An individual who can interpret the instructional implications of evaluation results and who may also be one of the other listed members;
6. At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
7. Whenever appropriate, the child with a disability.

The School Districts were not required to compel the attendance of any other professionals who may or may not have something to add regarding appropriate services in the IEP. Such individuals may attend an IEP meeting by request of the Parent or at the discretion of the educational entity. 34 C.F.R. § 300.321(a)(6). The Comments to the IDEA Amendments note that several commentators recommended that the IEP team include individuals with specific professional knowledge or qualifications. This proposal was rejected in favor of allowing attendance of others who have knowledge or special expertise regarding the child, including related services personnel as appropriate at the discretion of the school district or parent. Federal Register, Vol. 71, No. 156, August 14, 2006, p. 46669. While discretionary, it remains the responsibility of the school district to provide an appropriate IEP for the child.

The panel finds that the IEP team composition met the statutory requirements. Further, there was a case manager on the team who presumably had some knowledge of the Student's disabilities and needs.

### 3. Behavior Issues.

The primary expressed concern of Parent and Grandmother during the course of the hearing was her behaviors, not just the task-related behaviors primarily noted by the School Districts, but her aggressive behaviors toward teachers and other students. The behavior of Student was the primary force behind Parent's belief that Student would be better served in a segregated environment. The IEP team did note, however, that the aggressive behavior complained of by Parent and Grandmother was noted more in the home than in the school environment.

Neither Student's March 29, 2009 IEP nor the January 21, 2009 IEP required the development of a BIP or a FBA. Both IEPs noted that the Student's behavior did impede her learning and/or that of others and required strategies, including positive behavior interventions and supports, to be considered by the IEP team and addressed through IEP goals and IEP accommodations.

The IDEA does not require the inclusion of a BIP at any particular date. In the recent Western District of Missouri court case, *Lathrop R-II School District v. Gray*, 2009 WL 2982645 (W.D.Mo. September 11, 2009), the district court overturned a three-person hearing panel decision that the student in question was denied a FAPE due to the failure of the district to adequately address behavior issues in the IEP. The panel had conceded that the IDEA does not require a school district to create goals or objectives for behavior in an IEP, but the panel believed that the IEP should document in some way that behaviors are being addressed, through goals and behavior plan or a statement in the present levels section of the IEP. The district court disagreed, as the panel had found that the student was continuing to progress academically. The district court stated, "if the student's IEP is "reasonably calculated to enable the child to receive academic benefits" [quoting *Rowley*], then the IDEA's IEP requirements have been met."

The *Lathrop* court cited an Eighth Circuit Court of Appeals case, *CJN v. Minneapolis Public Schools*, 323 F.3d 630 (2003). In *CJN*, the child continued to exhibit inappropriate behavior which regularly disrupted his education but the child continued to progress academically. *CJN*, 323 F.3d at 634. The child's teacher tried accommodating the behavior but the behavior was such that the child at times had to be physically restrained. The *Lathrop* court contrasted the *CJN* holding with the Eighth Circuit holding in *Neosho R-V School District v. Clark*, 315 F.3d 1022 (8<sup>th</sup> Cir. 2003), in which case the Court of Appeals found a FAPE violation as the child had not progressed academically. Similarly, the *Lathrop* court distinguished the holding of the District Court in Minnesota, which found a FAPE denial in *Larson v. Independent School District No. 361*, 2004 WL 432218 (D. Minn. March 2, 2004) as in that case the sole focus of the IEP was the student's significant behavior problems.

The *CJN* court noted that the student's steady academic progress despite severe behavioral problems was evidence that the school district had at least made a good faith attempt to address behaviors. Academic progress is an important factor in determining whether an IEP is reasonably calculated to provide educational benefits according to the Supreme Court's *Rowley* decision, 458 U.S. at 202. The severity of the behavior problems exhibited by the student in *CJN* made "his academic progress even more relevant to the educational benefit inquiry, because it demonstrates that his IEPs were not only reasonably calculated to provide educational benefit, but, at least in part, did so well. *CJN*, 323 F.3d at 638. Finally the *CJN* court noted that it wished that the student "had made more behavioral progress, but the IDEA does not require that the schools attempt to maximize a child's potential, or, as a matter of fact, guarantee that the student actually make any progress at all." *Id.* at 642.

Applying these standards regarding the treatment of behavioral issues allows the majority of the panel to conclude that there was no IDEA violation in how Student's behaviors were addressed. While conducting a FBA and development of a formal BIP may have allowed greater academic progress, this is not required by the IDEA. Student progressed academically and met the goals in prior IEPs in academic areas. The current IEP contains behavioral interventions for both task focus and aggressive behaviors and goals in these areas. Both the regular and special education teachers indicated that progress was being made both academically and socially under the May 29, 2009 IEP. Parent indicated that progress was being made as well. The special education teacher reported that aggression wasn't a problem for her, that Student was cooperative more often than not. The behaviors that Mother and Grandmother were concerned

with were not occurring with the same frequency in the school environment. The behaviors that were being exhibited were being dealt with effectively by staff. The May 29, 2009 IEP increased interventions to deal with parental concerns.

A majority of the panel finds that the SSD and Ritenour School District properly considered the use of positive behavior interventions and supports and other strategies to address the Student's behaviors in compliance with the IDEA and that the May 29, 2009 IEP was reasonably calculated to provide a FAPE to Student. Panel member Hodgson believes that FAPE was denied by the SSD in this area but does not believe Parent met her burden of proof for the resolution she requested, the placement in the segregated alternative school.

#### 4. Communication.

The Parent contends that because the Missouri Department of Mental Retardation and Developmental Disabilities determined that Student was below the mean in social and communication skills, and that the classroom teacher noted Student's difficulties in putting thoughts on paper, that the IEP should have specifically addressed communication needs.

The IEP team determined that Student did not have communication needs as defined by the IDEA. A review of commentary to 34 C.F.R. Section 300.324(a)(2)(iv) establishes that the communication needs section was directed to students with hearing impairments or some communication impairment that affected language and communication mode. The IDEA requires the IEP team to consider "opportunities for direct communications with peers and professional personnel in the child's language and communication mode." Student was not found to be deficient in the ability to communicate with teachers and peers. A difficulty in writing is not what is contemplated by the IDEA as a communication need.

The May 29, 2009 IEP allocates minutes to written communication. The panel finds that the IEP properly considered Student's written communication needs and was reasonably calculated to provide FAPE in this area.

#### 5. Assistive Technology Services.

The Parent does not believe that the assistive technology devices employed by the district have been working. The Parent believes that Student requires a laptop computer.

The May 29, 2009 IEP acknowledges Student's strong visual learning channel. Her special education and regular education teachers testified as to the use of what was characterized as "low tech" assistive technology and how well it was working for Student. The May 29, 2009 IEP states the devices to be used: graphic organizers, visual sheets and visual schedules. The elementary school has computers for use by the students. See *Kevin T. v. Elmhurst Community School District No. 205*, 2002 WL 433061, \*8 (N.D.Ill. Mar. 20, 2002) (stating that whether procedural violations such as failing to assess for assistive technology deny a FAPE turns on whether this resulted in a loss of educational opportunity). Similarly, there is no showing that absent access to the assistive technology Parent seeks, that Student would have been unable to make the educational progress the IDEA requires. *A.S. v. Trumbull Board of Education*, 414

F.2d 152, 177 (D.Conn. 2006). Student has continued to progress academically using the assistive technology specified in the IEP. The School Districts properly considered the use of appropriate assistive technology devices and services in compliance with 34 C.F.R. 300.324(a)(2)(v) and Part IV State Plan.

6. Extended School Year Services.

Parent contends that Student's academic progress supports her eligibility for ESY services. The IEP teams consistently found Student ineligible for ESY services, as did the team for the May 29, 2009 IEP.

Various Courts of Appeal have discussed the standard for determining when ESY services are appropriate under the IDEA. Essentially, these courts concluded that ESY services are appropriately provided in an IEP when the benefits accrued to a disabled child during a regular school year will be significantly jeopardized if s/he is not provided with an educational program during the summer months. *MM v. School District of Greenville County*, 303 F.3d 523, 537-38 (4<sup>th</sup> Cir. 2002); *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5<sup>th</sup> Cir. 1986); *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1028 (10<sup>th</sup> Cir. 1990). The Sixth Circuit has held that ESY Services are warranted when they "prevent significant regression of skills or knowledge retained by the child so as to seriously affect his progress toward self-sufficiency, or that benefits accrued to the child during the regular school year would be significantly jeopardized if he were not provided an educational program during the summer." *Cordrey v. Euckert*, 917 F.2d 1460, 1474 (6<sup>th</sup> Cir. 1990). The *MM* court noted that all students, disabled or not may regress to some extent during lengthy school breaks and that ESY services are only required when the regression would "substantially thwart" meaningful progress. 303 F.2d at 538.

Application of these standards to Student's situation does not find that there was the degree of regression needed to support ESY services. Student continued to progress on meeting the goals of the IEPs prior to May 29, 2009. Her failure to progress could have been a factor to consider in eligibility for ESY services but this was not the case.

The panel finds that the May 29, 2009 IEP appropriately considered ESY service eligibility and that ESY services were not necessary to provide FAPE.

7. Placement in Alternative Segregated School.

Parent wants Student placed in an alternative school which would be segregated and only attended by disabled students. Parent does not believe that the Ritenour School District is capable of dealing with students with multiple disabilities and behavioral issues and needs and that a segregated special education placement is appropriate. Parent suggested the Litzsinger School which is a separate day school operated by the SSD.

The criteria for a segregated placement are set out above in the discussion of least restrictive environment. There was no evidence presented by Parent from the Litzsinger School as to whether Student's placement in this environment would provide her with FAPE in the least

restrictive environment. Current teachers and administrators testified that Litzinger would not be an appropriate placement for Student. Student is progressing in special and regular education classes even with her behaviors. There is no evidence that Student cannot be educated in the regular classroom environment with the use of supplementary aids and services.

The continuum of placement considerations in the May 29, 2009 IEP does not even consider a public separate school and it was not raised by Parent at this meeting. According to the continuum, a placement of outside of the regular classroom in the local school is considered as less restrictive than a separate day school facility.

One of the purposes of keeping Student in the local school district is to provide her with opportunities for interaction with non-disabled peers both inside and outside the academic setting. This opportunity would be lost with placement in a separate day school.

The panel finds that Litzinger School or a separate day school would not provide Student with FAPE at the time of the May 29, 2009 IEP and is not the least restrictive environment for Student.

### CONCLUSIONS OF LAW

The hearing panel makes the following conclusions of law on Petitioner's issues:

1. The Student is now and has been a resident of the Ritenour School District at all times relevant to this due process proceeding, as defined by Section 167.020 R.S.Mo. The Student is now and has been during all times relevant to this proceeding, a "child with a disability" as that term is defined by the IDEA regulations, 34 C.F.R. § 300.8 and Section 162.675(1) R.S.Mo. The Student is eligible to receive special education services through the Special School District of St. Louis County pursuant to Section 162.825 R.S.Mo. and Part IX of the State Plan.

2. The majority of the panel finds has determined that the May 29, 2009 IEP at the time it was developed, was reasonably calculated to provide Student with FAPE in all respects and Parent has failed to meet her burden of proving any IDEA violations in the areas alleged in the Complaint. Panel member Hodgson has determined that the May 29, 2009 IEP provides FAPE in all areas except for the area of behaviors and that Parent failed to meet her burden of proof on all issues of the Complaint except those relating to behavior.

3. The IEP team was properly constituted and considered present levels of academic achievement and functional performance, Parent's communication concerns, assistive technology and extended school year eligibility. The majority of the panel concludes that behavior issues were appropriately considered and that the IEP's service minutes and goals addressed Student's special education needs in all respects.

4. The special education placement in the May 29, 2009 IEP is the least restrictive environment for Student.

**DECISION**

The majority of the hearing panel finds in favor of the Special School District on all issues raised by the Petitioner's due process Complaint and panel member Hodgson finds in favor of the Special School District on all issues except for those relating to behavior.

**APPEAL PROCEDURE**

This order constitutes the final decision of the Missouri Department of Elementary and Secondary Education in this matter. Pursuant to § 162.962 R.S.Mo., the following procedures apply to requests for judicial review:

1. Proceedings for review may be instituted by filing a petition in the state circuit court of the county of proper venue within forty-five (45) days after the receipt of the notice of the agency's final decision and are governed by Chapter 536, R.S.Mo., to the extent not inconsistent with other provisions of Chapter 162 R.S.Mo. or 34 C.F.R. Part 300.
2. The venue of such cases shall be at the option of the plaintiff, be in the Circuit Court of Cole County, or in the county of the plaintiff's residence.
3. You also have a right to file a civil action in federal or state court pursuant to the Individuals with Disabilities Education Act, 34 C.F.R. § 300.516.

IT IS SO ORDERED this 30th day of April, 2010.



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Janet Davis Baker  
Chairperson

Accord:

Dr. Richard Staley (concurrence attached)  
Accord on all issues except behavior:  
Rand Hodgson (concurrence attached)

Copies sent this date to:

Petitioner (by regular and certified mail and electronic mail)  
Respondent (by regular and certified mail)  
Robert Thomeczek, attorney for Respondent (by regular mail and electronic mail)  
Dr. Richard Staley (by regular mail and electronic mail)  
Rand Hodgson (by regular mail and electronic mail)  
Jackie Bruner, DESE (by regular mail)  
Wanda Allen, DESE (by electronic mail)

I concur in the above decision:



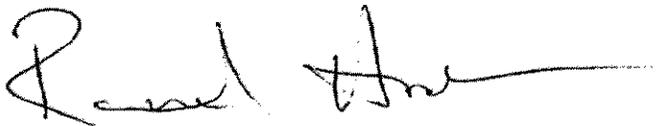
Dr. Richard Staley, panel member

Concurrent opinion of Rand Hodgson

There is a disagreement with the panel members on the Part C of the Behavior Issues.

Testimonies of Mary Whitmore and Stephanie Moscola, district personnel, highlight major concerns over the behavior in the classroom during student's 4<sup>th</sup> grade years. Mary Whitmore's testimony states she is aware extreme behavior see transcript Pg 69 Line 21 thru Pg 70. These behaviors included hitting students with books on the head, elopement, throwing desks and name-calling. Stephanie Moscola testified of extreme behavior in her class Pg 349 line 13 thru 352 line 7. Even though student made some progress during this period the iep team recognized this behavior was interfering with Learning, as stated on iep. There were additional problems on the bus and many office referrals during the nine-month period. In holding with the 8<sup>th</sup> circuit in Neosho R-V School District v. Clark, 315 F.3d 1022 (8th Cir 2003), this case refers to some progress. I believe the school district did have a F.A.P.E. violation and the remedy by the panel should be an independent Functional Behavior Assessment and the Appropriate Behavior Intervention Plan. However, Plaintiff did not cover their burden to find for her remedies.

Rand Hodgson, Panel Member.



Apr 28/10