BEFORE THE MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION DUE PROCESS PANEL

XXXXXXXXXXXXXXXXXXXX,	)
on behalf of, YYYYYYYYYYYY,	)
	)
Petitioners,	)
	)
v.	)
	)
ST. JOSEPH SCHOOL DISTRICT,	)
	)
Respondent.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

The Hearing Panel, after conducting the due process hearing in this matter on November 9 & 10, 2009 and January 11-12, 2010, issues the following Findings of Fact, Conclusions of Law, Decision and Order:

FINDINGS OF FACT

The Hearing Panel makes the following Findings of Fact:

The Parties

1. During all times material to this due process proceeding, Student resided with his parents ("Parents" or "Petitioners") within the boundaries of the St. Joseph School District ("District" or Respondent"). Student was born on _____. He has a younger sister who is non-disabled. (Tr. 2:155-56.) Student qualifies for, and is in need of, special education services with an educational diagnosis of autism. (Stipulation; Tr. 1:29.)

2. The District is a public school district created and operating under the laws of the State of Missouri. The District is located in Buchanan County, Missouri. The District educates over eleven thousand (11,000) Students and approximately fifteen hundred (1,500) special education Students. (Tr. 3:68.[1])

[1] The hearing transcript consists of four volumes, with the pagination in each volume beginning at page 1. References to the hearing transcript shall be denoted as (Tr. xx: yyy), with "x' representing the volume number, and "y" representing the page number within that volume.

The parties' potential exhibits were filed in consecutively numbered pages, with Parents' exhibits running from A to Z, and the District's exhibits running from 1 to 29. References to the exhibits submitted by the parties and admitted into evidence shall be in the following format: (Ex. xx, p. yyyy), with "xx" referring to the exhibit number or letter and "yyyy" referring to the page number of the applicable party's set of exhibits.

3. The Parents were represented at the hearing by Stephen Walker, 212 East State Road 73, Suite 122, Saratoga Springs, Utah 84043.

4. The District was represented by Linda J. Salfrank and Kristina V. Giddings, with the law firm of Spencer Fane Britt & Browne LLP, 1000 Walnut Street, Suite 1400, Kansas City, Missouri 64106.

5. The hearing panel for the due process proceeding was: Pamela Wright, Hearing Panel Chair; Dr. Patty Smith, Panel Member; and Marilyn McClure, Panel Member.

Procedural Background and Timeline Information

6. On March 28, 2007, nearly ten months after unilaterally withdrawing Student from the District, Petitioners filed a request for a due process hearing ("Complaint I") with the Department of Elementary and Secondary Education ("DESE").[2] (Ex. D.)

7. A hearing regarding Complaint I was originally scheduled to occur November 5-9, 2007. A few days before the scheduled hearing, the parties reached what the District believed was a final settlement of all issues. Pursuant to the settlement agreement, the parties planned to develop a new IEP for Student that would be in effect from January 15, 2008 through January 15, 2009.

8. The District took steps to enforce the alleged settlement through the state courts. The Missouri Court of Appeals, Western District issued its decision on March 30, 2010 holding that the first Hearing Panel had authority to determine if the parties reached an enforceable settlement agreement in November 2007.

9. Although proceedings regarding Complaint I were still pending, Petitioners filed a second request for due process on June 1, 2009 ("Complaint II" or "Complaint").

10. On its face, Complaint II covers the period between November 1, 2007 and June 1, 2009.

11. In their initial Complaint II, Petitioners did not request reimbursement for the expenses associated with providing a home program to Student.

12. On June 5, 2009, the District filed an Answer to Petitioner's Due Process Complaint with the Hearing Chairperson.

13. On or about June 8, 2009, Petitioners appointed Rand Hodgson as their selected member of this Hearing Panel.

During the hearing, several additional exhibits, which had not been exchanged between the parties before the commencement of the hearing, were marked and some were admitted into evidence. References to such exhibits shall be in the format: (HP Ex. xx, p. yyyy), with "xx" referring to the exhibit number and "yyyy" referring to the page number.

[2] As reflected below, Petitioners unilaterally withdrew STUDENT from the District on June 6, 2006.

14. On June 10, 2009, the District filed a Child Complaint with DESE asserting that, because Mr. Hodgson had previously acted as a "lay advocate" in IEP meetings with the District regarding Student and might even be a witness in this case, he did not meet the impartiality requirements imposed on hearing officers by state and federal law.

15. On June 30, 2009, the District submitted dozens of pages of information to DESE in support of its June 10, 2009 complaint that Mr. Hodgson did not meet the impartiality requirements of state and federal law because he had a professional, and possibly a personal, interest in the matters to be decided in this hearing.

16. Petitioners did not deny the allegations in the District's Child Complaint and, instead, merely asserted that, because Mr. Hodgson's prior involvement with Student's education had ended in October 2006, he should be permitted to serve as a Hearing Panel member in this case.

17. On July 10, 2009, while the Child Complaint regarding Mr. Hodgson's conflict of interest was being investigated by DESE, the Hearing Panel Chair had a Pre-Hearing Conference by telephone with the attorneys for the parties. During the call, the parties discussed potential dates for the hearing and acknowledged that it would not be prudent to schedule a hearing while DESE's decision regarding the District's Child Complaint was pending. As a result, the parties agreed to extend the statutory deadline for issuing a final decision to October 31, 2009 in order to allow time both for DESE to investigate and issue a conclusion regarding Mr. Hodgson's impartiality and then for the hearing to take place. The parties also agreed to send comments regarding the issues previously proposed by the Hearing Panel Chair.

18. On July 30, 2006, DESE concluded that Mr. Hodgson had an actual conflict of interest regarding this case and, therefore, was not permitted to serve as a Hearing Panel member.

19. On August 2, 2009, the Hearing Panel Chair issued a Scheduling Order setting the hearing in this case for September 15-17, 2009. In the Scheduling Order, the Hearing Panel Chair allocated 12 hours to each party to present direct and cross-examination testimony and any opening or closing statements the parties wished to make. The Scheduling Order also identified the issues that would be resolved by the Hearing Panel.

20. On or about August 10, 2009, Petitioners chose Marilyn McClure to replace Mr. Hodgson as their selected Hearing Panel Member.

21. Pursuant to Regulation V of the Missouri State Plan (2007), on August 12, 2009, the District requested the substitution of Ms. McClure. However, DESE denied the District's request on August 13, 2009.

22. As a result, on August 26, 2009, the District filed a Child Complaint alleging that DESE's decision to deny the District's request to substitute Ms. McClure violated state and federal regulations implementing IDEA.

23. On August 29, 2009, the District filed a supplemental request to extend the statutory timelines in this matter to December 31, 2009 in order to allow time for DESE to investigate and rule on the District's August 26, 2009 Child Complaint. The Hearing Panel Chair denied this request on September 8, 2009.

24. On September 9, 2009, the District filed Stipulations and a Motion to Dismiss. In its Stipulations, the District stipulated that it would, and had always been ready, willing, and able to provide the remedies requested in Petitioners' Complaint, to the extent that such remedies could otherwise be ordered by this Hearing Panel. In light of its agreement to provide the remedies requested by Petitioners (to the extent that the requested remedies were of a kind the Hearing Panel has the authority to award), the District argued that the instant action was moot and, therefore, should be dismissed.

25. On September 10, 2009, during a conference call with the Hearing Panel Chair, Petitioners' counsel requested that the hearing previously scheduled for September 15-17, 2009 be continued and that the statutory timeline for issuing a final decision in the matter be extended to December 31, 2009. Petitioners' counsel stated that he needed to amend the Complaint. The District did not object. The Hearing Panel Chair granted Petitioners' request.

26. Accordingly, the Hearing Panel Chair issued a First Amended Scheduling Order setting the matter for hearing on November 9 and 10, 2009. In the First Amended Scheduling Order, and after soliciting input from counsel for both parties, the Hearing Panel Chair allocated 8 hours to each party to present direct and cross-examination and any opening or closing statements the parties wished to make. [3]

27. On September 17, 2009, in response to the District's September 9 Stipulations and Motion to Dismiss, Petitioners amended the relief requested in Complaint II to include: (1) "Reimbursement and/or payment for any and all expenses incurred by the Parents in providing services for their son during the time span covered by this due process request;" and (2) "[c]ompensatory services and/or payment for services that should have been provided during this time but for which the parents were unable to provide because of a lack of financial resources."

28. On September 28, 2009, the District submitted its Response to Petitioners' September 17, 2009 filing. In its Response, the District pointed out that both of Petitioners' supplemental requests for relief suggest that the District be required to pay Petitioners, even though such a form of relief is not available under applicable law. The District also noted that Petitioners' own arguments conceded that Student's home program did not provide him with an appropriate education.

29. On October 7, 2009, DESE issued its decision regarding the District August 26, 2009 Child Complaint. In its decision, DESE concluded that it had complied with applicable law in denying the District's request to replace Ms. McClure as a Panel member in this case.

[3] Note Petitioners' counsel had a running objection throughout the proceedings to the time limits set by the Hearing Panel Chair.

30. The due process hearing commenced on November 9 and continued through November 10, 2009.

31. Petitioners rested their case on November 10, 2009. (Tr. 2:200.)

32. On November 12, 2009, the Hearing Panel Chair issued an Order confirming the parties' agreement to hold additional hearing sessions on January 11 and 12, 2010, and to extend the statutory deadline for the issuance of a final decision to April 1, 2010. In this Order, the Hearing Panel Chair reminded the parties that they had each been allocated 8 hours of time and notified Petitioners that they had already used 6 hours, 14 minutes of their time. The Hearing Panel Chair did not count time spent by the parties discussing admissibility of exhibits. Neither Petitioners nor Respondent were assessed any minutes for the time spent by the Hearing Panel members questioning witnesses.

33. The hearing reconvened on January 11 and continued through January 12, 2010. (Tr. Vol. 3:5.) At the conclusion of the hearing, the Hearing Officer ordered that the parties submit their post-hearing briefs by March 1, 2010[4] and that the deadline for issuance of the final decision in this matter would remain April 1, 2010. (Tr. Vol. 4, 174:6-7). This opinion is issued within the current timeline.

34. During the hearing, exhibits were introduced and received into evidence. The identification of those exhibits received into evidence was confirmed on the record. (Tr. 2, 126-154 discussing Petitioners' Exhibits; Tr. 3, 102-140 addressing Respondent's Exhibits and Hearing Panel Exhibits). Specifically, Petitioners introduced Exhibits A-J, L- M, and O-Z. The District objected to Exhibits A-C, E, G-I, M, O-Q, T, U, X-Z, all of which were admitted except for E, I, and L. Petitioners also introduced District Exhibits 7, 10, 23-25, and 28, all of which were admitted. Additionally, Petitioners offered Hearing Panel Exhibits 1-4 and 6. The District objected to Hearing Panel Exhibits 2-4, but Exhibits 3 and 4 were admitted over objection; Exhibit 2 was not admitted. The District presented Exhibits 1-6, 8-9, 11, and 21 as well as Hearing Panel Exhibits 1 and 5, all of which were admitted into evidence. Petitioners objected to Exhibits 1-6 and Hearing Panel Exhibit 5. Additionally, Hearing Panel Exhibit 7 was admitted over objection by both parties.

35. Witnesses for Petitioners were Student's mother, Krissy Byrd, Jennifer Potterfield, and Denise Buersmeyer. The District presented two witnesses: Brenda Smith and Denise Buersmeyer.

[4] On February 24, 2010, the District filed a Motion to Extend the Deadline for Submission of Post-Hearing Briefs to March 4, 2010. Petitioners did not oppose the District's Motion. On February 25, 2010, the Hearing Panel Chair granted the District's Motion in part, ordering the parties to submit their post-hearing briefs by no later than 5:30 pm on March 3, 2009 due to a previously scheduled conference call on March 4, 2010 for the Hearing Panel to discuss the case.

The Issues Heard by the Hearing Panel[5]

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

> (1) By no later than January 24, 2008, did the St. Joseph School District ("the School District") have a duty under IDEA and the State Plan to conduct a three year re-evaluation of an IEP Student, who was last evaluated on January 24, 2005, but whose Parents unilaterally withdrew him from school on June 6, 2006 and put Student in a [home-based program] without consent of School District?
>
> (2) Did the School District have a duty to provide a Notice of Action to the Parents as to why Student would not re-evaluated in January 2008?
>
> (3) After the Parents chose a [home-based program] from November 2007 to the present, did the School District continue to have a duty to develop or review Student's IEPs on an annual basis?
>
> (4) Assuming that the School had a duty under Issues 1, 2 or 3 above and failed to perform is duty under one or more of these Issues, has the Student been denied FAPE? If FAPE was not provided, what conduct, if any, of Student's Parents contributed to the failure to provide FAPE?
>
> (5) Assuming FAPE has been denied, what are the available remedies to Student and Parents?

Background of Primary Witnesses

37. Student's Mother ("Student's Mother" or "Mother") is a high school graduate and also took some courses at a junior college in the field of data processing. (Tr. 2:155.) At or around 2005, Mother began attending Missouri Western, pursuing an undergraduate degree in special education Student. (Id.) Mother has not yet completed the undergraduate program. (Id.) Mother has never provided educational services to a Student nor is she certified to teach in Missouri or any other state. She has never taught special education, and does not consider herself an expert in special education. (Tr. 2:179.)

[5] Our findings are not meant to usurp the authority of the Hearing Panel appointed for the timeframe encompassing Complaint I wherein the parents allege a lack of FAPE for the IEP covering the 05-06 school year, ESY services for 2006 and for the IEP developed in November/December 2006. *See A.B. v. Clarke County School District*, 52 IDELR 259 (M. D. Ga. 2009) (holds that a second due process complaint on matters at issue in a previously filed due process complaint are barred by claim preclusion).

38. Jennifer Potterfield has a Bachelor's degree in criminal justice and a Master's degree in special education (Tr. 1:51), but is not certified to teach in any state (Tr. 1:56). Additionally, Ms. Potterfield is not licensed to practice psychology, child psychology or behavioral psychology in any state. (Ex. J.) She is a Board Certified Behavior Analyst (Tr. 1:51), the certification for which she received in March 2008 (Tr. 1:53). There is no evidence that Ms. Potterfield ever developed an IEP for Student.

39. Krissy Byrd graduated from high school, but does not have a college degree. (Tr. 2:29.) She has been employed as a paraprofessional in the St. Joseph School District since 2000 (id.) and began working with Student in his home program in 2001 (Tr. 2:30).

40. Denise Buersmeyer is the District's Director of Special Services. (Tr. 3:64.) Ms. Buersmeyer's credentials are set forth in Ex. 21. She has a Master's of science in special education (Tr. 3:66) and is certified to administer and teach special education in the State of Missouri. (Tr. 3:66-67; Ex. 21.) Ms. Buersmeyer has been a special education administrator in the District at all times relevant to this hearing. (Ex. 21.) She has extensive experience working with and educating children with autism (Tr. 3:65-68) and received in-district autism consultant credentials in 2002 (Tr. 3:74; Ex. 21).

BACKGROUND FACTS[6]

41. Within about two and a half years of his birth, Student's parents began to suspect that he might have some type of disability. (Tr. 2:156). Shortly thereafter in 1997, Student began receiving educational services from the District. (Id). Around June 1, 1997, he began receiving services through a home program designed by Jessica Royer from Partners in Behavioral Milestones, a school that focuses on children with autism. (Tr. 2:161-162). According to Petitioners, Student began acquiring new skills and making rapid progress after instituting this home program. (Tr. 2:163)

42. The District's autism program utilizes a variety of methodologies which are based upon academic research. (HP Ex. 5; Ex. 9; Tr. 3:165-168.) Among those methodologies are discrete trial training, applied behavior analysis, errorless learning, visual schedule cues, priming/pre-teaching skills, sensory diet, targeted maintenance, and planned generalization. (Id.)

43. The particular methodology which will be used with a child at a given time in the District depends on the teacher's understanding of the child's needs at that time. (Tr. 3:167-168.) Ms. Buersmeyer noted that, although the District believes that Applied Behavior Analysis ("ABA") "is good teaching for lots of Students," including Students with autism (Tr. 3:166), "the professional staff really need [] an opportunity to use best practices in or outside of ABA." (Tr. 3:168.)

[6] We provide some Facts, including arguments advanced by each party on the issue of whether the District failed to provide FAPE in school years 05-06 & 06-07. While this issue is before the Hearing Panel dealing with Complaint I and not within our jurisdiction over Complaint II, we include these "Facts" to give context to the current relationship of the parties as well as the decision of the parents to remove their child from school in June 2006.

44. According to Student's January 24, 2005 educational evaluation, Student has a sound system disorder characterized by substitutions for the sounds sh, l, th, v, and related blends. (Ex. 9, p. TBII 068.) He demonstrates mild to moderate sensory processing difficulties including poor registration, modulation of movement affecting activity level, low/endurance/tone, oral sensitivity, oral sensory processing, modulation of sensory input affecting emotional responses (Id). The evaluator also found that Student engages in self-stimulatory behavior (e.g., finger tapping, head drumming) which can be seen during unstructured activities. Student's cognitive skills appeared to be in the low average to average range but he continues to have difficulty generalizing skills. (Id). He showed a lack of social initiations and contact with peers. (Id).

2005-06 School Year

45. During the majority of the 2005-06 school year, Student received educational services pursuant to an IEP created during a meeting on October 7, 2005. (HP Ex. 5). Pursuant to his October 7, 2005 IEP, the District was to provide the following educational services to Student: 150 minutes per week of specialized instruction in reading; 120 minutes per week of specialized instruction in social skills; 180 minutes per week of specialized instruction in spelling; 120 minutes per week of speech/language services; 10 minutes per week of occupational therapy consultation; and 1425 minutes per week of 1-on-1 specialized education in the regular education environment. (Id. at TBII 411-412.) As a result, Student's educational placement was classified as "[o]utside regular class 21-60% of time." (Id. at TBII 413.)

46. Therefore, Student's educational placement was primarily in the regular education class with a full-time paraprofessional. (Tr. 3:79-80.) This placement allowed him to access general education and to be in the least restrictive environment possible. (Tr. 3:80.) Moreover, this placement accommodated Petitioners' wish that Student be included in regular education classes and educated with typically developing peers as much as possible. (Tr.3:79.)

47. Student's paraprofessional was intended to help Student "maintain joint attention with the teacher [and] to participate with assistance in group activities." (Tr. 3:81.)[7]

48. The October 7, 2005 IEP for Student specified that he was to receive the following Supplementary Aids/Services: 75 minutes per week of consultation by the In-District Autism Consultant with Student's paraprofessional and in observation of Student; 2 hours per month of service by an educational consultant; 30 minutes per month of home/school team consultation; and an individual aide (id.) at all times except lunch (Tr. 3:100.)

49. Student's Mother testified regarding her frustration in not getting the promised outside help for the teachers and aides who were having difficulty dealing with Student's increasing number of meltdowns. (Tr. 2: 165-166.)

[7] Ms. Buersmeyer testified that STUDENT had a similar educational placement when he was in fourth grade, during the 2004-05 school year. (Tr. 3:79-81.) Ms. Buersmeyer also testified that STUDENT's placement during his fourth grade year complied with Petitioners' expressed wishes to have him in the regular education environment as much as possible. (Tr. 3:79.)

50. In response to a request for outside help by Student's Mother, Jennifer Potterfield was permitted to observe Student at school and to make recommendations to members of Student's IEP team. (Tr. 2: 167-68; 3:115-116.)

51. Student's October 7, 2005 IEP was intended to be used until October 7, 2006. (Tr. 3:108.) Therefore, each goal and benchmark in the IEP would be finally measured to determine progress on October 7, 2006. (Id.)

52. Ms. Buersmeyer testified that, despite his absences (12 days in the second quarter of the 05-06 school year) and the District did not have the opportunity to implement the IEP for a full calendar year, Student mastered one goal and several benchmarks on other goals between October 7, 2005 and May 2006. (Tr. 3:100, 105, 109-111.) Additionally, Ms. Buersmeyer testified that Student's IEP progress report in May 2006 indicated that his teachers expected him to meet almost all of the other goals and benchmarks on his October 7, 2005 IEP, on or before the October 7, 2006 anniversary date. (Tr. 3:109-111.)

53. Around May 30, 2006, Student's IEP team (including one of the Petitioners) met and developed an Extended School Year ("ESY") program for Student (Tr. 3:127.)

54. The original ESY program, which was developed during the May 30, 2006 meeting, included services four day per week and four hours per day. (Id.) In particular, during the month of June 2006, the original program provided Student access to three hours per day full-time paraprofessional support, working on a modified curriculum and on maintaining his IEP goals, all while also maintaining access to his typically-developing peers. (Id.) In June, Student was also scheduled to receive "very specialized instruction" for one hour per day, as well as weekly occupational therapy and speech-language services. (Id.)

55. In July and August 2006, the District did not sponsor "summer school" for Student's typically developing peers. Despite that, and in order to address Petitioners' desire to maintain "peer modeling" opportunities for Student, the District proposed incorporating him into the District's Summer Explorers program[8] in order work on generalization and interact with his peers. (Tr. 3:124.)

56. On May 31, 2006, Petitioners rejected the District's ESY proposal in a letter to the District's Superintendent and Director of Special Services. Petitioners further asserted that they had "come to the conclusion that this will not work this year for [Student] because he needs to make academic gains instead of focusing on maintenance." (HP Ex. 3.) Petitioners also stated in the letter that "[Student] has to make progress on his IEP goals this summer…." (Id.) The Petitioners also emphasized that their child had met only one goal since October and just a few benchmarks. (Id.) Petitioners also state in the letter: "[d]ata shows he has even regressed on maintenance goals and there are a couple of goals where data hasn't even been taken. We have completely lost this year and [Student] has failed miserably". (Id.)

[8] The Summer Explorers program is a service provided by the District that allows parents who do not have child-care during the summer to send their school-aged children to a safe place and participate in organized activities. (Tr. 3:124.)

57. In the same letter, Petitioners also shared their belief that Student needed a program "using an ABA approach with a minimum of 25 hours per week, five hours per day, five days per week for eight weeks," adding that "this is the only way" to provide services to Student (Id.)

58. As part of their proposed summer program, Petitioners offered to pay for the services of a person that they already had "in place to supervise and program the data to address Student's IEP goals." (Id.) However, Petitioners requested that the District hire and pay three "implementers" selected by the parents for the 25 hours of service per week that they were proposing. (Id.)

59. In their May 31, 2006 letter, Petitioners informed the District that they would "not allow [Student] to start the next school year until we gain some ground…." (Id.)

60. In response to Petitioners' May 31, 2006 letter, the District proposed doubling the amount of Student's one-on-one instruction during ESY from one hour per day to two hours per day. (Tr. 3:125.) The District also specifically wrote into its proposal that the instructional practices that would be used with Student would include ABA principles, including discrete trial training. (Id.) Additionally, in order to address Petitioners' concerns about Student's self-stimulating behaviors, the District increased the amount of direct service that Student would receive from the District's occupational therapist. (Id.)

61. In response to the District's amended ESY proposal, Petitioners sent a second letter reinforcing the requests made in their May 31, 2006 letter. (Tr. 3:127-128.)

62. In response to Petitioners' second letter, the District sent Petitioners a Notice of Action refusing to adopt Petitioners' proposed summer program in its entirety and explaining why the District did not believe Petitioners' proposal was appropriate for Student (Tr. 3:128.) Included with the Notice of Action was a copy of the Procedural Safeguards. . (Tr. 3:129.)

63. After receiving the District's Notice of Action refused, on June 5, 2006, Petitioners drafted a letter to the District's Superintendent withdrawing Student from school to implement their proposed summer program. (HP Ex. 4.) Petitioners indicated in the letter that they may seek reimbursement from the District for the summer program. (Id.)

64. Student's Mother testified that, when they withdrew Student from school, their "intention was to run the 25-hour intense one-on-one program for as long as it took…." (Tr. 2:208.)

65. The District received Petitioners' letter withdrawing Student from the District on June 6, 2006. (Tr. 1:182.)[9] In the letter, they indicated their intention to implement their home-based program. (HP Ex. 4.)

[9] At this point, Student had completed the fifth grade school year at Pickett Elementary School in the District. He currently should be entering high school during the 2009-2010 school year in St. Joseph, MO. (tr. 1:29.)

2006-07 School Year

66. On September 18, 2006, Kay Denver, the District's Director of Special Services at the time, and Denise Buersmeyer, the District's Coordinator of Special Services at the time, sent Petitioners a letter expressing the District's disappointment that Petitioners had chosen not to enroll Student in the District for the 2006-07 school year. In the letter, Ms. Denver and Ms. Buersmeyer notified Petitioners that the District was prepared on the first day of school, and continued to be prepared, to provide services to Student (Ex. 1; Ex. N.)

67. The parties agreed to hold an IEP team meeting on October 24, 2006 at 10 am. (Ex. R.)

68. During the October 24, 2006 meeting, the District staff also requested that Petitioners provide any other information they wanted the District to consider. Shortly thereafter, Petitioners delivered to the District nearly 800 pages of data from Student's summer home program. (Tr. 1:218-19.)

69. After receiving this data, District personnel met several times to review the home program data and incorporate the information from that data into Student's Fall 2006 IEP. (Tr. 3:146.)

70. On November 7, 2006, the District sent Petitioners a letter with a number of enclosures, including the draft IEP developed during and after the October 24, 2006 IEP meeting. (Ex. 5; Ex. S.) The District also included a Notice of Meeting, scheduling another IEP meeting on November 17, 2006, and a copy of the revised Procedural Safeguards. (Id.)

71. On November 17, 2006, Student's IEP team met for the second time to discuss his 2006 IEP. (Ex. 6.) During the meeting, there was significant discussion regarding the goals in the IEP and how they would affect Student's educational placement. (Ex. 6; Tr. 3:158.) However, no placement decision was finalized. (Ex. 8.)

72. Four days after that meeting, on November 21, 2006, the District sent Petitioners a draft IEP incorporating the revisions that were made during the November 17th meeting. (Ex. 7.)

73. On December 4, 2006, Student's IEP team met again and finalized an IEP which would be in place upon his re-enrollment in the District. (Tr. 3:163; Ex. 9; Ex. A.) Pursuant to this IEP, Student was to receive the following special education and related services: 475 minutes per week of specialized instruction in math; 475 minutes per week of specialized instruction in reading; 100 minutes per week of specialized instruction in social skills; 475 minutes of specialized instruction per week in written expression; and 120 minutes per week of language therapy. (Ex. 9, p. TBII 075; Ex. A.) Under this IEP, Student was also given the full-time daily use of an individual aide. (Id.) Additionally, the IEP provided for 30 minutes per month consultation between the home and school team, 9 hours per month (at least 75 minutes per week) of consultative services for school personnel from the District Autism Consultant, an Out of District Autism Consultant, and/or a BCBA, and at least 10 minutes per week of consultation with the occupational therapist. (Ex. 9, p.

TBII 075-76.) Student was also to receive a number of accommodations and modifications to the general and/or special education curriculum. (Id. at TBII 084.)

74. Student did not return to school on December 15, 2006 as expected by the District. (Tr.3:174.) Ms. Buersmeyer explained that, "for all Students in [the District], once you have missed 10 days, you're dropped from our Student information system" because the District is not permitted to "collect average daily attendance dollars through the state of Missouri for Students not in attendance." (Tr. 3:175.) Therefore, to "keep [] attendance clean, [the District] drops non-attending Students from [its] roles." (Id.) Because of this policy, in order to be enrolled, a Student must be both registered and actually in attendance. (Tr. 4:80.)

75. Pursuant to this District policy, although Petitioners had completed Student's registration paperwork in November, the District instituted its "drop procedures" when he did not arrive on December 15th or after that date. (Tr. 3:174.) The Petitioners, however, disagreed with the District regarding whether Student re-enrolled in the fall of 2006. (Tr. 1:212.)

76. In February 2007, the District sent a Notice of Action refusing to pay for the Petitioner's home-based program. (Ex. 10, p. TBII 085). Ms. Buersmeyer also testified as of November 2007, the District knew that the Petitioners were seeking reimbursement for the home-based program. (Tr. 1: 259-260.)

2007 to Present

77. At the beginning of the 2007-08 school year, the beginning of the 2008-09 school year, and the beginning of the 2009-10 school year, Petitioners completed registration materials for their daughter to attend as a Student in the District. (Tr. 3:175-177.) However, they did not complete the registration paperwork for Student in any of those years. (Id.)

78. Student was last evaluated by the District on January 24, 2005. (Stipulation) Ms. Buersmeyer testified that the District did not conduct a re-evaluation of Student prior to January 24, 2008 because he was not enrolled in the District. (Tr. 3:178.) Further, she testified that she understands that the District is not obligated to re-evaluate children who are residents of, but not enrolled in, the District. (Tr. 3:179-180.)[10]

79. Petitioners did not request an IEP meeting for Student during the 2007-08 school year, the 2008-09 school year, or the 2009-10 school year. (Tr. 3:180.)

80. During the time period at issue in this complaint, Petitioners have not requested that the District conduct a re-evaluation of Student (Tr. 3:180.) The District has not offered to conduct a re-evaluation of Student since January 24, 2005. (Stipulation) The District has not sought the consent from the Petitioners to conduct a re-evaluation. (Stipulation)

[10] Petitioners contend that re-enrollment was not a prerequisite to imposing liability on the District for failing to do a re-evaluation. For reasons discussed in footnote 5, we decline to address the enrollment issue.

81. The District has not offered Student an IEP or determined his present level of educational performance since November 2007. (Stipulation)

82. The District has not provided Student's parents with a Notice of Action regarding why it did not evaluate Student or offer him an IEP. (Stipulation)

83. The District has not given Student's parents Procedural Safeguards during the timeframe relevant to this complaint. (Stipulation)

Home-Based Program

84. Since June 6, 2006, Student has not attended school in the District. Instead, he has received a varying amount of services through a home-based program in which the District was not involved in any way but which was funded by the Department of Mental Health ("DMH").

85. The District never consented to Student being withdrawn from school and provided services only through a home-based program.

86. The services provided to Student in the home-based program were classified as a particular type of activity. Specifically, based on the documents provided by Petitioners, Student appears to have participated in the following types of activities in his home program: daily living activities, community access, money management, protective oversight, and exercise. (Tr. 2:67; Ex. H, pp. 67-186.)

87. Between November 2007 and June 1, 2009, Ms. Jennifer Potterfield "supervised" Student's home program. (Tr. 1:69-70.) However, she testified that "no one [] was directly there" observing and overseeing Student's home program between August 2008 and July 2009. (Tr. 1:133.)

88. Ms. Potterfield testified that she has not seen Student work in a group setting. (Tr. 1:110.) All of his work has been in a one-to-one setting. Tr. 1:111). He is not ready to learn in a group setting. (Id.) He has been out of school so long that he would need to be eased back into the public school setting. (Tr. 1: 76-78.)

89. Student's home program was provided in accordance with a Person Centered Plan, developed by his mother and a case manager contracted with the Department of Mental Health. (Tr. 3:21-22, 2:221, 2:223.)

90. According to Krissy Byrd, ABA was the only method used with Student in the home program. (Tr. 2:40.)

91. The services were provided by "implementers" (Tr. 1:69), none of whom were required to be certified teachers or possess an education degree. (2:220-222.)

92. Krissy Byrd testified at some length about the types of activities with which she has worked with Student in his home program over the last couple years. For instance, she has worked with Student on such things as answering social questions like "What's your address?" and "What's

your first name?" (Tr. 2:34), sequencing things like making popcorn or brushing his teeth (Tr. 2:35), playing catch (Tr. 2:36), waiting in line (Tr. 2:37), and counting money (Id.)

93. Ms. Byrd also testified that the only non-disabled peers to which Student was regularly exposed were his younger sister (Tr. 2:84-85) and Ms. Byrd's son, who is also younger than Student (Tr. 2:32). Ms. Potterfield testified that he is with non-disabled peers on a weekly basis. (Tr. 1: 109-110.)

94. The times and days of the week that Student received services at home were inconsistent and varied. (Tr. 2:78; Ex. H, pp. 45-204.) Additionally, there was not a schedule with regard to which programs Student would work on and at which times; instead, the implementers choose which programs to work on and when to work on them. (Tr. 2:78-79.)

95. The reinforcers used with Student in the home program varied by day and there were no "set tangible reinforcers." (Tr. 2:82.)

96. Although Ms. Byrd said that she was trained in ABA, that training was provided by the Petitioners (Tr. 2:80), neither of whom have education degrees or expertise (Tr. 2:179).

97. Neither Ms. Potterfield nor Ms. Byrd could estimate Student's current cognitive, grade, or reading level. (Tr. 1:108, 134; 2:85.) Ms. Potterfield could not estimate the level of his current math skills. (Tr. 1:134.) She admitted the last time the ABLLS was administered to Student was in 2001 or 2002. (Tr. 1: 117-118.) Ms. Potterfield later corrected that testimony to reflect that she administered the full ABLLS in 2006. (Tr. 1:147)

98. There was no evidence that Student receives any speech-language, occupational therapy, or physical therapy services through his home-based program.

99. Ms. Potterfield testified at some length about the importance of data collection in an ABA program, stressing that programming decisions are based on data, thereby making data collection "critical." (Tr. 1:63-64.) However, she admitted that Petitioners submitted absolutely no data from the home program to the Hearing Panel. (Tr. 1:141.)

100. Ms. Potterfield testified that she recommended that it would be beneficial for Student to receive at least 25 hours of ABA services per week. (Tr. 1:73.)

101. Mother testified that she believes Student needs an educational program that includes at least 20 to 25 hours of ABA services per week. (Tr. 4:151.)

102. However, Petitioners admitted that Student did not receive 25 hours of ABA service per week at all times during their home program. (Tr. 1:73, 2:39, 2:181.) For the last couple of years, Ms. Byrd provided services two-four hours per day, three-four days per week. (Tr. 2: 32-33.)

103. During the time period covered by this complaint, Student never received more than 82 hours of home program services in an entire month. (See Ex. H.) In fact, he sometimes received

as few as 32 hours in an entire month. (Id.) Moreover, nothing in the exhibits or testimony before this Panel stated that all of Student's home services were ABA services.

104. Ms. Potterfield testified that the invoices reproduced in Ex. G, pages 38A through 43, accurately reflect the amount of time that she spent working on Student's programming. (Tr. 1:83.)

105. Ms. Buersmeyer testified that, based on the information she had received about Student's home program since November 2007, she believes it is "an appropriate home program as funded by the Department of Mental Health" (Tr. 4:5), in that it "included the appropriate aspects of a person-centered plan, such as daily living activities, community access, protective oversight" (Tr. 4:6) and was "heavy on recreation" (Tr. 4:82).

106. However, Ms. Buersmeyer did not believe that the home program provided a "plan that would be seen in a school setting, or that would really move a Student toward educational gains." (Id.) Rather, it is the type of program that would normally supplement the services provided by the District. (Id.)

Testimony of Brenda Smith

107. Brenda Smith, a service coordinator supervisor at the Albany Regional Center, a DMH facility that funds services for people with disabilities, testified regarding the type of services provided through the Missouri Department of Mental Health. (Tr. 3:19.)

108. A service coordinator from the Albany Regional Center works directly with parents of children with disabilities to determine what types of services a family needs and to develop a person-centered plan regarding the implementation of those services. (Tr. 3:21-22.) However, the Albany Regional Center does not provide the contemplated services; rather, it contracts with other agencies to actually provide services. (Tr. 3:22.) Those contract agencies follow DMH guidelines and rules in providing services which are funded via DMH. (Tr. 3:22-23.)

109. The agencies with which the Albany Regional Center contracts are considered fiscal intermediaries. (Tr. 3:32.) The contract agencies, such as Sherwood and Another Day, pay the staff providing services and ensures that all taxes and withholdings are taken out of the providers' paychecks. (Tr. 32-33.) However, families are permitted to choose, hire, and fire their own staff. (Tr. 3:32.)

110. When a family receives "lots of paid services," the Albany Regional Center usually works with that family to qualify for one of four types of "waivers" to help the "dollars go farther." (Tr. 2:23.) Pursuant to these waivers, one of which is the Lopez waiver, DMH pays 40% of the cost of services provided to the family of a child with a developmental disability and Medicaid pays the other 60%. (Id.)

111. Student receives services pursuant to a Lopez waiver (Tr. 2:229, 3:40), which is available only to children under the age of 18 (Id.).

112. Only limited types of services are available under the Lopez waiver. (Id.) Specifically, the following types of services are available through a Lopez waiver: personal

assistance, day habilitation, transportation, a community specialist, environmental accessibility adaptation, specialized medical equipment and supplies, crisis intervention, behavior therapy, and respite care. (Tr. 2:28-29; HP Ex. 7.) Physical therapy, occupational therapy, and speech services are not available. (HP Ex. 7.)

113. The services provided under a Lopez waiver "may not duplicate or replace special education and related services which are otherwise available to the child through a state or local education agency." (HP Ex. 7) (internal citations omitted). The services under the Lopez waiver are meant to supplement special education services provided by a school district. (Tr. 3:24)

114. Pursuant to the Lopez waiver guidelines, personal assistance services include community outings, socialization, and teaching people how to keep a clean home, perform their daily living skills, brush their teeth, choose their clothing, budget their money, read menus, and read signs in the community. (Tr. 3:29.) Although these services may be educational in nature, they are not intended to be a substitute for services provided by a school. (Tr. 3:29-30, 37.) In fact, the Albany Regional Center "will not provide a service if it should be provided by the school." (Tr. 3:37.)

115. When funding for DMH services is initially requested by a family and a service plan is created, the Albany Regional Center's utilization review committee reviews the plan and decides whether to approve it. (Tr. 3:35-36.) The utilization review committee also determines whether "a particular service is replicating or replacing a school function." (Tr. 3:46.) If the plan gets approved by the Regional Center, then the services are presumed to be "proper" and payable under DMH guidelines. (Tr. 3:40.)

116. Additionally, when services are provided under a Lopez waiver, the family's service coordinator monitors submitted documents quarterly "to make sure the services are being provided that [the Albany Regional Center] is paying for, and that they're appropriate." (Tr. 3:30.)

117. Ms. Smith testified that there was nothing in Student's person-centered plan that suggested his services were duplicating or replacing any special education services that the school should have been providing. (Tr. 3:46.)

118. There is not a lifetime cap on services provided by DMH. (Tr. 3:30.) Services provided under the Lopez waiver cannot exceed $22,000 per year. (Tr. 3:48-49.) However, other available waivers do not have caps at all and, therefore, allow a child receive more than $22,000 of services each year if needed. (Tr. 3:49.)

Expenses Incurred by Parents for Home-Based Program

119. Included in Petitioners' exhibits were invoices from Jennifer Potterfield, who "supervised" Student's home-based program between November 2007 and June 1, 2009. (Ex. G, pp 38A-43.) Ms. Potterfield testified that not all of the invoices had been paid, but that portions may have been paid by the Albany Regional Center. (Tr. 1:150-151.) Exhibit G invoices total $4699.05, including $300.00 from the summer of 2007.

120. Each implementer of the home-based program completed bi-weekly or monthly timesheets reporting their time spent working with Student as well as the types of things that they

did with him each session. (Tr. 2:53, 2:71, 2:195; Ex. H, pp. 45-204.) The timesheets were then submitted to an outside agency, referred to as a fiscal intermediary. During the period of time relevant to this hearing, Petitioners worked with several such agencies, including Sherwood Center, ICAN, and Another Day. (Tr. 2:220-21; Ex. H, pp. 67-186A.) All of the hours provided by the implementers in Student's home-based program during the time period relevant to this complaint have been paid by one of those three outside agencies. (Tr. 2:219.) In turn, each such agency then invoices and receives reimbursement from the Missouri Department of Mental Health pursuant to a contract between the agency and DMH. (Tr. 2:73, 2:221, 2:222-23.) As a result, Petitioners have not personally paid any of the home program implementers during the time period relevant to this hearing. (Tr. 2:223.)

121. At the outset of the hearing, Petitioners' counsel asserted that there may be a "lifetime max" to the services that DMH will provide to a particular person or family and, therefore, that the District should be required to reimburse DMH for the services provided to Student during the time frame relevant to this complaint. (Tr. 1:43.) However, Ms. Smith, on behalf of the Albany Regional Center took the position that Student's home program services were properly paid by DMH (Tr. 46-47) and, therefore, no reimbursement is required. Additionally, Ms. Smith testified that there is no such lifetime max on DMH services. (Tr. 2:229, 3:30.)

CONCLUSIONS OF LAW

The Hearing Panel makes the following Conclusions of Law:

The Parties

1. The District is a Missouri Public School District which is organized pursuant to Missouri statutes.

2. The Petitioners are now and have been during all times material to this proceeding, residents of the District, as defined by Section 167.020 RSMo.

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

Due Process Complaints and Burden Of Proof under IDEA

4. Petitioners filed the due process complaint that initiated this matter on June 1, 2009 (later amended on September 17, 2009). The complaint alleges the District violated the IDEA by failing : (a) to conduct a three year re-valuation by no later than January 24, 2008; (b) to send a Notice of Action to the Petitioners as to why their child would not re-evaluated and (c) to review or develop IEPs for Petitioner on an annual basis. For the alleged violation, they seek compensatory services as well as reimbursement for certain expenses incurred with a home-based program,

including costs paid by the Missouri Department of Mental Health ("DMH").[11] The burden of proof in an administrative hearing arising under the IDEA is properly placed upon the party seeking relief. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528, 537 (2005). Thus, the burden of proof in this case rests with the Petitioner. The U. S. Supreme Court's reference is to the burden of persuasion, which means that the Student and his Parents lose at the conclusion of the case if the evidence on both sides is evenly balanced. The standard of proof in this administrative proceeding, as in most civil cases, is proof by a preponderance of the evidence. *Tate v. Department of Social Services*, 18 S. W. 3d 3, 8. (Mo. App. E. D. 2000).

Statute Of Limitations under IDEA

5. The IDEA regulations, 34 C.F.R. § 300.507(a) and 34 C.F.R. § 300.511(e) and (f) establish the IDEA's statute of limitations for the filing of due process complaints by Parents or by the local educational agency. The parties have agreed that the two year statute of limitations set out in Section 300.507 applies but the Petitioners are willing for the Hearing Panel to focus from November 7, 2007 to the present. The District, however, argues from January 15, 2009 –June 1, 2009 as the controlling timeframe because the alleged settlement agreement covers through mid-January 2009. We conclude that the Hearing Panel should focus on November 2007 to June 1, 2009.

Free Appropriate Public Education

6. The IDEA, its regulations and the *Missouri State Plan for Special Education* (2007), ("State Plan") set forth the rights of Students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District in providing special education and related services to Students with disabilities.

7. 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 the District, in providing special education and related services to Students with disabilities.

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

9. The IDEA generally requires that a child with a disability be provided with access to a "free appropriate public education." ("FAPE") *Board of Education of the Hendrick Hudson Central School District, Board Of Education, Westchester County v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982). The term "free appropriate public education" is defined by 34 C.F.R. § 300.8 as follows:

[11] In their Post-Trial Brief, Petitioners cite no federal or state law that would require a school district to reimburse DMH for expenses incurred in connection with a home-based program.

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

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

10. If parents believe that the educational program provided for their child fails to meet this standard or if no program is provided for their child whom the parents contend is eligible for special education, they may obtain a state administrative due process hearing. 34 C.F.R. § 300.506; *Thompson v. Board of the Special School District No. 1*, 144 F.3d 574, 578 (8th Cir. 1998)*; Fort Zumwalt School District v. Clynes*, 119 F.3d 607, 610 (8th Cir. 1997), *cert. denied* 523 U.S. 1137 (1998).

11. The IDEA requires that Students with disabilities be educated in the least restrictive environment reflecting a strong preference that disabled Students attend regular classes with non-disabled children and a presumption in favor of placement in the public schools. *T. F. v. Special School Dist. of St. Louis County*, 449 F.3d 816 (8th Cir. 2006). The regulations of the IDEA, 34 C.F.R. §300.114(a)(2), define the term "Least Restrictive Environment" as follows:

> (a) 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 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.

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

13. If a school district fails in its obligation to provide a free appropriate public education to a disabled child, the parents may enroll the child in a private school and seek retroactive reimbursement for the cost of the private school from the school district. *Sch. Comm. of Burlington v. Dep't of Educ.,* 471 U. S. 359, 370 (1985). In determining whether parents are entitled to reimbursement, the Supreme Court has established a two part test: (1) was the IEP proposed by the school district appropriate and (2) was the private placement appropriate to the child's needs. *See Burlington,* 471 U. S. at 370; *see also Florence County Sch. Dist. Four v. Carter ex rel. Carter,* 510 U. S. 7, 12-13 (1993). The Supreme Court has also stated, because the authority to grant reimbursement is discretionary, "equitable considerations [relating to the reasonableness of the action taken by the parents] are relevant in fashioning relief." *Burlington,* 471 U. S. at 374; 20 U. S. C. Section 1412(a)(10)(C)(iii)(III).

14. An IEP is a written statement that includes, *inter alia*, 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. Section 1414 (d)(1)(A); *M. P. v. Independent School District No. 721,* 326 F. 3d 975, 977 n.1 (8th Cir. 2003). It is prepared jointly with school staff and parents, and is reviewed annually. *M.P.* , 326 F.3d at 977, n.1.

15. An IEP does not violate the IDEA (a) if the procedures set forth in the IDEA are followed and (b) the IEP is formulated to enable the child to receive educational benefits. *Rowley, supra.,* 102 S. Ct. at 3034.

16. The *Rowley* standard continues to be applicable, and not a higher standard, for determining FAPE under IDEA. *M. M. ex rel. L.R. v. Special School Dist. No. 1,* 512 F. 3d 455, 461 (8th Cir. 2008).

Placement Of Children By Parents When FAPE Is At Issue

17. This case is governed, in part, by IDEA regulation 34 C.F.R. § 300.148, *Placement of children by parents when FAPE is at issue*. That regulation states, in pertinent part, as follows:

"§ 300.148 Placement of children by parents when FAPE is at issue.

> (a) General. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. *However, the public agency must include that child in the population whose needs are addressed consistent with §§ 300.131 through 300.144.* (emphasis added; refers to the Sections of C.F.R. dealing with parentally-placed private school child with a disability).
>
> (b) Disagreements about FAPE. Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in §§ 300.504 through 300.520.
>
> (c) Reimbursement for private school placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, . . . a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the . . . hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer . . . even if it does not meet the State standards that apply to education provided by the SEA and LEAs.
>
> (d) Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied--
>
> (1) If--
>
> (i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the

public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in §300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(e) Exception. Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement--

(1) Must not be reduced or denied for failure to provide the notice if--

(i) The school prevented the parents from providing the notice;

(ii) The parents had not received notice, pursuant to § 300.504, of the notice requirement in paragraph (d)(1) of this section; or

(iii) Compliance with paragraph (d)(1) of this section would likely result in physical harm to the child; and

(2) May, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if--

(i) The parents are not literate or cannot write in English; or

(ii) Compliance with paragraph (d)(1) of this section would likely result in serious emotional harm to the child."

Parentally-Placed Private School Child with a Disability

18. Pursuant to 34 C.F.R. § 300.130 of the IDEA regulations, the term "Parentally-Placed Private School Children with Disabilities" is defined as follows:

> *Parentally-placed private school children with disabilities* means children with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the definition of elementary school in § 300.13 or secondary school in § 300.36, other than children with disabilities covered under §§ 300.145 through 300.147.

In turn, 34 C.F.R. § 300.140 defines the extent to which the parents of a parentally placed private education Student with a disability can use the IDEA's due process procedures. Specifically, the regulation states as follows:

> (a) *Due process not applicable, except for child find.*
>
> (1) Except as provided in paragraph (b) of this section, the procedures in §§ 300.504 through 300.519 do not apply to complaints that an LEA has failed to meet the requirements of §§ 300.132 through 300.139, including the provision of services indicated on the child's services plan.
>
> (b) *Child find complaints – to be filed with the LEA in which the private school is located.*
>
> (1) The procedures in §§ 300.504 through 300.519 apply to complaints that an LEA has failed to meet the child find requirements in § 300.131, including the requirements in §§ 300.300 through 300.311.
>
> (2) Any due process complaint regarding the child find requirements (as described in paragraph (b)(1) of this section) must be filed with the LEA in which the private school is located and a copy must be forwarded to the SEA.
>
> (c) *State complaints.*
>
> (1) Any complaint that an SEA or LEA has failed to meet the requirements in §§ 300.132 through 300.135 and 300.137

> through 300.144 must be filed in accordance with the procedures described in §§ 300.151 through 300.153.
>
> (2) A complaint filed by a private school official under § 300.136(a) must be filed with the SEA in accordance with the procedures in § 300.136(b).

In its comments to the IDEA regulations, the U.S. Department of Education defines what is meant in 34 C.F.R. § 300.140 as follows:

> Section 615(a) of the Act specifies that the procedural safeguards of the Act apply with respect to the identification, evaluation, educational placement, or provisions of FAPE to children with disabilities. The special education and related services provided to parentally-placed private school children with disabilities are independent of the obligation to make FAPE available to these children.
>
> While there may be legitimate issues regarding the provision of services to a particular parentally-placed private school child with a disability an LEA has agreed to serve, the due process provisions in section 615 of the Act and 300.504 through 300.519 do not apply to these disputes, because there is no individual right to these services under the Act. Disputes that arise about these services are properly subject to the State complaint procedures under §§ 300.151 through 300.153.
>
> Federal Register, Vol. 71, No. 156, p. 46597.

19. In Missouri, home schooled children are classified as children who attend private or parochial schools. *Fitzgerald v. Camdenton –III School District*, 439 F.3d 773, 775 (8th Cir. 2006); Missouri State Plan, Regulation VIII, p. 121, "Private Schools" (2007). Additionally, the Missouri State Plan provides that "[t]he due process procedures only apply to complaints that an LEA has failed to meet the child find requirements." *Id*. at 127.

Child Find and Re-Evaluations

20. The "child-find" provisions of IDEA require school districts to identify, locate and evaluate disabled children. 20 U.S. C. Section 1412 (a)(3)(A) states:

> All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine

which children with disabilities are currently receiving needed special education and related services.

21. 20 U. S. C. Section 1414 (a)(2) provides as follows for Reevaluations:

> (A) In general
>
> A local educational agency shall ensure that a reevaluation of each child with a disability is conducted in accordance with subsections (b) and (c) of this section—
>
> > (i) if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
> >
> > (ii) if the child's parents or teacher requests a reevaluation.
>
> (B) Limitation
>
> A reevaluation conducted under subparagraph (A) shall occur—
>
> > (i) not more frequently than once a year, unless the parent and the local educational agency agree otherwise; and
> >
> > (ii) at least once every 3 years, unless the parent and the local educational agency agree that a reevaluation is unnecessary.

22. The District was required under IDEA to re-evaluate Student before January 24, 2008 under the child find requirements for parentally-placed private school children – irrespective of whether FAPE is an issue. A Notice of Action should also have been sent explaining why Student would not be re-evaluated. *See Office of Special Education Programs ("OSEP") Letter to Chief State School Officers in 2005 dealing with Questions & Answers on Obligations of Public Agencies in Serving Children with Disabilities Placed by their Parents at Private Schools. See specifically Child Find Q & A #9.*

23. The District did not have a duty to continue to develop or review IEPSs once Student was placed in the home –based program. *Carl D. v .Special School District of St. Louis County,* 21 F. Supp2d 1042, 1057 (E. D. Mo. 1998); *OSEP letter, Child Find Q & A #8*.

24. The Petitioners requested reimbursement for expenses previously paid in whole or in part by DMH for the Petitioners' home-based program is denied for the following reasons: (a) it was not an educational program for which Petitioner derived educational benefit and was not an appropriate placement for Petitioner; *T. F. v. Special School District of St. Louis County,* 449 F. 3d 816 (8th Cir. 2006); *Reese ex rel. Reese v. Board of Education of Bismarck R-V School District*, 225 F. Supp.2d 1149 (E. D. MO. 2002); *Pinn v. Harrison Central School District*, 473 F. Supp. 2d 477 (S. D. N. Y. 2007); *Berger v. Medina City Sch. Dist.*, 348 F.3d 513 (6th Cir. 2003); (b) the Petitioners did not prove beyond a reasonable doubt that they have incurred any expenses for the

home-based program (FF#119,120); (c) there is no legal basis for a school district to reimburse DMH for a personal assistance program as has been provided here to Petitioner. *Yancey v. New Baltimore City Board of School Commissioners*, 42 F. Supp 2d 512, 515 (D. Md. 1998) (Not "appropriate relief" under IDEA to reimburse parents for private school tuition that was waived by the school).

25. Hearing Panels are given broad authority to grant relief for IDEA violations. *See e. g., J. T. by Harvell v. Missouri State Board of Education* , 51 IDELR 270 (E. D. Mo. 2009); *Board of Education of Fayette County, Ky. v. L. M.* , 478 F. 3d 307(6th Cir. 2007). Section 300.151 (b) of C. F. R. also sets out expansive powers:

> Remedies for denial of a free appropriate services. In resolving a complaint in which the SEA has found a failure to provide appropriate services, an SEA, pursuant to its general supervisory authority under Part B of the Act, must address---
>
> (1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and
>
> (2) Appropriate future provision of services for all children with disabilities.

26. Based on the above authority, Petitioner will be awarded the following transition services (previously offered in part by the District in its Stipulations):

> a. By no later than 30 days from the date of this decision, the District will arrange for an evaluation, to be administered by an individual or individuals outside of the St. Joseph School District at District expense.
>
> b. Assuming Student continues to reside in the District, the District will provide Student with 25 hours of ABA-type services per week, effective one week after an IEP is finalized. Placement for such services will be at Student's home, with the goal of transitioning him back to the school setting no later than the Fall of the 2010-2011 school year.
>
> c. The District will retain the services of a BCBA to assist the IEP Team in preparing an IEP for Student and to provide consultation and in-service training to District staff. The BCBA will conduct observations, provide input into the evaluation planning and process, and will assist the District in working with the home service providers to transition back into the School District in the Fall of the 2010-2011 school year.

DECISION

Petitioners filed the due process complaint that initiated this matter on June 1, 2009 (later amended on September 17, 2009). The complaint alleges the District violated the IDEA by failing : (a) to conduct a three year re-evaluation by no later than January 24, 2008; (b) to send a Notice of Action to the Petitioners as to why their child would not re-evaluated and (c) to review or develop IEPs for Student on an annual basis. For the alleged violation, they seek compensatory services as well as reimbursement for certain expenses incurred with a home-based program, including costs paid by DMH.

Failure to Offer a Three Year Re-Evaluation

As noted in Finding of Fact ("FF") #78, Student was last evaluated on January 24, 2005 and was found to have continuing educational needs as a result of his autism. His next scheduled evaluation would have been a three year re-evaluation in January 2008. The District did not notify the Petitioners of this right because the District argues that he was a Parentally-Placed Private School Child with a Disability as defined by 34 C. F. R. 300.130 (as set out in Conclusion of Law #18).

The District is correct that pursuant to 20 U.S.C. §§ 1412(a)(10)(A)(i)(I) and 1412(a)(10)(C)(i), public school districts "are not required to pay the costs of special education services for a particular child" who attends private school. *Foley v. Special Sch. Dist. of St. Louis Cty.*, 153 F.3d 863, 865 (8th Cir. 1998). Rather, districts "are required only to spend proportionate amounts on special education services for this class of Students as a whole." *Id*.

Districts, however, have "child find" requirements imposed on them so that the number of privately-placed Students deserving of proportionate share funds can be identified. U. S. C. Section 9a)(10)(A)(i)(II) states:

> In calculating the proportionate amount of Federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools as described in clause (iii), shall conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency.
>
> *Id.*

Logically, if school districts must conduct initial evaluations to determine the number of parentally placed children with disabilities in private schools, it follows that they should conduct a three year re-evaluations to see if the children continue to have disabilities and qualify for proportionate share funds.

OSEP came to the same conclusion in a letter sent to Chief State School Officers dealing with Obligations of Public Agencies in Serving Children with Disabilities Placed by Their Parents at Private Schools. OSEP addressed this issue in Question 9 and the Answer thereto:

> Are public agencies required to conduct periodic reevaluations of parentally-placed private school children with disabilities, and if so, of which parentally-placed private school children?
>
> ANSWER: Yes. The requirements for reevaluations that are applicable to children with disabilities served at public agency programs or at public agency placements at private school apply equally to parentally-placed private school children with disabilities. Part B requires public agencies to conduct reevaluations of a child with a disability, if conditions warrant a revaluation, or if the child's parent or teacher requests a reevaluation, but at least once every three years. Before additional assessments are conducted, parents must give informed consent.

See OSEP Letter to Chief State School Officers in 2005 dealing with Questions & Answers on Obligations of Public Agencies in Serving Children with Disabilities Placed by their Parents at Private Schools. See specifically Child Find Q & A #9.

Thus, we conclude the District violated the child find requirements of IDEA by not offering to conduct a three year re-evaluation of Student by no later than January 24, 2008. We find, however, the District was not obligated to provide an annual IEP for this privately-placed Student. *Carl D. v .Special School District of St. Louis County*, 21 F. Supp2d 1042, 1057 (E. D. Mo. 1998); *OSEP letter, Child Find Q & A #8.*

Appropriateness of the Home-Based Program

Under *Burlington (*as noted in Conclusion of Law # 13), the parents of a unilaterally placed child must show that the private setting was appropriate in providing educational instruction designed to meet the special needs of the disabled child. See *Burlington*, 471 U. S. at 370. The program set up by the Petitioners may have been the most affordable (basically free in their case) for the family budget and the private options in the St. Joseph area may have been limited but the home-based program did NOT meet his academic and social needs. The program was woefully inadequate for the following reasons: (1) he received no related services such as speech, physical or occupational therapy (FF#98) ; (2) there was not a set schedule (FF#94); (3) an academic component was glaringly absent ---- Petitioners produced no evidence of current cognitive skills, current grade level, reading or math levels (FF#97); (4) minimal teaching of social skills – non-disabled peer once per week (FF#93); (5) he received 2-4 hours, 3-4 days per week of services, a very small part of which was educational (FF#102-103); (6) he basically received a DMH personal assistance service plan such as to help with sign reading; budgeting money; ordering from a menu; daily living skills.

The home-based program was also highly restrictive i.e., it did not "educate" Petitioner in the least restrictive environment ("LRE"). While the failure of a parent to put a Student in the LRE is not a bar to reimbursement for expenses of a private placement, it is a factor that may be considered by a hearing panel. *T. F. v. Special School District of St. Louis County*, 449 F. 3d 816; 820 (8th Cir.

2006); *Reese ex rel. Reese v. Board of Education of Bismarck R-V School District*, 225 F. Supp.2d 1149, 1160-1161 (E. D. MO. 2002). The deficiencies found in the private school in the *Reese* case mirror some of the above-cited shortfalls in the case at hand: education was not a principal focus; no charting of goals reached; no standardized testing protocols in place; no textbooks; no art or music classes; minimal opportunity to interact with non-disabled peers and benefit from exposure to positive behaviors. *Id*. at 1162-1163.

In *Pinn v. Harrison Central School District*, 473 F. Supp. 2d 477 (S. D. N. Y. 2007), the Court denied reimbursement for tuition expenses based on analogous defects to the home-based program operated by the Petitioners: (1) not LRE in that Student had mostly one-on-one tutoring; (2) no educational evaluations; (3) no information presented regarding subjects taught or grades given, if any. *Id*. at 482-483.

While a private school does not need to meet the state's education standards in order to be deemed an appropriate placement, *Florence Co. Sch. Dist. Four v. Carter*, 510 U.S. 7, 14 (1993), a private school placement cannot be reviewed without accounting for all relevant considerations under the IDEA. For instance, the extent to which a disabled Student receives related services such as speech, occupational therapy, and physical therapy, "remains a consideration that bears upon a parent's choice of an alternative placement and may be considered by the hearing officer in determining whether the placement was appropriate." *M.S. v. Yonkers Bd. of Educ.*, 231 F.3d 96, 105 (2d Cir. 2000), *abrogated on other grounds, Schaffer v. Weast, supra*. *See also Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 523 (6th Cir. 2003) (private school was not appropriate placement where, among other things, it did not provide Student with the speech and language therapy that he needed.)

In sum, the home-based program[12] did not provide significant learning and confer meaningful educational benefit in the least restrictive educational environment. Essentially, Petitioner received a DMH funded program providing personal assistance services. Although they may have had some educational value, these services are not intended to be a substitute for services provided by a school. (Tr. 3:29-30,37.) In fact, pursuant to its contract with DMH, the Albany Regional Center "will not provide a service if it should be provided the school." (Tr. 3:37.) Additionally, applicable DMH regulations explicitly state that the services provided under a Lopez waiver "may not duplicate or replace special education and related services which are otherwise available to the child through a state or local education agency." (HP Ex. 7) (internal citations omitted).

Another basis to deny reimbursement is that the Petitioners had very few expenses that were not paid by DMH. [13] In *Yancey v. New Baltimore City Board of School Commissioners*, 42 F. Supp.2d 512 (D. Md. 1998), the Court found that the parents had no reimbursable expenses because the private school tuition for their child had been waived by the school. *Id.* at 515. The Court stated: "Reimbursing private school expenses that were never incurred would not be 'appropriate relief' under IDEA." *Id*.

Transition Services

Hearing Panels are given broad authority to grant relief for IDEA violations. *See e. g., J. T. by Harvell v. Missouri State Board of Education*, 51 IDELR 270 (E. D. Mo. 2009);

[12] Note our conclusions cover November 2007 to June 1, 2009. As previously noted in footnote #5, our findings are not meant to usurp the authority of the Hearing Panel appointed for the timeframe encompassing Complaint I. Thus, we decline to make a finding on whether the parents gave the requisite notice and whether their conduct should foreclose reimbursement.

[13] The Petitioners failed to prove beyond a preponderance of the evidence what portion, if any, of the Potterfield invoices were unreimbursed by DMH. (FF#119)

Board of Education of Fayette County, Ky. v. L. M. , 478 F. 3d 307(6th Cir. 2007). Section 300.151 (b) of C. F. R. also sets out expansive powers:

> Remedies for denial of a free appropriate services. In resolving a complaint in which the SEA has found a failure to provide appropriate services, an SEA, pursuant to its general supervisory authority under Part B of the Act, must address---
>
> (1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and
>
> (2) Appropriate future provision of services for all children with disabilities.

Based on the above powers, we conclude that the Petitioners should be provided the following services to transition Student back into the School District as follows:

> a. By no later than 30 days from the date of this decision, the District will arrange for an evaluation, to be administered by an individual or individuals outside of the St. Joseph School District at District expense.
>
> b. Assuming Student continues to reside in the District, the District will provide Student with 25 hours of ABA-type services per week, effective one week after an IEP is finalized. Placement for such services will be at Student's home, with the goal of transitioning him back to the school setting no later than the Fall of the 2010-2011 school year.
>
> c. The District will retain the services of a BCBA to assist the IEP Team in preparing an IEP for Student and to provide consultation and in-service training to District staff. The BCBA will conduct observations, provide input into the evaluation planning and process, and will assist the District in working with the home service providers to transition student back into the School District in the Fall of the 2010-2011 school year.

CONCLUSION

We conclude that the Petitioners carried their burden of proof to show under Issues # (1) & (2) the District violated IDEA in failing to conduct a three year re-evaluation of Student before January 24, 2008 and failing to send a Notice of Action refused. Petitioners did not carry their

burden of proof to show that the District violated IDEA by not continuing to develop or review IEPSs once Student was placed in the home –based program and Issue # 3 is dismissed. We also conclude that the Petitioners failed to carry their burden regarding the appropriateness of the home-based program and the request for reimbursement is denied. The Petitioners, however, are awarded transition services as set out in the Order below.

ORDER

The Due Process Complaint filed by the Petitioner is dismissed as to Issue #3 regarding an alleged failure to continue to develop IEPS on an annual basis and judgment is entered in favor of the St. Joseph School District and is entered against the Petitioners on that issue. Judgment is entered in favor of Petitioners and judgment is entered against St. Joseph School District on the issues of failing to conduct a three re-evaluation and sending a Notice of Action refused. The St. Joseph School District is hereby ordered to do the following:

> a. By no later than 30 days from the date of this decision, the District will arrange for an evaluation, to be administered by an individual or individuals outside of the St. Joseph School District at District expense.
>
> b. Assuming Student continues to reside in the District, the District will provide Student with 25 hours of ABA-type service per week, effective one week after an IEP is finalized. Placement for such services will be at Student's home, with the goal of transitioning him back to the school setting no later than the Fall of the 2010-2011 school year.
>
> c. The District will retain the services of a BCBA to assist the IEP Team in preparing an IEP for Student and to provide consultation and in-service training to District staff. The BCBA will conduct observations, provide input into the evaluation planning and process, and will assist the District in working with the home service providers to transition student back into the School District in the Fall of the 2010-2011 school year.

APPEAL PROCEDURE

PLEASE TAKE NOTICE that these Findings of Fact, Conclusions of Law, Decision and Order constitute the final decision of the Department of Elementary and Secondary Education in this matter and you have a right to request review of this decision. Specifically, you may request review as follows:

> 1. Proceedings for review may be instituted by filing a petition in the circuit court of the county of proper venue within forty-five days after the mailing or delivery of the notice of the agency's final decision....
>
> 2. The venue of such cases shall, at the option of the plaintiff, be in the circuit court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence...

PLEASE TAKE NOTICE that you also have a right to file a civil action in Federal or State Court pursuant to the IDEA. See 34 C.F.R. §300.512.

Dated this 1st day of April, 2010.

_____

Pamela S. Wright, Chairperson

_____

Dr. Patty Smith, Member of the Hearing Panel

_____

Marilyn McClure, Member of the Hearing Panel

(Files dissenting opinion in part)

CERTIFICATE OF SERVICE

Copies of the foregoing Opinion were mailed via certified mail, receipt requested (and by electronic mail) to the attorneys and via regular U. S. Mail to Dr. Smith, Ms. McClure and Ms. Bruner on this 1st day of April, 2010:

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Pamela S. Wright

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McClure DISSENT in part, AFFIRM in part. April 1, 2010

1. Conduct of Three-Year Evaluation

I agree with the panel.

2. No Notice of Action Issued

I agree with the panel.

3. Annual Review or Development of IEP

I agree with the panel there was a violation since a service plan was not offered to this "home-based" student.

4. Educational Benefit of the Home-Based Program

I disagree with my panel members on this issue. The "home-based" program provided some educational benefit. The main implementer in the home was eariler an employee of the SJSD for a lengthy period of time who worked with this student in the district as this student's paraprofessional. This paraprofessional held qualifications that allowed her to provide direct insturction in the school district, thus she was qualified to instruct him in the home setting.

The student received some educational benefit, but not comparable to programming that the school district, through the IEP process, had the potential to create when developing what was to be an "individualized" program.

My fellow panel members find the appropriateness of the home-based program was deficient in several areas. These deficiencies are inherent in the nature of a makeshift home-based program. The home-based program is the default placement since the family did not have the means to access educational resources in the community, had they been available. The mother testified that she never intended to "home-school", yet, available options for programming were another state agency. After the fact, this panel finds the home-based program lacking although there is no duty under IDEA for the parent who has withdrawn the child from the public school when FAPE is at issue, to construct a "school" yet to know where to begin to provide services to a child with special needs. It is in this dilemma that the family and child are penalized for no fault of their own.

The family is placed in an unreasonable task, that is, to meet these expectations although unknown or arbitary to the the parent at the time.

5. Expenses Incurred by Parent for Home-Based Program

The parents incurred indirect expenses in arranging, providing a setting in their home where programming could be conducted. Parents lost significant disruption to their lives, as a result of the child's disability. The parent experienced limited opportunity at a livelihood as a result.

6. Summary

This action occurred only because the student has disabilities.

Current case law involving statutes of limitations resulted in this student being penalized; long periods of time passed where the student was not receiving appropriate services of which compensatory servcies would not and could not repair. Procedural maneuvering resulted in the child being "put on hold" to his great loss. Educators know that opporutnities for learning is precious time for children that, as children age, cannot be fully recovered. Clearly, the system denied him equal opportunity due to disability.
This panel member would order compensatory services that would provide two years' equivalent of full-time services to supplement a full-time program.